

1999 DRAFTING REQUEST

Bill

Received: **04/05/1999**

Received By: **mdsida**

Wanted: **As time permits**

Identical to LRB:

For: **Mark Pettis (608) 267-2365**

By/Representing: **Patrick Essie**

This file may be shown to any legislator: **NO**

Drafter: **olsenje**

May Contact: **Joe Chernelich or Don Valdez (if**

Alt. Drafters: **mdsida**

Subject: **Criminal Law - miscellaneous
Trade Regulation**

Extra Copies: **Mike Heifetz (Rep. Foti's offic**

Pre Topic:

No specific pre topic given

Topic:

Unauthorized copying of sound recordings

Instructions:

See Attached

Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/P1	olsenje 04/05/1999 mdsida 07/01/1999	wjackson 07/07/1999		_____			
/P2			mclark 07/12/1999	_____	lrb_docadmin 07/12/1999		
/1	mdsida 10/08/1999 mdsida	wjackson 10/12/1999 wjackson	kfollet 10/12/1999 kfollet	_____	lrb_docadmin 10/12/1999	lrb_docadmin 10/14/1999	

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	10/12/1999	10/12/1999	10/12/1999	_____			

FE Sent For:

<END>

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/P1	olsenje 04/5/99 mdsida 07/1/99	wjackson 07/7/99 1 WJ 10/11					
/P2			mclark 07/12/99 KJF 10/12		lrb_docadmin 07/12/99 KJF/MIC 10/12		
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/P1	olsenje 04/5/99 mdsida	PI WLJ 7/7	7/9 MRC	MRC/SF 7/9			

FE Sent For:

<END>

Patrick Essie

PUBLIC AFFAIRS CONSULTING

4/1/99

To: Michael Dsida

From: Patrick Essie

Re: Anti-piracy of recording legislation.

Earlier today Tom Moore contacted you about this bill draft.

Following is material which describes legislation which needs to be drafted on behalf of Representative Steve Fati.

I have included a suggested draft, but obviously draft it as you think best.

If you have any questions please do not hesitate to contact me

Thank you for your help.

Mike Dosida
Needed by Thu.
4/20

Legal Misc.

99-2690

REVISED STATUTE

WISCONSIN STATUTES

CHAPTER 943. CRIMES AGAINST PROPERTY

943.207 Definitions.

WPO:
No Italics
in entire
document.

- (1) "Owner" means a person who owns the sounds fixed in a master phonograph record, master disc, master tape, master film, or other recording on which sound is or can be recorded and from which the transferred recorded sounds are directly or indirectly derived.
- (2) "Fixed" means embodied in a recording or other tangible medium of expression, by or under the authority of the author, so that the matter embodied is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.
- (3) "Live performance" means a recitation, rendering, or playing of a series of images; musical, spoken or other sounds; or combination of images and sounds.
- (4) "Recording" means a tangible medium on which sounds, images, or both are recorded or otherwise stored, including an original phonograph record, disc, tape, audio or video cassette, wire, film, or other medium now existing or developed later on which sounds, images, or both are or can be recorded or otherwise stored or a copy or reproduction that duplicates in whole or in part the original.
- (5) "Manufacturer" means the entity authorizing the duplication of the recording in question, but shall not include the manufacturer of the cartridge or casing itself.

943.2071^{1/2} Transfer of recorded sounds for unlawful use; sale.

- No¹¹ (1) Whoever does any of the following may be penalized as provided in sub. (2):
- (a) Knowingly and willfully transfers or causes to be transferred, without the consent of the owner, any recording, with intent to sell or cause to be sold, the article onto which such sounds are transferred for commercial advantage or private financial gain; or
 - (b) Advertises, offers for sale, sells, rents, causes the sale, resale, or rental of, or possesses any article onto which sounds have been transferred or reproduced as described in par. (a), with the

knowledge that the sounds thereon have been so transferred without the consent of the owner; or

- (c) *Transports within this state, for commercial advantage or private financial gain, a recording with the knowledge that the sounds have been reproduced or transferred without the consent of the owner.*

^{cs}
B (2) Penalties.

- (a) An offense under this section is a Class C ~~Felony~~ if:
(1) The offense involves at least one thousand unauthorized recordings during a one hundred eighty-day period; or
(2) The defendant has been previously convicted under this section.
- (b) An offense under this section is a Class D ~~Felony~~ if the offense involves more than one hundred but less than one thousand unauthorized recordings during a one hundred eighty-day period.
- (c) Any other offense under this section is a Class A ~~Misdemeanor~~.

^B (3) *This section does not affect the rights and remedies of a party in private litigation.*

^B (4) *This section applies only to recordings that were initially fixed before February 15, 1972.*

943.2072. Use of recording of live performance without consent of owner
unlawful.

^{cs}
^{No 4} (1) Whoever does any of the following may be penalized as provided in sub^v(2):

- (a) For commercial advantage or private financial gain advertises, offers for sale, sells, rents, transports, causes the sale, resale, rental, or transportation of or possesses for one or more of these purposes a recording of a live performance with the knowledge that the live performance has been recorded or fixed without the consent of the owner;
- (b) With the intent to sell for commercial advantage or private financial gain records or fixes or causes to be recorded or fixed on a recording a live performance with the knowledge that the live performance has been recorded or fixed without the consent of the owner.

^{cs}
B (2) Penalties.

- (a) An offense under this section is a Class C ~~Felony~~ if:
(1) The offense involves at least ~~one thousand~~ ^{1,000} unauthorized recordings embodying sound or at least ~~one hundred~~ ¹⁰⁰ unauthorized audiovisual recordings during a 180-day period; or
(2) The defendant has been previously convicted under this section.
- (b) An offense under this section is a Class D ~~Felony~~ if the offense involves more than ~~one hundred~~ ¹⁰⁰ but less than ~~one thousand~~ ^{1,000} unauthorized recordings embodying sound or more than ~~ten~~ ¹⁰ but less

than ~~one hundred~~¹⁰⁰ unauthorized audiovisual recordings during a 180-day period.

(c) Any other offense under this section is a Class A ~~Misdemeanor~~.

- §(3) In the absence of a written agreement or law to the contrary, the performer or performers of a live performance are presumed to own the rights to record or fix those sounds.
- §(4) For the purposes of this section, a person who is authorized to maintain custody and control over business records that reflect whether or not the owner of the live performance consented to having the live performance recorded or fixed is a competent witness in a proceeding regarding the issue of consent.
- §(5) This section does not affect the rights and remedies of a party in private litigation.

943.2073 Failure to disclose origin of certain recordings unlawful.

Not §(1) A person is guilty of failure to disclose the origin of a recording when, for commercial advantage or private financial gain, the person knowingly advertises, or offers for sale, resale, or rent, or sells or resells, or rents, leases, or lends, or possesses for any of these purposes, any recording which does not contain the true name and address of the manufacturer in a prominent place on the cover, jacket, or label of the recording.

§(2) Penalties

- (a) An offense under this section is a Class C ~~Felony~~ if: ¹⁰⁰
- {1} The offense involves at least ~~one hundred~~ unauthorized recordings during a 180-day period; or
 - {2} The defendant has been previously convicted under this section.
- (b) An offense under this section is a Class D ~~Felony~~ if the offense involves more than 10 but less than 100 unauthorized recordings during a 180-day period.
- (c) Any other offense under this section is a Class A ~~Misdemeanor~~.

§(3) This section does not affect the rights and remedies of a party in private litigation.

943.2074 Contraband recordings – Disposition, forfeiture, penalty.

- Not §(1) All recordings which ^s have been fixed, transferred, or possessed without the consent of the owner in violation of 943.2071 or 943.2072, and any recording which does not contain the true name and address of the manufacturer in violation of 943.2073 shall be deemed to be contraband. The court shall order the seizure, forfeiture, and destruction or other disposition of such contraband.
- §(2) The owner or the prosecuting attorney may institute proceedings to forfeit

contraband recordings. The provisions of this subsection shall apply to any contraband recording, regardless of lack of knowledge or intent on the part of the possessor, retail seller, manufacturer, or distributor.

- ⓑ (3) Whenever a person is convicted of a violation under this chapter, the court, in its judgment of conviction, shall, in addition to the penalty therein prescribed, order the forfeiture and destruction or other disposition of all contraband recordings and any and all electronic, mechanical, or other devices for manufacturing, reproducing, packaging, or assembling such recordings, which were used to facilitate any violation of this chapter.

943.2075 *Exceptions.* ⓐ

This section does not apply to:

- ⓑ (1) The transfer by a cable television operator or television broadcaster of any recorded sounds other than form the sound track of a motion picture, intended for, or in connection with, broadcast or other transmission or related uses, or for archival purposes.
- ⓑ (2) The transfer of any video tape of nonvideo audio tape intended for possible use in a civil or criminal action or special proceeding in a court of record.

943.2076. *Severability.* ⓐ

If any provision of this act, or its application to any person or circumstance is held invalid, the remainder of the act, or the application of the provision to other persons or circumstances is not affected.

Tom Moore Rep Steve Foti

Illegal recordings pirated

Increased penalties for



Plc to Foti

Michael Heitko (9/2) ~~with me~~

- ~~was~~ told me to work w/ Essie

Also:

Joe ~~the~~ Chmelich

Don Valdez



} may call, but

i should talk to

Essie if I have q's

Don't talk to Moore

Timing of "forfeiture"
other c of a
who gets m \$

recordings only or equip

Fix:

RICO 946.87
ch. 132 ?

P/c to Essie -

Unsure abt meaning of

Didn't know

8

Sugg'd I talk to Valdez - 817/473-1341

dvaldez@riaa.com

Fix -

4/28/99 -

Conversation w/ Don Valdez - Recording Industry Assn of America
(Assoc represents record cos)

1) Fix - ~~usually~~ often (but not always) 1st time sounds are recorded. (He said no fed'l preemption of bottles b/c never been recorded before)

2) Not overly concerned w/ how forfeiture is structured
~~Make it conform to existing w/ law~~
Main concern seemed to be the case (very rare) where state seizes contraband, doesn't prosecute, + decides to give it back (99% of time, it's destroyed even if no prosecution)

~~_____~~
4/29/99

P/c from Valdez -

Said "owner of sounds" ok. Copy using copyright language as in fed'l law may be problematic in view of pre-'72 / post-'72 distinction

"Radio" left out inadvertently of exceptions

Don't need exception to apply to .208 + .209

Plc from Don Valdez

Motion picture industry has begun amending true name/
address provisions in other states
Wants to include amendment into ours

Wd prohibit people from camcording movies at theatres

I asked him to have Foti let us know that's ok

huge profits to be made, while the relatively lenient penalties provided by the current law have done little to stem the tide.

The Senate Committee reviewed the litany of evils associated with the piracy and counterfeiting of sound recordings and found the following:

- (1) recording artists lose significant amounts in royalties and fees;
 - (2) musicians are denied income received on the basis of the number of records sold;
 - (3) earnings of composers and publishers are adversely affected;
 - (4) the recording industry is denied income needed to assume the risk involved in investing in new recordings and developing new talent;
- and,
- (5) most importantly, the public is victimized through the deceptive practices of counterfeiters whose product is marketed as legitimate but which has none of the quality control which a legitimate product would.

The loss of tax revenue to state and federal governments was also cited.

II. "WHY LEGISLATION IN WISCONSIN"

A. Introduction

The state of Wisconsin is faced with problems similar to those faced by Congress in 1981. If Wisconsin is to combat the crimes of sound recording bootlegging, piracy, and counterfeiting in its state, it needs to adopt laws which seek to eliminate the problem of piracy and provide stiff penalties for those who engage in such activities. This can be accomplished by:

- (1) stiffening the penalties under Chapter 943.207 to deter would-be pirates and counterfeiters from an activity presently viewed as virtually risk-free;
- (2) protecting the consumer from additional deceptive practices of pirates and counterfeiters by

adopting a true name and address statute;

(3) providing an adequate anti-bootleg statute;

and,

(4) adding a forfeiture provision that would permit the seizure and disposal of infringing articles by the court.

B. Piracy and Counterfeiting

Much of the sale and distribution of illegal product occurs at flea markets throughout the country. Vendors of piratical and counterfeit products often prefer this forum because of the mobility swap meets provide. Wisconsin has become a target for such piratical activities. Further, complaints from various CD plants indicate the use of brokers operating within Wisconsin, while the "end users" are in another state. It appears that brokers know they can operate in Wisconsin and enjoy protection from prosecution due to the lack of adequate anti-piracy legislation. Another Wisconsin case currently under grand jury investigation by the FBI and United States Attorney's office involved the seizure of more than 600,000 counterfeit products. This case will be prosecuted as a criminal fraud or trafficking case.

Currently, there are two legal tools that many states use in combating piracy and counterfeiting:

(1) unauthorized duplication statutes (UD); and (2) "labeling" or "true name and address" statutes.

Forty-nine states (including Wisconsin) and the District of Columbia have UD type laws. In most states, the manufacturing of sound recordings without the permission of the copyright owner is a felony. In Wisconsin, however, a first time violation of the unauthorized duplication (UD) statute is only a misdemeanor offense.³ *The existing statute currently provides for a fine of an amount not to*

³ The Wisconsin UD statute covers recordings first "fixed" (i.e. put into a final master mix ready for commercial reproduction) prior to February 15, 1972. Federal law supplements this protection of sound recordings

exceed \$1,000 or imprisonment not to exceed ninety days (or both) for first offenses. A subsequent offense is a Class A misdemeanor and therefore a person may be fined an amount not to exceed \$10,000 or imprisonment not to exceed nine months (or both). Unfortunately, such minor penalties lead to situations in which criminals view the potential penalties as an insignificant cost of doing business. Furthermore, prosecutors are reluctant to prosecute, and where prosecution does occur, courts impose sentences which are not commensurate with the crimes involved.⁴

Not only does Wisconsin have an inadequate UD law, but it also has no "true name and address" statute. Forty-five other states and the District of Columbia have adopted statutes requiring the disclosure of the true name and address of the manufacturer of a sound recording on the package containing the recording. These laws are particularly useful in combating counterfeiting because counterfeiters, by their very nature, will not disclose the correct name of the manufacturer.

Today the public is victimized through the deceptive practices of counterfeiters whose product is marketed as legitimate, but which has none of the quality control of a legitimate product. A Wisconsin "labeling" law would thus protect consumers who are defrauded into buying shabby reproductions, thinking they are buying the genuine product. The insidious nature of counterfeiting demands that this offense be treated as a separate crime, apart from sound recording piracy.

C. Bootlegging

Wisconsin does not have a statute that protects against the unauthorized fixation and subsequent distribution of the sounds of live performances. Thirty-two states and the District of

by covering recordings first fixed on or after February 15, 1972. Federal copyright law (Title 17 U.S.C. 101, et seq.) preempts the application of the unauthorized duplication statute to sound recordings "fixed" on or after February 15, 1972.

⁴ In 1981, the Senate Committee on the Judiciary held hearings to consider changes in the Federal Copyright Law and reached this conclusion regarding the nationwide problem of piracy and counterfeiting and the inadequate penalties under then existing federal law.

Columbia have already enacted anti-bootlegging statutes. In these states, it is generally an offense to possess for sale, sell, record, or fix the sounds of a live performance with the knowledge that the sounds have been recorded or fixed without the consent of the owner of the live performance.

From 1990 to 1997, the RIAA investigated approximately twenty bootleg cases in Wisconsin. In 1998 alone, fourteen bootleg cases were investigated. Because of the lack of anti-bootlegging legislation, it appears that Wisconsin has become a target for such activities. Further, Wisconsin currently provides its residents with a large volume of concerts from various kinds of recording artist, and thus should undertake legislative efforts to outlaw bootleg activity. A high concentration of communities with colleges, as in Wisconsin, also tends to attract a greater number of bootleggers to the area. Adoption of an anti-bootlegging statute would protect the arena owners, promoters, and performers of concerts as well as the consuming public.⁵

III. CONCLUSION

Illegal piracy practices in Wisconsin exist to the great detriment of the legitimate recording industry, artists, musicians, and most importantly, the general public. If Wisconsin is to combat the crimes of bootlegging, piracy, and counterfeiting, it needs to:

- (1) provide stiffer penalties under the current unauthorized duplication statute;
 - (2) provide a true name and address statute which mandates disclosure of the manufacturer's name and address;
- and,
- (3) provide an anti-bootleg statute.

The proposed legislation will provide prosecutors with the tools to pursue sound recording

⁵ *Composers' and publishers' rights are protected by Federal law (i.e., the musical composition copyright). Because the state anti-bootleg statutes and the Federal law protect different rights, Federal preemption*

piracy, counterfeiting, and bootlegging actions. Higher penalties will serve as a deterrent to this sort of activity instead of merely as a cost of doing business.

is not a problem when applied to the right of the performer in his unfixed performance.

ATTACHMENT I

STATE PIRACY OR UNAUTHORIZED DUPLICATION LAWS

1. Alabama 13A-8-80, 13A-8-81, 13A-8-82, 13A-8-84, 13A-8-85, 13A-8-86
..... (Felony)
2. Alaska 45.50.900 (Misdemeanor)
3. Arizona 13-3705 (Felony)
4. Arkansas 5-37-510 (Felony)
5. California CA Penal Code Secs. 653h (Felony)
6. Colorado 18-4-601, 18-4-602, 18-4-603, 18-4-605 (Felony)
7. Connecticut 3-142(1), 3-142(3) (Felony)
8. Delaware Ti. 11, Secs. 920, 921, 923, 924 (Felony)
9. DC 22-3814 (Felony)
10. Florida 540.11 (Felony)
11. Georgia 16-8-60 (Felony)
12. Hawaii Ti. 26, Secs. 482c-1 through 482c-5 (Misdemeanor)
13. Idaho 18-7601 through 18-7608 (Felony)
14. Illinois 5/16-7, 5/16-8 (Felony)
15. Indiana 24-4-10-1 through 24-4-10-3, 24-4-10-5, 34-4-30.1-1, 35-43-4-1
..... through 35-43-4-3, 35-43-5-1 through 35-43-5-4 (Felony)
16. Iowa 714.15 (Felony)
17. Kansas 21-3748 through 21-3750 (Felony)
18. Kentucky 434.445 (Felony)
19. Louisiana 14:223 through 14:223.4, 14:223.7, 14:223.8 (Felony)
20. Maine Ti. 10, Sec. 1261 (Felony)
21. Maryland Art. 27, Sec. 467A (Felony)
22. Massachusetts ... Chap.266, Sec. 143, 143A, 143D, 143E (Felony)
23. Michigan Sec. 752.1051, 752.1052, 752.1054 through 752.1057 (Felony)
24. Minnesota 325E.169 through 325E.201 (Felony)
25. Mississippi 97-23-87, 97-23-91 (Felony)
26. Missouri 570.225, 570.226, 570.230, 570.235, 570.255 (Felony)
27. Montana 30-13-141 through 30-13-143, 30-13-145 through 30-13-147
..... (Misdemeanor)

ATTACHMENT J
STATE STATUTES MANDATING DISCLOSURE OF
MANUFACTURER'S TRUE NAME AND ADDRESS

1. Alabama 13A-8-83 (Felony)
2. Alaska 45.50.900(2) (Misdemeanor)
3. Arizona 13-3705(A)(3), (4) (Felony)
4. Arkansas 5-37-510(c) (Felony)
5. California CA Penal Code 653w (Felony)
6. Colorado 18-4-604 (Misdemeanor)
7. Connecticut 53-142(2) (Misdemeanor)
8. Delaware Ti. 11, Sec. 922 (Misdemeanor)
9. DC 22-3814.1 (Felony)
10. Florida 540.11(3)(a)(3) (Felony)
11. Georgia 16-8-60(b) (Felony)
12. Hawaii No Statute
13. Idaho 18-7603(3) (Misdemeanor)
14. Illinois 5/16-8(a) (Felony)
15. Indiana 24-4-10-4, 24-4-10-5 (Infraction), 35-43-5-4(11) (Felony)
16. Iowa 714.15(2) (Felony)
17. Kansas 21-3750 (Felony)
18. Kentucky 434.445(4) (Felony)
19. Louisiana 14:223.6, 14:223.7 (Felony)
20. Maine No Statute
21. Maryland Art. 27, Sec. 467A(3)(b) (Felony)
22. Massachusetts ... Chap. 266, Sec. 143C (Felony)
23. Michigan 752.1053 (Felony)
24. Minnesota 325E.18 (Felony)
25. Mississippi 97-23-89 (Felony)
26. Missouri 570.240, 570.241 (Felony)
27. Montana 30-13-144 (Misdemeanor)
28. Nebraska 28-1324 (Misdemeanor)

ATTACHMENT K
STATE ANTI-BOOTLEGGING STATUTES

1. Alabama 13A-8-81(2) (Felony)
2. Alaska No Statute
3. Arizona 13-3705(5) (Felony)
4. Arkansas 5-37-510(b) (Felony)
5. California CA Penal Code Sec. 653(s) (Misdemeanor)
6. Colorado No Statute
7. Connecticut No Statute
8. Delaware No Statute
9. DC 22-3814(b) (Misdemeanor)
10. Florida 540.11(2)(a) (Felony)
11. Georgia No Statute
12. Hawaii No Statute
13. Idaho No Statute
14. Illinois 5/16-7(a)(4) (Felony)
15. Indiana 35-43-4-1(8)(B) (Felony)
16. Iowa No Statute
17. Kansas 21-3748(1) (Felony)
18. Kentucky 434.445(2) (Felony)
19. Louisiana 14:223.5 (Felony)
20. Maine No Statute
21. Maryland Art. 27, Sec. 467A(2) (Felony)
22. Massachusetts Chap. 266, Sec. 143B (Felony)
23. Michigan 752.1052 (Felony)
24. Minnesota No Statute
25. Mississippi 97-23-87(b) (Felony)
26. Missouri 570.226 (Felony)
27. Montana 30-13-143(2) (Misdemeanor)
28. Nebraska No Statute
29. Nevada No Statute

STATE ANTI-BOOTLEGGING STATUTES (continued)

30. New Hampshire . . . 352-A:2 (Felony)
31. New Jersey 2C:21-21(c)(3) (Felony)
32. New Mexico 30-16B-5 (Felony)
33. New York NY Penal Law 275.15, 275.20 (Felony)
34. North Carolina . . . 14-433(a)(3) (Felony)
35. North Dakota 47-21.1-02(2) (Felony)
36. Ohio No Statute
37. Oklahoma Ti. 21, Sec. 1978 (Felony)
38. Oregon 164.869 (Felony)
39. Pennsylvania Ti. 18, Art. C, Chap. 41, Sec. 4116(d.1) (Felony)
40. Rhode Island No Statute
41. South Carolina . . . 16-11-915 (Felony)
42. South Dakota No Statute
43. Tennessee 39-14-139(c) (Felony)
44. Texas BUS. & COM. CODE 35.93 (Felony)
45. Utah No Statute
46. Vermont No Statute
47. Virginia 59.1-41.2 (Felony)
48. Washington 19.25.030 (Felony)
49. West Virginia 61-3-50(a) (Felony)
50. Wisconsin No Statute
51. Wyoming 40-13-202(a)(II) (Felony)
52. Puerto Rico Title 33 of the Laws of Puerto Rico Annotated
. 33 LPR Sections 2168-2171 (Felony)

(Rev. 4-29-98)



State of Wisconsin
1999 - 2000 LEGISLATURE

LRB-2690/P1
MGD:./:hnh
WJ

D-Note

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

WPOs -
This is the draft
dated ~~7/11~~ 7/11
(i'm not sure where others
came from.)

1 **AN ACT** ^{Gen Cat} relating to: unauthorized duplication of a recording, unauthorized
2 recording of a performance and failure to disclose manufacturer of a recording
3 and providing a penalty.

Analysis by the Legislative Reference Bureau

This is a preliminary draft. An analysis will be provided in a later version.

(3) bold

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

4 SECTION 1. 943.206 of the statutes is created to read:

5 **943.206 Definitions.** In this section and ss. 943.207 to 943.209:

6 (1) "Manufacturer" means a person who transfers sounds to a recording.

7 ~~ms~~ "Performance" means a recital, rendering or playing of a series of sounds,
8 either alone or in combination with images or physical activity. ^{words or other}

9 (2) "Recording" means a medium on or in which sounds or images or both are
10 stored. ^{(S) (V)}

~~"Performance owner" means the person or persons who own the rights to~~
(4) "Performance owner" means the performer or performers or the person to whom the performer or performers have transferred, through a contract, the right to sell recordings of a performance.

1 SECTION 2. 943.207 (title) of the statutes is amended to read:

2 943.207 (title) Transfer of recorded sounds for unlawful use; sale.

3 History: 1975 c. 300; 1977 c. 173.

3 SECTION 3. 943.207 (1) of the statutes is amended to read:

4 943.207 (1) Whoever does any of the following may be penalized as provided

5 in sub. (3) (3m):

6 (a) ~~Knowingly and wilfully Intentionally transfers or causes to be transferred,~~

7 without the consent of the owner, any sounds recorded on a phonograph record, disc,

8 wire, tape, film or other article on which sounds are recorded embodied in/a or on

9 recording, with intent to sell or cause to be sold, the article the recording into or onto

10 which such sounds are transferred for commercial advantage or private financial

11 gain.

12 (b) Advertises, offers for sale or, sells any article onto which rents or possesses

13 a recording with knowledge that sounds have been transferred as described in into

14 or onto it in violation of par. (a), with the knowledge that the sounds thereon have

15 been so transferred without the consent of the owner.

16 SECTION 4. 943.207 (1) (c) of the statutes is created to read:

17 943.207 (1) (c) Transports a recording within this state for commercial

18 advantage or private financial gain with knowledge that sounds have been

19 transferred onto ~~it~~ ^{into or the recording} without the consent of the owner in violation of par. (a). ✓

20 History: 1975 c. 300; 1977 c. 173.

20 SECTION 5. 943.207 (2) of the statutes is amended to read:

21 943.207 (2) ²⁰⁶ ~~In this section "owner"~~ ^{renumbered 943.206(2) and} means the person who owns the original

22 fixation of sounds embodied in the master phonograph record, master disc, master

23 tape, master film or other device used for reproducing recorded sounds on

24 phonograph records, discs, tapes, films or other articles on which sound is recorded, and ^{strike}

1
2

sounds ^{or on} in/a recording from which the transferred sounds are directly or indirectly derived. ^{Score}

History: 1975 c. 300; 1977 c. 173.

3

SECTION 6. 943.207 (3) of the statutes is repealed.

4

SECTION 7. 943.207 (3m) of the statutes is created to read:

5

943.207 (3m) Whoever violates this section is guilty of:

6

(a) A Class A misdemeanor if the person transfers sounds into or onto 100 or fewer recordings or creates, advertises, offers for sale, sells, rents, possesses or transports 100 or fewer recordings in violation of sub. (1) during a 180-day period.

9

(b) A Class D felony if the person transfers sounds into or onto more than 100 but less than 1,000 recordings or advertises, offers for sale, sells, rents, possesses or transports more than 100 but less than 1,000 recordings in violation of sub. (1) during a 180-day period.

10

11

13

(c) A Class C felony if the person transfers sounds into or onto at least 1,000 recordings or advertises, offers for sale, sells, rents, possesses or transports at least 1,000 recordings in violation of sub. (1) during a 180-day period or if the violation occurs after the person has been convicted under this section.

15

16

17

SECTION 8. 943.208 of the statutes is created to read:

18

943.208 Recording performance without consent of performer. (1)

19

Whoever does any of the following for commercial advantage or private financial gain may be penalized as provided in sub. (2):

20

21

(a) Creates a recording of a performance with knowledge that the performer ^{performance owner} ~~has not consented~~ and with intent to sell the recording. _{without consent of the performance owner}

22

images or both
sounds
images

1 (b) Advertises, offers for sale, sells, rents, or transports a recording of a
 2 performance with knowledge that the sounds from the performance embodied in the
 3 recording were recorded without the consent of the performer, ^{performance}
 4 ^{with intent to advertise, offer for sale, sell, rent or transport} ~~performer~~ ^{owner}
 5 (c) Possesses a recording of a performance ~~for one or more of the purposes in~~
 6 ~~part (b)~~ with knowledge that the sounds from the performance embodied in the
 7 recording were recorded without the consent of the performer.

7 (2) Whoever violates sub. (1) is guilty of:

8 (a) A Class A misdemeanor if the person creates, advertises, offers for sale,
 9 sells, rents, transports or possesses 100 or fewer recordings embodying sound or 10
 10 or fewer audiovisual recordings in violation of sub. (1) during a 180-day period.

11 (b) A Class D felony if the person creates, advertises, offers for sale, sells, rents,
 12 transports or possesses more than 100 but less than 1,000 recordings embodying
 13 sound or more than 10 but less than 100 audiovisual recordings in violation of sub.
 14 (1) during a 180-day period.

15 (c) A Class C felony if the person creates, advertises, offers for sale, sells, rents,
 16 transports or possesses at least 1,000 recordings embodying sound or at least 100
 17 audiovisual recordings in violation of sub. (1) during a 180-day period or if the
 18 violation occurs after the person has been convicted under this section.

insert
4-18

19 (3) Whoever violates sub. (1) is guilty of

20 SECTION 9. 943.209 of the statutes is created to read:

21 **943.209 Failure to disclose manufacturer of recording.** (1) Whoever does
 22 any of the following for the purpose of commercial advantage or private financial gain
 23 may be penalized as provided in sub. (2):

1 (a) Knowingly advertises, offers for sale or rent, sells, rents or lends a recording
2 that does not contain the name and address of the manufacturer in a prominent place
3 on the cover, jacket or label of the recording.

4 (b) Possesses with intent to advertise, offer for sale or rent, sell, rent or loan
5 a recording that does not contain the name and address of the manufacturer in a
6 prominent place on the cover, jacket or label of the recording.

7 (2) Whoever violates sub. (1) is guilty of

8 (a) A Class A misdemeanor if the person advertises, offers for sale or rent, sells,
9 rents, lends or possesses 10 or fewer recordings in violation of sub. (1) during a
10 180-day period.

11 (b) A Class D felony if the person advertises, offers for sale or rent, sells, rents,
12 lends or possesses more than 10 but less than 100 recordings in violation of sub. (1)
13 during a 180-day period.

14 (c) A Class C felony if the person advertises, offers for sale or rent, sells, rents,
15 lends or possesses at least 100 recordings in violation of sub. (1) during a 180-day
16 period or if the violation occurs after the person has been convicted under this
17 section.

*IN sect
5-17*

18 SECTION 10. 973.075 (1) (e) of the statutes is created to read:

19 973.075 (1) (e) Any recording created, advertised, offered for sale or rent, sold,
20 rented, lent, transported or possessed in violation of ss. 943.206 to 943.208 and any
21 electronic, mechanical or other device for manufacturing, reproducing, packaging or
22 assembling such recordings that was used to facilitate a violation of ss. 943.207 to
23 943.209, regardless of the knowledge or intent of the person who owns the recording
24 or device. is seized from whom

25 SECTION 11. 973.075 (5) (intro.) of the statutes is amended to read:

1 973.075 (5) (intro.) All forfeitures under ss. 973.075 to 973.077 shall be made
 2 with due provision for the rights of innocent persons under sub. (1) (b) 2m. and (d).
 3 ~~Any~~ Except as provided in sub. (5m), any property seized but not forfeited shall be
 4 returned to its rightful owner. Any person claiming the right to possession of
 5 property seized may apply for its return to the circuit court for the county in which
 6 the property was seized. The court shall order such notice as it deems adequate to
 7 be given the district attorney and all persons who have or may have an interest in
 8 the property and shall hold a hearing to hear all claims to its true ownership. If the
 9 right to possession is proved to the court's satisfaction, it shall order the property
 10 returned if:

History: 1981 c. 267; 1983 a. 243, 238; 1987 a. 348; 1989 a. 263; 1990 a. 92, 169, 459, 491; 1995 a. 290, 448; 1997 a. 35, 285.

11 **SECTION 12.** 973.075 (5m) of the statutes is created to read:

12 973.075 (5m) (a) In this subsection:

Insert 6-13 ↓

13 1. "Forfeiture action deadline" means the ~~date by which a forfeiture action must~~
 14 ~~be commenced under s. 973.076 (2) (a).~~

15 2. "Prosecutor" means the district attorney or, in counties having a population
 16 of 500,000 or more, the district attorney or the corporation counsel.

17 3. "Victim" means the owner, as defined in s. 943.206 (2), of the sounds in a
 18 recording described in sub. (1) (c) or, if the recording is seized in connection with an
 19 investigation or prosecution of a violation of s. 943.208, the performance owner.

20 (b) If recordings ^a involved in a violation of ss. 943.207 to 943.209 ⁷ are forfeited, ⁹
 21 the sheriff of the county in which the recordings ^{was} were seized shall destroy it after the
 22 completion of all proceedings in which the recording might be required as evidence.

23 (c) If, by the forfeiture action deadline, a summons, complaint and affidavit
 24 have not been filed under s. 973.076 (2) (a) with respect to property seized under ~~the~~

Sub.
878075/1 (e), the prosecutor shall notify the victim, if known, by certified mail no
later than 7 days after the forfeiture action deadline. The prosecutor shall then
return the property to the person from whom it was seized no earlier than 60 days
and no later than 90 days after the forfeiture action deadline unless one of the
following applies:

1. A court has entered an order prohibiting the return of the property or
requiring it to be conveyed to another person. *is likely to*

2. The property is needed as evidence in a criminal proceeding and ~~will~~^{is likely to} be
unavailable for use as evidence if returned to the person from whom it was seized.

(END)

1999-2000 DRAFTING INSERT
FROM THE
LEGISLATIVE REFERENCE BUREAU

P2 ins
LRB-2690/Pins
MGD:...:hnh

Insert dated
7/1

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INSERT 4-18

(3) Under this section, the number of recordings ^{that} ~~which~~ a person rents shall be the sum of the number of times in which each individual recording is ^{rented} ~~rented~~.

5
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8
9
INSERT 5-17

(3) Under this section, the number of recordings ^{that} ~~which~~ a person rents or lends shall be the sum of the number of times in which each individual recording is rented or lent.

10
11
12
13
INSERT 6-13

(3) 30th day after the seizure of the property, ^{for} ~~unless~~ the property was seized as a result of a criminal conviction, ^{if} ~~in which case~~ "forfeiture action deadline" means the 30th day after the date of the conviction.

~~_____~~

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

June 29, 1999

P2dn
LRB-2690/P1dn
JEO...f...
wlj
MGD

Don:

Please review this draft carefully to ensure that it is consistent with your intent. In particular, please note the following:

1. Under the bill, "performance" includes the presentation of non-musical sounds, such as a monologue. Is this okay?

2. The definition of "recording" includes any medium ^{that} which may be developed in the future on which sounds or images or both are stored and encompasses non-tangible media. Consequently, the draft replaces "article" in s. 943.207 (1) with "recording." The draft, however, does not clearly indicate how penalties are to be calculated for violations that consist of making available a single unauthorized recording to more than one person — for example, through the internet. Please let us know how you want the penalties to be structured for such violations.

3. The revisions suggested for s. 943.207 (1) add a requirement that the sale be for commercial advantage or private financial gain. The prosecutor is already obligated under the draft to prove that the person was engaged in certain types of conduct (such as advertising or selling the recording) that, in most cases, would reflect the person's goal of commercial advantage or private financial gain. ~~But~~ adding this requirement adds another element for a prosecutor to prove. Therefore, you may want to consider removing the "commercial advantage/private financial gain" requirement.

4. Under the bill, a person who transports unauthorized recordings violates ss. 943.207 and 943.208. ~~But~~ based on the suggested language, ^{however,} s. 943.209 does not refer to transporting counterfeit recordings. Moreover, a person making the initial recording under ss. 943.207 (1) (a) and 943.208 (1) (a) is only liable if he or she does so with intent to sell it. These provisions do not prohibit a person from making the recording with intent to rent copies (although the person would be subject to prosecution under ss. 943.207 (1) (b) and 943.208 (1) (b) if he or she ultimately rents the recording). Are these distinctions okay?

5. In view of the suggested language, the draft covers, among other things, renting, lending and offering to rent counterfeit recordings (s. 943.209). Sections 943.207 and 943.208 refer to renting pirated and counterfeit recordings, but they do not refer to lending or offering to rent such recordings. It is unclear to me what distinguishes "lending" from "renting," particularly in view of the "commercial advantage/private

based on advertising alone.



financial gain" language. Aside from that, does the draft reflect your intent in this area?

6. Prosecutors may have difficulty determining the number of recordings involved in offenses predicated on the advertisement of illicit recordings. This ~~should not deter you from including it; it only makes it unlikely for such a person to be charged with anything more than a Class A misdemeanor.~~ *think that I will*

7. By linking the penalty to the aggregate number of recordings, the bill may be construed as limiting prosecutors' ability to charge multiple offenses. For example, a person who sells 1,200 pirated copies of recording A and 1,500 pirated copies of recording B in one day may only be charged with a single Class C felony. (At the same time, since the total number of recordings would exceed 100, a person who sells 70 pirated copies of recording C and 60 pirated copies of recording D would be subject to prosecution for a Class D felony — although prosecutors would retain the discretion to charge the violation as a Class A misdemeanor — or two (or more) separate Class A misdemeanors, depending on how the 180-day period is measured.) *(The bill, however, may be construed as leaving a prosecutor significant discretion in deciding how to charge a person who violates these provisions through different types of conduct. Thus, a person who transports 120 pirated copies of recording Z and sells 110 of them could arguably be charged with two Class D felonies (one based on transporting the recordings, the other based on the sale). Finally, unlike ss. 943.207 and 943.209, the penalty provisions in s. 943.208 treat audiovisual recordings differently from other recordings. A person who sells 95 sound recordings and eight audiovisual recordings during a 180-day period in violation of s. 943.208 may be guilty of a Class D felony (for selling more than 100 but less than 1,000 recordings embodying sound) and a Class A misdemeanor (for selling 10 or fewer audiovisual recordings). If you would like the draft's treatment of any of these issues to be changed, please let us know.*

(A) At the same time,

8. Under s. 973.075, when certain property (such as a vehicle) that is subject to a perfected security interest is forfeited, the proceeds of the forfeiture are to be used to pay the holder of the security interest, provided that the the holder lacked knowledge of the crime. Do you want to include similar provisions in this bill?

Michael G. Dsida
Legislative Attorney
Phone: (608) 266-9867

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-2690/P2dn

MGD:wlj:mrc

July 9, 1999

Don:

Please review this draft carefully to ensure that it is consistent with your intent. In particular, please note the following:

1. Under the bill, "performance" includes the presentation of non-musical sounds, such as a monologue. Is this okay?

2. The definition of "recording" includes any medium that may be developed in the future on which sounds or images or both are stored and encompasses non-tangible media. Consequently, the draft replaces "article" in s. 943.207 (1) with "recording." The draft, however, does not clearly indicate how penalties are to be calculated for violations that consist of making available a single unauthorized recording to more than one person — for example, through the Internet. Please let us know how you want the penalties to be structured for such violations.

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4. Under the bill, a person who transports unauthorized recordings violates ss. 943.207 and 943.208. Based on the suggested language, however, s. 943.209 does not refer to transporting counterfeit recordings. Moreover, a person making the initial recording under ss. 943.207 (1) (a) and 943.208 (1) (a) is only liable if he or she does so with intent to sell it. These provisions do not prohibit a person from making the recording with intent to rent copies (although the person would be subject to prosecution under ss. 943.207 (1) (b) and 943.208 (1) (b) if he or she ultimately rents the recording). Are these distinctions okay?

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“lending” from “renting,” particularly in view of the “commercial advantage/private financial gain” language. Aside from that, does the draft reflect your intent in this area?

6. Prosecutors may have difficulty determining the number of recordings involved in offenses predicated on the advertisement of illicit recordings. This makes it unlikely that a person will be charged with anything more than a Class A misdemeanor based on advertising alone.

7. By linking the penalty to the aggregate number of recordings, the bill may be construed as limiting prosecutors’ ability to charge multiple offenses. For example, a person who sells 1,200 pirated copies of recording A and 1,500 pirated copies of recording B in one day may only be charged with a single Class C felony. (At the same time, since the total number of recordings would exceed 100, a person who sells 70 pirated copies of recording C and 60 pirated copies of recording D would be subject to prosecution for a Class D felony — although prosecutors would retain the discretion to charge the violation as a Class A misdemeanor — or two (or more) separate Class A misdemeanors, depending on how the 180-day period is measured.)

At the same time, the bill, may be construed as leaving a prosecutor significant discretion in deciding how to charge a person who violates these provisions through different types of conduct. Thus, a person who transports 120 pirated copies of recording Z and sells 110 of them could arguably be charged with two Class D felonies (one based on transporting the recordings, the other based on the sale). Finally, unlike ss. 943.207 and 943.209, the penalty provisions in s. 943.208 treat audiovisual recordings differently from other recordings. A person who sells 95 sound recordings and eight audiovisual recordings during a 180-day period in violation of s. 943.208 may be guilty of a Class D felony (for selling more than 100 but less than 1,000 recordings embodying sound) and a Class A misdemeanor (for selling 10 or fewer audiovisual recordings). If you would like the draft’s treatment of any of these issues to be changed, please let us know.

8. Under s. 973.075, when certain property (such as a vehicle) that is subject to a perfected security interest is forfeited, the proceeds of the forfeiture are to be used to pay the holder of the security interest, provided that the the holder lacked knowledge of the crime. Do you want to include similar provisions in this bill?

Michael G. Dsida
Legislative Attorney
Phone: (608) 266-9867

Mtg at Rep. Pottis' Office

- Protect innocent lien-holders in forfeiture

- Add movie theater recordings



Plc to Valdez

Address

Doesn't need to cover providers for free

Want to cover transporting in true name/address
Posselt

Operant

RIAA

I. "WHY LEGISLATION IS NEEDED"

File in "Piracy"

A. Introduction

The explosive advances made in recording technology and the corresponding increase in the level of piratical and counterfeiting activities have necessitated changes in our laws to respond to these new challenges. Pirates, bootleggers, and counterfeiters¹ now have at their disposal the technology by which near-perfect copies and/or recordings may be produced. The present law in Wisconsin does not adequately address the problem of piratical activities. Stiffer penalties under the current Wisconsin statute and additional legislation are needed to adequately deal with this problem

B. Problem—Historically

The experience of the U.S. Congress in consideration of the enactment of the Piracy and Counterfeiting Amendments Act of 1982² should prove instructive to the Wisconsin Legislature. In recommending passage of the 1982 Act, the House Committee on the Judiciary noted that the increased sanctions and penalties were "essential to curb the explosive growth of counterfeiting and piracy and to deter the sophisticated criminals who have created an industry in the illegal reproduction and distribution . . . [of] . . . records and tapes."

The Senate Committee on the Judiciary concurred and found that:

Piracy and counterfeiting of copyrighted material, the theft of intellectual property, is now a major white collar crime. The dramatic growth of this problem has been encouraged by the

¹ There are three forms of "piracy": (1) piracy; (2) counterfeiting; and, (3) bootlegging. Piracy is the unauthorized duplication of sounds contained in a legitimate recording. Counterfeiting is the unauthorized duplication not only of the recorded sounds but also of the original label artwork. Trademark, and packaging of the original recording. Bootlegging is the unauthorized recording of a performance that is not legitimately available. Bootlegs are commonly reproductions of concert or studio outtakes not intended for release.

² The Piracy and Counterfeiting Amendments Act of 1982, codified in 18 U.S.C. §§ 2318-2319, accomplished two objectives—it established a graduated system of criminal penalties for copyright infringements of sound recordings and audiovisual works (including motion pictures) and established a uniform penalty for trafficking in counterfeit labels.



Memorandum

July 23, 1999

MGD
~

TO: Patrick Essie
Joe Chernelich
Peggy Partenfelder-Moede

FROM: Don Valdez

RE: Preliminary Draft – Wisconsin Anti-Piracy Statute

Having reviewed the preliminary draft from the Legislative Reference Bureau and the issues raised, I shall address each issue as enumerated. In addition I noticed that three key provisions were not included in the proposed draft:

(1) I would include a section 943.207(1)(d) that would read: "This section applies only to sound recordings that were initially "fixed" before February 15, 1972." This will alert prosecutors to preemption issues with regard to the unauthorized duplication section of the statute. I have included an explanation of preemption for your information.

(2) While I was on vacation earlier this summer, I faxed you a copy of the "camcorder law" that has been included as part of the state anti-piracy law in other states. This law is important to the motion picture industry, but was not included in the preliminary draft. I've also included another copy of it. If the Legislative Reference Bureau would like to see how it fits in I can provide them with copies of the New York and Pennsylvania anti-piracy statutes. As I recall, the language I faxed you came directly from the Pennsylvania statute.

(3) No exemption section was included in the preliminary draft. In my proposed revised Wisconsin draft I had included the section in tact as it appeared in the original anti-piracy statute.

Question 1: Is it okay that "performance" includes the presentation of non-musical sounds?

Answer: Yes. Live performances by comedians, dramatic actors and actresses, as well as other artists and public figures often result in sound recordings that are released for commercial purposes. These performances should enjoy the same protection as any other recording, since such a recording released for public sale can be a primary source for an artist's income.

Page 2

**Questions – WI Preliminary Draft
July 23, 1999**

Question 2: The preliminary draft replaces “article” in 943.207(1)(a) with “recording” (any medium that may be developed in the future on which sounds or images or both are stored, encompassing non-tangible media), but does not clearly indicate how penalties are to be calculated for violations that consist of making available a single unauthorized recording to more than one person—for example, through the Internet. How should penalties be structured for such violations?

Answer: It is the intention of the legislation that each individual copy of the same or different recording count toward the total number of recordings calculated to reach the different levels of criminal activity. In the case of piracy of intellectual property (in this case recordings) on the internet, each individual download should not be treated any differently than if physical product (e.g., infringing copies of individual compact discs) had been seized and were being tallied to reach different levels of the violation. To give you an idea of how quickly internet infringement can occur and why counting the individual copies is so important, in a recent story by writer Gil Kaufman published in Sonicnet, an 18-year old webmaster claimed that more than 1000 people had downloaded two new songs (sound recordings) during an 18-hour period that he had put them on line. The only reason that he didn’t keep them up longer is because the artist’s record company found out about the site and had their legal department contact him requesting that the site be taken down.

Question 3: Justify the existence of both the following requirements: (a) that a sale be for commercial advantage or private financial gain and (b) that the prosecutor is already obligated to prove the defendant was engaged in certain types of conduct, like advertising or selling the recording.

Answer: It appears that the Legislative Reference Bureau (LRB) is not questioning why “commercial advantage” and “private financial gain” are both included. Instead, the LRB seems to be wondering why “advertising” would not count as being for commercial advantage or private financial gain. Each sub-section of 943.207(1) is designed for a different purpose. §943.207(1)(a) addresses the actual transfer of the sounds. §943.207(1)(b) addresses not only the sale and process of selling, but also encompasses the situation in which someone may have warehoused illegal recordings for sale. §943.207(1)(c) addresses the distribution of illegal recordings. The commercial requirement protects those who transfer sounds only for personal use from prosecution. Financial gain includes the receipt or expectation of receipt, of anything of value, including the receipt of other copyrighted works.

Page 3

Questions – WI Preliminary Draft

July 23, 1999

Question 4. Why does the draft in 943.207 – 943.208 punish a person who transports unauthorized recordings, but not the transport of counterfeit recordings in 943.209? Also, why is a person who makes the initial recording with intent to sell liable under 943.207(1)(a) and 943.208(1)(a), but not if the person makes it with intent to rent copies? (In (b) of these subsections, the person is liable for ultimately renting the recording.)

Answer: §943.209 does not address unauthorized recordings. This section is referred to as the “true name and address section” and punishes for improper labeling of recordings whether the product is authorized or unauthorized. 47 states plus the District of Columbia and Puerto Rico have enacted statutes mandating the disclosure of the true name and address of the manufacturer of a sound recording on the package containing the recording. These statutes, like §943.209, are intended to protect the public. They are not like the federal copyright law, state unauthorized duplication laws (§943.207) and state anti-bootleg laws (§943.208) which protect record companies and artists.

Question 5. The draft covers, among other things, renting, lending, and offering to rent counterfeit recordings (§943.209). §§943.207 and 943.208 refer to renting pirated recordings, but they do not refer to lending or offering to rent such recordings. What distinguishes renting from lending, particularly in view of the “commercial advantage/private financial gain” language?

Answer: I don't know why lending or any derivative of it is in §943-209. When preparing early drafts a former law clerk had included it, but it was removed. There are only two states of which I know that included lending in their anti-piracy statutes, Washington and Oregon. I recommend that it be deleted from §943.209.

For your information, however, there is a federal record rental law (17 U. S. C. 109) which prohibits rental, leasing and any other ...”act or practice in the nature of rental, lease or lending.” In particular the law states that unless authorized by the owners of copyright in the sound recording and in the musical works embodied therein, the owners of a particular phonorecord may not, for purposes of direct or indirect commercial advantage, dispose of, or authorize the disposal of, the possession of that phonorecord by rental, lease or lending.

Question 6. Prosecutors may have difficulty determining the number of recordings involved in offenses predicated on the advertisement of illicit recordings. This makes it unlikely that a person will be charged with anything more than a Class A misdemeanor based on advertising alone.

Page 4

**Questions – WI Preliminary Draft
July 23, 1999**

Answer: Should a prosecutor decide to bring a case based solely on the advertisement of illicit recordings, he/she must use the number of recordings advertised. However, in our experience most individuals who advertise such recordings for sale have hundreds of titles listed in the advertisement.

Question: 7 (a) Are prosecutors prevented from charging multiple offenses due to linking the penalty to the aggregate number of recordings? **(b)** Why are audiovisual recordings treated differently from other recordings?

Answer: **(a)** while it might be construed to be limiting, I don't believe it is an impediment. In the RIAA's experience the 180-day period has worked out nicely in the investigation and prosecution of these types of cases. The 180-day period allows an investigator and prosecutor to choose any 180-day period. Often these cases take a while to develop and the 180-day period allows for undercover buys to be made in varying amounts during the period. If a defendant is willing to sell illicit recordings several times over the 180-day period, those acts go to show knowledge and intent on behalf of the defendant and that the illicit business in which he/she is engaged is ongoing. In many cases it also allows time for law enforcement to develop enough information to locate the illicit manufacturing operation.

(b) Audiovisual recordings are treated differently because they generally have had a much higher value than sound recordings. Movies are just more expensive than audio compact discs. However, today that gap has narrowed somewhat and often a movie is released for sale near the same price of a musical compact disc, although they generally still have a higher value. The Motion Picture Association of America (MPAA) also has a formula by which they can calculate the value of motion pictures.

Question 8. Under §973.075, when certain property (such as a vehicle) that is subject to a perfected security interest is forfeited, the proceeds of the forfeiture are to be used to pay the holder of the security interest, provided that the holder lacked knowledge of the crime. Do you want to include a similar provision in this bill?

Answer: The RIAA is interested in stopping music piracy within the state of Wisconsin. We rely on the good judgment of the legislature to determine this issue.



EXPLANATION OF PREEMPTION

The Federal Copyright Law is Title 17 of the United States Code. This is the jurisdictional basis for federal law enforcement activity in the field of sound recording piracy. The original and Sound Recording Amendment's initial effective date was February 15, 1972. Sound recordings which were "fixed" (final mix of master or master now ready for commercial reproduction) on or after the February 15, 1972 date were and are protected by Federal Copyright Law.

State unauthorized duplication laws apply only to sound recordings fixed and released prior to February 15, 1972. Few state statutes specify this as the cut-off date. However, the combined effect of Goldstein v. California (a U.S. Supreme Court case; 412 U.S. 546, 1973), the United States Congress' enactment of Section 301 of Title 17, and the United States Constitution's Supremacy Clause all establish this as the cut-off date. This result is due to a concept known as federal preemption.

The Supremacy Clause states that when Congress enacts laws covering the same activities as state laws do, federal law is "supreme" and preempts any use of the similar state law. This preemption is true even if the federal law is not used. The mere existence of a federal law covering the same activity as a state law is sufficient to preempt the use of the state law. Applying this concept in Goldstein v. California the Supreme Court decided that since the Federal Copyright Law protects sound recordings fixed on or after February 15, 1972, state unauthorized duplication statutes could only be validly applied to protect sound recordings fixed (and released) before February 15, 1972.

1ST DOCUMENT of Level 1 printed in FULL format.

PENNSYLVANIA STATUTES

*** THIS DOCUMENT IS CURRENT THROUGH THE 1997 SUPPLEMENT (1996 SESSIONS) ***

TITLE 18. CRIMES AND OFFENSES
PENNSYLVANIA CONSOLIDATED STATUTES
PART II. DEFINITION OF SPECIFIC OFFENSES
ARTICLE C. OFFENSES AGAINST PROPERTY
CHAPTER 41. FORGERY AND FRAUDULENT PRACTICES

18 Pa.C.S. § 4116.1 (1997)

[Pa.C.S.] § 4116.1. Unlawful operation of recording device in motion picture theater

(A) OFFENSE.-- A person commits the offense of unauthorized operation of a recording device in a motion picture theater if the person operates a recording device in the theater without written authority or permission from the motion picture theater owner.

(B) THEATER OWNER RIGHTS.--

(1) A peace officer, theater owner or an agent under contract with a theater owner who reasonably believes that an offense under the section has occurred or is occurring and who reasonably believes that a specific person has committed or is committing an offense under this section may detain the suspect in a reasonable manner for a reasonable time on or off the premises for any of the following purposes:

- (i) To require the suspect to identify himself.
- (ii) To verify such identification.
- (iii) To determine whether the suspect has any recordings in violation of this section and, if so, to recover such recordings.
- (iv) To inform a peace officer.
- (v) To institute criminal proceedings against the suspect.

(2) If any person admitted to a theater in which a motion picture is to be or is being exhibited, refuses or fails to give or surrender possession or to cease operation of any recording device that the person has brought into or attempts to bring into that theater, then a theater owner shall have the right to refuse further admission to that person or request that the person leave the premises.

(C) LIABILITY.-- A theater owner or an employee or agent of a theater owner who detains or causes the arrest of a person in or immediately adjacent to a motion picture theater shall not be held civilly or criminally liable in any proceeding arising out of such detention or arrest if:

18 Pa.C.S. § 4116.1 (1997)

- (1) the person detaining or causing the arrest had, at the time thereof, reasonably believed that the person detained or arrested had committed or attempted to commit in that person's presence an offense § described in this section;
- (2) the manner of the detention or arrest was reasonable;
- (3) law enforcement authorities were notified within a reasonable time; and
- (4) the person detained or arrested was surrendered to law enforcement authorities within a reasonable time.

(D) PENALTY.-- A first violation of this section constitutes a misdemeanor of the first degree. A second or subsequent conviction is a felony of the third degree if at the time of sentencing the defendant has been convicted of another violation of this section.

(E) DEFINITIONS.-- As used in this section, the following words and phrases shall have the meanings given to them in this subsection:

"MOTION PICTURE THEATER." A premises used for the exhibition or performance of motion pictures to the general public.

"RECORDING DEVICE." A photographic or video camera, audio or video recorder or any other device now existing or later developed which may be used for recording or transferring sounds or images.

"THEATER OWNER." An owner or operator and the agent, employee, consignee, lessee or officer of an owner or operator of any motion picture theater.

Dsida, Michael

From: dvaldez@riaa.com
Sent: Tuesday, September 28, 1999 11:03 AM
To: Dsida, Michael
Subject: RE: Additional questions

Hi, Mike. I just talked with Ken Jacobsen at the Motion Picture Association of America (MPAA). They like your idea of enhancing the camcorder section, and gave me permission to advise you to proceed with it. Thanks for your help.

Don

"Dsida, Michael" <Michael.Dsida@legis.state.wi.us> on 09/27/99 04:32:45 PM

To: "dvaldez@riaa.com" <dvaldez@riaa.com>
cc:
Subject: RE: Additional questions

I'm not under the gun at this point. The legislature is now preoccupied with finishing work on the budget.

> -----Original Message-----

> From: dvaldez@riaa.com [mailto:dvaldez@riaa.com]
> Sent: Monday, September 27, 1999 10:14 AM
> To: Dsida, Michael
> Cc: Gbennett@mail.smu.edu
> Subject: Re: Additional questions

>
>
>

> Hi, Mike. Sorry I'm a little late in getting back to you,
> but I am on the
> road again in Houston, TX. Anyway, the answer to question
> one is, "Yes."
> I believe that recordings made and equipment used in
> violation of the movie
> theater provisions should be subject to forfeiture.

>
> With regard to question two, if minor changes can enhance the
> law, I'm all
> for it. The statute I passed on to you was given to me by the Motion
> Picture Association of America (MPAA) to be used as a model,
> and one with
> which they are quite pleased.

>

> I'll reach out for their people in Los Angeles just to make
> sure. Are you
> facing a critical deadline? I want be able to do this until
> tomorrow or
> Wednesday.

>

> Don

>
>
>
>
>
>
>
> "Dsida, Michael" <Michael.Dsida@legis.state.wi.us> on
> 09/24/99 09:25:30 AM
>
> To: "dvaldez@riaa.com" <dvaldez@riaa.com>
> cc:
> Subject: Additional questions
>
>
> 1. Do you want to subject recordings made and equipment used
> in violation
> of the movie theater provisions to forfeiture?
>
> 2. The provisions regarding pirating, bootlegging, and counterfeiting
> recordings cover more than just the original culprit by encompassing
> advertising, sale, transportation.... The Pennsylvania law
> which you gave
> me, by contrast, only covers the person who records the
> movie. Do you want
> to cover the chain of copying and distribution that will
> follow if someone
> gets away with recording a movie? It is arguably already
> covered by the
> revisions in s. 943.207, but if you want to leave less room
> for doubt, I
> would need to make a couple of minor changes in the language of that
> section
> and the definition of "owner."
>
>
>
>



State of Wisconsin
1999 - 2000 LEGISLATURE

LRB-2690/12
MGD:wlj:mrc

RMR

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

Regen
/

1 **AN ACT to repeal 943.207 (3); to renumber and amend 943.207 (2); to amend**
2 943.207 (title), 943.207 (1) and 973.075 (5) (intro.); and **to create** 943.206,
3 943.207 (1)(c), 943.207 (3m), 943.208, 943.209, 973.075 (1)(e) and 973.075 (5m)
4 of the statutes; **relating to:** unauthorized duplication of a recording,
5 unauthorized recording of a performance ~~and~~ failure to disclose manufacturer
6 of a recording and providing a penalty.

↑ unauthorized use of a recording device in a movie theater

Analysis by the Legislative Reference Bureau

~~This is a preliminary draft. An analysis will be provided in a later version.~~

Insert analysis →

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

7 **SECTION 1.** 943.206 of the statutes is created to read:

8 **943.206 Definitions.** In this section and ss. 943.207 to 943.209:

9 (1) "Manufacturer" means a person who transfers sounds to a recording.

10 (3) "Performance" means a recital, rendering or playing of a series of words or
11 other sounds, either alone or in combination with images or physical activity.

1 (4) "Performance owner" means the performer or performers or the person to
2 whom the performer or performers have transferred, through a contract, the right
3 to sell recordings of a performance.

4 (5) "Recording" means a medium on or in which sounds or images or both are
5 stored.

6 SECTION 2. 943.207 (title) of the statutes is amended to read:

7 **943.207 (title) Transfer of recorded sounds for unlawful use; sale.**

8 SECTION 3. 943.207 (1) of the statutes is amended to read:

9 943.207 (1) Whoever does any of the following may be penalized as provided
10 in sub. (3) (3m):

11 (a) ~~Knowingly and wilfully~~ Intentionally transfers or causes to be transferred,
12 without the consent of the owner, any sounds recorded on a phonograph record, disc,
13 wire, tape, film or other article on which sounds are recorded ^{first} embodied in or on a
14 recording, ^{before February 15, 1972} with intent to sell or cause to be sold, the article ^{or rent} the recording into or onto
15 which such sounds are transferred for commercial advantage or private financial
16 gain.

17 (b) Advertises, offers for sale ^{rent} or sells any article onto which, rents or possesses
18 a recording with knowledge that sounds have been transferred ~~as described in~~ into
19 or onto it in violation of par. (a), ~~with the knowledge that the sounds thereon have~~
20 been so transferred without the consent of the owner.

21 SECTION 4. 943.207 (1) (c) of the statutes is created to read:

22 943.207 (1) (c) Transports a recording within this state for commercial
23 advantage or private financial gain with knowledge that sounds have been
24 transferred into or onto the recording in violation of par. (a).

1 SECTION 5. 943.207 (2) of the statutes is renumbered 943.206 (2) and amended
2 to read:

3 943.206 (2) In this section "owner" "Owner" means the person who owns the
4 original fixation of sounds embodied in the master phonograph record, master disc,
5 master tape, master film or other device used for reproducing recorded sounds on
6 phonograph records, discs, tapes, films or other articles on which sound is recorded,
7 and sounds in or on a recording from which the transferred sounds are directly or
8 indirectly derived.

9 SECTION 6. 943.207 (3) of the statutes is repealed.

10 SECTION 7. 943.207 (3m) of the statutes is created to read:

11 943.207 (3m) Whoever violates this section is guilty of ^{any} ~~one~~ ^{of} ~~the~~ ^{following} ~~circumstances~~ ^{circumstances}.

12 (a) ~~A~~ Class A misdemeanor if the person transfers sounds into or onto 100 or
13 fewer recordings or creates, advertises, offers for sale, sells, rents, possesses or
14 transports 100 or fewer recordings in violation of sub. (1) during a 180-day period.

15 (b) ~~A~~ Class D felony if the person transfers sounds into or onto more than 100
16 but less than 1,000 recordings or advertises, offers for sale, sells, rents, possesses or
17 transports more than 100 but less than 1,000 recordings in violation of sub. (1)
18 during a 180-day period.

19 (c) ~~A~~ Class C felony if the person transfers sounds into or onto at least 1,000
20 recordings or advertises, offers for sale, sells, rents, possesses or transports at least
21 1,000 recordings in violation of sub. (1) during a 180-day period if the violation
22 occurs after the person has been convicted under this section.

23 SECTION 8. 943.208 of the statutes is created to read:

under the following circumstances: ^{any of} 1.

Insert 3/14

Insert 3/18

on rent

3.

Section # 943.207(4)(c) is created to read:
943.207(4)(c) Recording on which all of the
sounds and images

Insert
3-21

943.208 Recording performance without consent of performance

owner. (1) Whoever does any of the following for commercial advantage or private financial gain may be penalized as provided in sub. (2):

(a) Creates a recording of a performance without consent of the performance owner and with intent to sell the recording.

(b) Advertises, offers for sale, sells, rents or transports a recording of a performance with knowledge that the sounds, images or both from the performance embodied in the recording were recorded without the consent of the performance owner.

(c) Possesses with intent to advertise, offer for sale, sell, rent or transport a recording of a performance with knowledge that the sounds, images or both from the performance embodied in the recording were recorded without the consent of the performance owner.

(2) Whoever violates sub. (1) is guilty of

(a) A Class A misdemeanor if the person creates, advertises, offers for sale, sells, rents, transports or possesses 100 or fewer recordings embodying sound or 10 or fewer audiovisual recordings in violation of sub. (1) during a 180-day period.

(b) A Class D felony if the person creates, advertises, offers for sale, sells, rents, transports or possesses more than 100 but less than 1,000 recordings embodying sound or more than 10 but less than 100 audiovisual recordings in violation of sub. (1) during a 180-day period.

(c) A Class C felony if the person creates, advertises, offers for sale, sells, rents, transports or possesses at least 1,000 recordings embodying sound or at least 100 audiovisual recordings in violation of sub. (1) during a 180-day period or if the violation occurs after the person has been convicted under this section.

103

Note 5

or rent

1 (3) Under this section, the number of recordings that a person rents shall be
2 the sum of the number of times in which each individual recording is rented.

3 SECTION 9. 943.209 of the statutes is created to read:

4 943.209 Failure to disclose manufacturer of recording. (1) Whoever does
5 any of the following for commercial advantage or private financial gain may be
6 penalized as provided in sub. (2):

7 (a) Knowingly advertises, offers for sale or rent, sells, rents or ~~lends~~ a recording
8 that does not contain the name and address of the manufacturer in a prominent place
9 on the cover, jacket or label of the recording.

10 (b) Possesses with intent to advertise, offer for sale or rent, sell, rent or ~~lends~~
11 a recording that does not contain the name and address of the manufacturer in a
12 prominent place on the cover, jacket or label of the recording.

13 (2) Whoever violates sub. (1) is guilty of ~~it~~

14 (a) ~~A~~ Class A misdemeanor if the person advertises, offers for sale or rent, sells,
15 rents ~~or lends~~ or possesses 10 or fewer recordings in violation of sub. (1) during a
16 180-day period.

17 (b) ~~A~~ Class D felony if the person advertises, offers for sale or rent, sells, rents
18 ~~or lends~~ or possesses more than 10 but less than 100 recordings in violation of sub. (1)
19 during a 180-day period.

20 (c) ~~A~~ Class C felony if the person advertises, offers for sale or rent, sells, rents,
21 ~~or lends~~ or possesses at least 100 recordings in violation of sub. (1) during a 180-day
22 period or if the violation occurs after the person has been convicted under this
23 section.

stet *stet* *transports* *transports*

stet *stet* *transport*

Not
Keep comma
transports

transports

STET

STET

1 2. Whoever violates par. (a) is guilty of a Class D felony under any of the
2 following circumstances:

3 a. If the person creates, advertises, offers for sale or rent, sells, rents,
4 transports or possesses more than 10 but less than 100 recordings in violation of par.
5 (a) during a 180-day period.

6 b. If the person transfers sounds on ^{or to} the internet in violation of par. (a) and the
7 transferred sounds are replayed by others from the internet more than 100 but less
8 than 1,000 times during a 180-day period.

9 3. Whoever violates par. (a) is guilty of a Class C felony under any of the
10 following circumstances:

11 a. If the person creates, advertises, offers for sale or rent, sells, rents,
12 transports or possesses at least 100 recordings in violation of par. (a) during a
13 180-day period.

14 b. If the person transfers sounds on ^{or to} the internet in violation of par. (a) and the
15 transferred sounds are replayed by others from the internet at least 1,000 times
16 during a 180-day period.

17 c. If the violation occurs after the person has been convicted under this
18 subsection.

19 (c) Under this subsection, the number of recordings that a person rents shall
20 be the sum of the number of times in which each individual recording is rented.

21 (4) DETENTION OF PERSON COMMITTING VIOLATION. A theater owner, a theater
22 owner's adult employe or a theater owner's security agent who has reasonable cause
23 ~~for believing~~ ^{to believe} that a person has violated this section in his or her presence may detain
24 the person in a reasonable manner for a reasonable length of time to deliver the
25 person to a peace officer, or to his or her parent or guardian in the case of a minor.

Insert 6(3)

1 (3) Under this section, the number of recordings that a person rents or lends
 2 shall be the sum of the number of times in which each individual recording is rented
 3 ~~off~~ lent.

4 SECTION 10. 973.075 (1) (e) of the statutes is created to read:

5 973.075 (1) (e) Any recording, as defined in s. 943.206 (5), created, advertised,
 6 offered for sale or rent, sold, rented, ~~lent~~, transported or possessed in violation of ss.
 7 943.207 to 943.209 ^{or 943.49} and any electronic, mechanical or other device ^{for making recordings or} for manufacturing,
 8 reproducing, packaging or assembling ^a recordings ^{or 943.49} that was used to facilitate a
 9 violation of ss. 943.207 to 943.209, regardless of the knowledge or intent of the person
 10 from whom the recording or device is seized.

Insert 6/10

11 SECTION 11. 973.075 (5) (intro.) of the statutes is amended to read:

12 973.075 (5) (intro.) All forfeitures under ss. 973.075 to 973.077 shall be made and (e)
 13 with due provision for the rights of innocent persons under sub. (1) (b) 2m ^{STEN} and (d).
 14 ~~Any~~ Except as provided in sub. (5m), any property seized but not forfeited shall be
 15 returned to its rightful owner. Any person claiming the right to possession of
 16 property seized may apply for its return to the circuit court for the county in which
 17 the property was seized. The court shall order such notice as it deems adequate to
 18 be given the district attorney and all persons who have or may have an interest in
 19 the property and shall hold a hearing to hear all claims to its true ownership. If the
 20 right to possession is proved to the court's satisfaction, it shall order the property
 21 returned if:

22 SECTION 12. 973.075 (5m) of the statutes is created to read:

23 973.075 (5m) (a) In this subsection:

1

ANALYSIS INSERT

Under current law, a person may not knowingly and wilfully transfer recorded sounds without the consent of the owner with intent to sell the record, disc, wire, tape, film or other article onto which the sounds are transferred (an "unlawful transfer"). ("Owner" is defined under current law to mean the person who owns the sounds embodied in the original master recording from which the transferred sounds are directly or indirectly derived.) In addition, a person may not advertise, offer for sale or sell the article onto which such sounds have been transferred (a "pirated recording") with knowledge that the sounds were transferred onto the article without the consent of the owner. A first-time violator of the unlawful transfer prohibition may be fined not more than \$1,000 or imprisoned for not more than 90 days or both. For each subsequent unlawful transfer offense, the person may be ~~be~~ fined not more than \$10,000 or imprisoned for not more than ~~12~~ ^{nine} months or both. A person who knowingly advertises, offers for sale or sells a pirated recording may be fined not more than \$1,000 or imprisoned for not more than 90 days or both for each unlawful advertisement, offer or sale.

This bill amends these provisions to prohibit a person from knowingly transporting, offering to rent, renting or possessing pirated recordings. It also limits the prohibitions on unlawful transfers and on transporting pirated recordings to cases in which the person transferred the sounds or transported the pirated recordings for commercial advantage or private financial gain. The penalties for violations are also revised. Under the bill, a violation is generally classified based on the number of recordings involved or, in the case of a pirated recording distributed on the internet, the number of times the recording was replayed by another person during a 180-day period:

*Number of
 (I)*

<i>Recordings / replays involved during a 180-day period</i>	<i>Classification</i>
Under 100	Class A misdemeanor
100-999	Class D felony
1000 or more	Class C felony

The bill also creates three new crimes. The first relates to "bootlegging". Under the bill, no person may record a performance without the performer's consent ~~and~~ with intent to sell or rent the bootlegged recording. The bill also prohibits individuals who know that a recording has been bootlegged from advertising, offering to sell or rent, selling, renting, or transporting the recording or from possessing it for one of those purposes. Violations are ^{generally} classified as follows:

<i>Number of recordings involved during a 180-day period</i>	<i>Classification</i>
Under 100 recordings embodying sound or under 10 audiovisual recordings	Class A misdemeanor

100-999 recordings embodying sound or 10-99 audiovisual recordings	Class D felony
1000 or more recordings embodying sound or 100 or more audiovisual recordings	Class C felony

The second new crime relates to counterfeit recordings. Under the bill, no person may knowingly advertise, offer for sale or rent, sell, rent or transport a recording or possess a recording for one of those purposes if the recording does not contain the name and address of the manufacturer in a prominent place on its cover, jacket or label. Violations are ^{generally} classified as follows: ^{of the recording}

Number of recordings involved during a 180-day period	Classification
Under 10	Class A misdemeanor
10-99	Class D felony
100 or more	Class C felony

The provisions regarding the third new crime prohibit a person from using any type of recording device in a movie theater without the written authorization of the theater owner or his or her agent. A person who violates this prohibition is generally guilty of a Class A misdemeanor. The bill also prohibits a person from knowingly ~~transporting~~, offering to rent, renting or ~~possessing~~ unlawfully recorded movies ^{with the penalties generally classified as follows:} ^{transporting}

Number of recordings involved during a 180-day period	Classification
Under 100	Class A misdemeanor
100-999	Class D felony
1000 or more	Class C felony

The penalty provisions applicable to the three new crimes and to the unlawful transfer/pirated recording prohibitions treat repeat offenders separately. Under the bill, a person who commits one of these offenses — other than the unlawful recording of a movie — after having been previously convicted of the same offense is guilty of a Class C felony, regardless of the number of recordings or replays involved. A person who violates the provisions regarding unauthorized recording of a movie after having previously been convicted of that offense is guilty of a Class D felony.

The bill also subjects recordings and devices used for recording or for manufacturing, reproducing, packaging or assembling recordings involved in a violation of any of these provisions to forfeiture.

Penalties for violations are as follows:

^{STB} Crime	Maximum Fine	Maximum Imprisonment (for offenses occurring before 12/31/99)	Maximum Imprisonment (for offenses occurring on or after 12/31/99)
Class C felony	\$10,000	10 years	15 years

WFO:
Please format a table like the other four in this insert.

for sale or
~~advertising~~
advertising

or possessing a recording for one of those purposes

Class D felony	\$10,000	⁵ Five years	¹⁰ Ten years
Class A misdemeanor	\$10,000	⁹ Nine months	⁹ Nine months

1 **INSERT 3/14**

2 4 ✓ 2. If the person transfers sounds on ^{or to} the internet in violation of sub. (1) ✓ and the
3 transferred sounds are never replayed or are replayed by others from the internet
4 100 or fewer times during a 180-day period.

5 **INSERT 3/18**

6 4 ✓ 2. If the person transfers sounds ~~on~~ ^{on or to} the internet in violation of sub. (1) ✓ and the
7 transferred sounds are replayed by others from the internet more than 100 but less
8 than 1,000 times during a 180-day period.

9 **INSERT 3/21 3/21**

10 4 ✓ 2. If the person transfers sounds on ^{or to} the internet in violation of sub. (1) ✓ and the
11 transferred sounds are replayed by others from the internet at least 1,000 times
12 during a 180-day period.

13 **INSERT 6/3**

14 SECTION ~~4~~ ⁶ 943.49 ✓ of the statutes is created to read:

15 **943.49 Unlawful use of recording device in motion picture theater. (1)**

16 DEFINITIONS. In this section:

17 (a) "Motion picture theater" means a site used for the exhibition of a motion
18 picture to the public.

19 (b) "Recording" has the meaning given in s. 943.206 (5) ✓.

20 (c) "Recording device" means a camera, an audio or video recorder or any other
21 device that may be used to record or transfer sounds or images.

22 (d) "Theater owner" means an owner or operator of a motion picture theater.

1 (2) USE OF RECORDING DEVICE IN MOVIE THEATER. (a) No person may operate a
2 recording device in a motion picture theater without written authorization from the
3 theater owner or the theater owner's agent.

4 (b) 1. Except as provided in subd. (1), a person who violates par. (a) is guilty
5 of a Class A misdemeanor.

6 2. A person who violates par. (a) is guilty of a Class D felony if the violation
7 occurs after the person has been convicted under this subsection.

8 (3) DISTRIBUTING COPIES OF UNLAWFULLY RECORDED MOVIES. (a) Whoever does
9 any of the following for commercial advantage or private financial gain may be
10 penalized as provided in par. (b):

11 1. Advertises, offers for sale or rent, sells, rents or transports a recording of a
12 movie with knowledge that ~~it is derived~~ from a recording made in violation of sub.

13 (2).

14 2. Possesses with intent to advertise, offer for sale or rent, sell, rent or transport
15 a recording of a movie with knowledge that ~~it is derived~~ from a recording made in
16 violation of sub. (2).

17 (b) 1. Whoever violates par. (a) is guilty of a Class A misdemeanor under any
18 of the following circumstances:

19 a. If the person creates, advertises, offers for sale or rent, sells, rents,
20 transports or possesses 10 or fewer recordings in violation of par. (a) during a
21 180-day period.

22 b. If the person transfers sounds ~~on~~ ^{on or to} the internet in violation of par. (a) and the
23 transferred sounds are never replayed or are replayed by others from the internet
24 100 or fewer times during a 180-day period.

the sounds or images or both on the recording were
~~not~~ transferred

1 The detained person must be promptly informed of the purpose for the detention and
2 be permitted to make phone calls, but he or she shall not be interrogated or searched
3 against his or her will before the arrival of a peace officer who may conduct a lawful
4 interrogation of the accused person. The theater owner, the theater owner's adult
5 employe or the theater owner's security agent may release the detained person
6 before the arrival of a peace officer or parent or guardian. Any theater owner, theater
7 owner's adult employe or theater owner's security agent who acts in good faith in any
8 act authorized under this section is immune from civil or criminal liability for those
9 acts.

10 ~~No FF~~ INSERT 6/10

11 ~~9~~ If a device subject to forfeiture under this paragraph is encumbered by a bona
12 fide perfected security interest that was perfected before the date of the commission
13 of the current violation and the holder of the security interest neither had knowledge
14 of nor consented to the commission of that violation, the holder of the security
15 interest shall be paid from the proceeds of the forfeiture.

**DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU**

LRB-2690/1dn

MGD:/:....

MLJ

October 11, 1999

Don:

The prohibition contained in this draft regarding unauthorized use of a recording device in a theater covers an individual who records a movie for his or her own use, in contrast to the piracy prohibitions, which prohibit a transfer only if it is made "for commercial advantage or private financial gain". Thus, this draft classifies a first unauthorized movie recording offense as a Class A misdemeanor (like a first unlawful transfer offense) and each subsequent offense as a Class D felony (in contrast to second and subsequent unlawful transfer offenses, which are Class C felonies). At the same time, a person who, for commercial advantage or private financial gain, traffics in unlawfully recorded movies commits a Class A misdemeanor or a Class D or C felony (depending on the number of recordings or internet replays involved) if the violation is a first offense and a Class C felony if the violation is a second or subsequent offense. This treatment mirrors ~~those contained in~~ the piracy, bootlegging and counterfeiting provisions. ~~Are these distinctions among the penalties okay?~~

~~Is this~~ Are these classifications

Michael Dsida
Legislative Attorney
Phone: (608) 266-9867

the treatment in

**DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU**

LRB-2690/1dn
MGD:wlj:kjf

October 12, 1999

Don:

The prohibition contained in this draft regarding unauthorized use of a recording device in a theater covers an individual who records a movie for his or her own use, in contrast to the piracy prohibitions, which prohibit a transfer only if it is made "for commercial advantage or private financial gain". Thus, this draft classifies a first unauthorized movie recording offense as a Class A misdemeanor (like a first unlawful transfer offense) and each subsequent offense as a Class D felony (in contrast to second and subsequent unlawful transfer offenses, which are Class C felonies). At the same time, a person who, for commercial advantage or private financial gain, traffics in unlawfully recorded movies commits a Class A misdemeanor or a Class D or C felony (depending on the number of recordings or Internet replays involved) if the violation is a first offense and a Class C felony if the violation is a second or subsequent offense. This treatment mirrors the treatment in the piracy, bootlegging and counterfeiting provisions. Are these classifications okay?

Michael Dsida
Legislative Attorney
Phone: (608) 266-9867

**SUBMITTAL
FORM**

LEGISLATIVE REFERENCE BUREAU
Legal Section Telephone: 266-3561
5th Floor, 100 N. Hamilton Street

The attached draft is submitted for your inspection. Please check each part carefully, proofread each word, and **sign** on the appropriate line(s) below.

Date: 10/12/1999

To: Representative Pettis

Relating to LRB drafting number: LRB-2690

Topic

Unauthorized copying of sound recordings

Subject(s)

Criminal Law - miscellaneous, Trade Regulation

1. **JACKET** the draft for introduction _____

Mark G. Pettis

in the **Senate** ____ or the **Assembly** (check only one). Only the requester under whose name the drafting request is entered in the LRB's drafting records may authorize the draft to be submitted. Please allow one day for the preparation of the required copies.

2. **REDRAFT.** See the changes indicated or attached _____.

A revised draft will be submitted for your approval with changes incorporated.

3. Obtain **FISCAL ESTIMATE NOW**, prior to introduction _____.

If the analysis indicates that a fiscal estimate is required because the proposal makes an appropriation or increases or decreases existing appropriations or state or general local government fiscal liability or revenues, you have the option to request the fiscal estimate prior to introduction. If you choose to introduce the proposal without the fiscal estimate, the fiscal estimate will be requested automatically upon introduction. It takes about 10 days to obtain a fiscal estimate. Requesting the fiscal estimate prior to introduction retains your flexibility for possible redrafting of the proposal.

If you have any questions regarding the above procedures, please call 266-3561. If you have any questions relating to the attached draft, please feel free to call me.

Jefren E. Olsen, Senior Attorney
Telephone: (608) 266-8906