
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Loni Hancock, Chair

2015 - 2016 Regular

Bill No: AB 1241 **Hearing Date:** June 21, 2016
Author: Calderon
Version: March 26, 2015
Urgency: No **Fiscal:** No
Consultant: JM

Subject: *Crimes: Audiovisual Work: Recording*

HISTORY

Source: Recording Industry Association of America

Prior Legislation: AB 160 (Dababneh) – Ch. 427, Stats. 2015
AB 2122 (Bocanegra) – Ch. 857, Stats. 2014
SB 1479 (Pavley) – Ch. 873, Stats. 2012
SB 550 (Padilla) – Ch. 421, Stats. 2011
SB 830 (Wright) – Ch. 480, Stats. 2010
AB 2750 (Krekorian) – Ch. 468, Stats. 2008
AB 64 (Cohn) – Ch. 9, Stats, 2006
SB 1506 (Murray) – Ch. 617, Stats. 2004

Support: Unknown

Opposition: None known

Assembly Floor Vote: 78 - 0

PURPOSE

The purpose of this bill is to require a sentencing court to impose a mandatory minimum fine of at least \$1,000 for a second or subsequent conviction of audio or video piracy.

Existing law provides that a person is guilty of the failure to disclose the origin of a recording or audiovisual work (piracy) if, for commercial advantage or private financial gain, he or she knowingly advertises or offers for sale or resale, or sells or resells, or causes the rental, sale or resale, or rents, or manufactures, or possesses for these purposes, any recording or audiovisual work, the outside cover, box, jacket, or label of which does not clearly and conspicuously disclose the actual true name and address of the manufacturer thereof and the name of the actual author, artist, performer, producer, programmer, or group thereon. (Pen. Code, § 653w, subd. (a)(1).)

Existing law provides that if the offense involves at least 100 articles of audio recordings or audiovisual works, or the commercial equivalent thereof, then the punishment is imprisonment in a county jail not to exceed one year, by imprisonment pursuant to criminal justice realignment for two, three, or five years, by a fine not to exceed \$500,000, or by both that fine and

imprisonment. (Pen. Code § 653w, subd. (b)(1).)

Existing law punishes any other first-time violation of the crime by imprisonment in a county jail not to exceed one year, by a fine of not more than \$50,000, or by both that fine and imprisonment. (Pen. Code § 653w, subd. (b)(2).)

Existing law punishes a second or subsequent conviction by imprisonment in a county jail not to exceed one year, or by imprisonment pursuant to criminal justice realignment, by a fine not more than \$200,000, or by both that fine and imprisonment. (Pen. Code § 653w, subd. (b)(3).)

Existing law defines "recording" as any "tangible medium upon which information or sounds are recorded or otherwise stored, including, but not limited to, any phonograph record, disc, tape, audio cassette, wire, film, memory card, flash drive, hard drive, data storage device, or other medium on which information or sounds are recorded or otherwise stored, but does not include sounds accompanying a motion picture or other audiovisual work." (Pen. Code § 653w, subd. (a)(2).)

Existing law defines "audiovisual works" as the "physical embodiment of works that consist of related images that are intrinsically intended to be shown using machines or devices, such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films, tapes, discs, memory cards, flash drives, data storage devices, or other devices, on which the works are embodied." (Pen. Code § 653w, subd. (a)(3).)

Existing law requires, in addition to any other penalty or fine, the court to order a person who has been convicted of a music or video piracy to make restitution to an owner or lawful producer, or trade association acting on behalf of the owner or lawful producer, of a phonograph record, disc, wire, tape, film, or other device or article from which sounds or visual images are derived that suffered economic loss resulting from the violation. (Pen. Code § 1202.4, subd. (r)(1).)

Existing law requires the restitution order be based on the aggregate wholesale value of lawfully manufactured and authorized devices or articles, and to also include reasonable costs incurred as a result of the investigation undertaken by the owner, lawful producer, or trade association acting on behalf of the owner. (Pen. Code § 1202.4, subd. (r)(1).)

This bill imposes a mandatory minimum fine of not less than \$1,000 for a second or subsequent conviction for the crime of music or video piracy, as prosecuted under the California law that requires a person to disclose the true name and address of the manufacturer of a musical or audio work.

RECEIVERSHIP/OVERCROWDING CRISIS AGGRAVATION

For the past several years this Committee has scrutinized legislation referred to its jurisdiction for any potential impact on prison overcrowding. Mindful of the United States Supreme Court ruling and federal court orders relating to the state's ability to provide a constitutional level of health care to its inmate population and the related issue of prison overcrowding, this Committee has applied its "ROCA" policy as a content-neutral, provisional measure necessary to ensure that the Legislature does not erode progress in reducing prison overcrowding.

On February 10, 2014, the federal court ordered California to reduce its in-state adult institution population to 137.5% of design capacity by February 28, 2016, as follows:

- 143% of design bed capacity by June 30, 2014;
- 141.5% of design bed capacity by February 28, 2015; and,
- 137.5% of design bed capacity by February 28, 2016.

In December of 2015 the administration reported that as “of December 9, 2015, 112,510 inmates were housed in the State’s 34 adult institutions, which amounts to 136.0% of design bed capacity, and 5,264 inmates were housed in out-of-state facilities. The current population is 1,212 inmates below the final court-ordered population benchmark of 137.5% of design bed capacity, and has been under that benchmark since February 2015.” (Defendants’ December 2015 Status Report in Response to February 10, 2014 Order, 2:90-cv-00520 KJM DAD PC, 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (fn. omitted).) One year ago, 115,826 inmates were housed in the State’s 34 adult institutions, which amounted to 140.0% of design bed capacity, and 8,864 inmates were housed in out-of-state facilities. (Defendants’ December 2014 Status Report in Response to February 10, 2014 Order, 2:90-cv-00520 KJM DAD PC, 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (fn. omitted).)

While significant gains have been made in reducing the prison population, the state must stabilize these advances and demonstrate to the federal court that California has in place the “durable solution” to prison overcrowding “consistently demanded” by the court. (Opinion Re: Order Granting in Part and Denying in Part Defendants’ Request For Extension of December 31, 2013 Deadline, NO. 2:90-cv-0520 LKK DAD (PC), 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (2-10-14). The Committee’s consideration of bills that may impact the prison population therefore will be informed by the following questions:

- Whether a proposal erodes a measure which has contributed to reducing the prison population;
- Whether a proposal addresses a major area of public safety or criminal activity for which there is no other reasonable, appropriate remedy;
- Whether a proposal addresses a crime which is directly dangerous to the physical safety of others for which there is no other reasonably appropriate sanction;
- Whether a proposal corrects a constitutional problem or legislative drafting error; and
- Whether a proposal proposes penalties which are proportionate, and cannot be achieved through any other reasonably appropriate remedy.

COMMENTS

1. Need for This Bill

According to the author:

Crimes related to piracy are often viewed as victimless. As such, they are often treated lightly by the courts. While there are opportunities for the courts to establish fines, there is no mandatory fine in cases involving piracy of copyright,

intellectual property, despite the unquestioned impact upon the entertainment and other industries affected by these illegitimate activities. AB 1241 would create a minimum fine of \$1,000 on a second offense.

2. Special Restitution in Music and Video Piracy is Equivalent to a Fine; this Bill requires Imposition of a Standard Criminal Fine

In audio and audio-visual piracy, restitution is defined to include the value of unsold items seized from the defendant. As the items did not actually replace a legitimate sale, the value of these items is not truly restitution for a loss. (*People v. Garcia* (2011) 194 Cal.App.4th 612, 614-622.) The restitution is essentially a fine paid to the victim in an amount measured by the value of the illegitimate sales the defendant would have made if he or she had actually sold the items. This form of restitution is a penalty based the defendant's criminal intent, not actual losses suffered by the victim and appears to be similar to punitive damages ordered in a civil suit.

This bill requires payment of a traditional fine. A criminal fine is paid to the government, not the victim. Criminal fines are generally imposed based on the culpability of the defendant. The fact that a defendant would have made additional illicit sales had he or she not been caught is such a consideration. A fine can also reflect the harm the defendant's conduct more generally caused society.

3. Federal Law Controls Copyright – State Law Generally Involves Other Defined Offenses that may Indirectly Advance Copyright Interests

Federal law preempts state law in the area of copyright. State laws related to copyright interests are generally called "true name and address" laws, which are intended to protect consumers and prohibit specified forms of unfair competition. Penal Code Section 653w is a form of true name and address law. In *Anderson v. Nidorf* (9th Cir. 1994) 26 F.3d 100, the United States 9th Circuit Court of Appeals upheld the California true name and address law. The defendant's claim that the true name and address law (Pen, Code § 653w) is preempted by federal copyright law was rejected by the 9th Circuit. The court in *Anderson* explained its holding:

The state's interest in enacting Penal Code section 653w is the desire to protect the public in general, and the many employees of the vast entertainment industry in particular, from the hundreds of millions of dollars in losses suffered as a result of the "piracy and bootlegging" of the industry's products. However, the statute also has the purpose of protecting the public from being victimized by false and deceptive commercial practices. . . . [Anderson's] argument ignores the other purpose the legislative materials . . . show Section 653w was designed to serve: 'assisting consumers in this state by mandating that manufacturers market products for which consumers can go back to the source if there are any problems or complaints.' Preemption would frustrate the State's objective of consumer protection through disclosure. Federal copyright laws do not serve this purpose of protecting consumers. They are designed to protect the property rights of copyright owners.

Further, the California statute criminalizes selling recordings whose labels fail to disclose the manufacturer or author; it does not criminalize unauthorized duplication or "bootlegging" of copyrighted works. An act criminalized by §

653w thus does not "in and of itself . . . infringe one of the exclusive rights" listed in the copyright laws. (*Id.*, at pp. 102-103.)

4. Underground Economy

The "underground economy" refers to those individuals and businesses that deal in cash and/or use other schemes to conceal their activities, identities, and true tax liabilities from government licensing, regulatory, and taxing agencies. The activities that occur in the underground economy include the sale or transfer of illegal goods, such as pirated music or movies, counterfeit pharmaceutical drugs, vitamins, wine, clothing, accessories, weapons, tax evasion or fraud, and untaxed tobacco products or alcohol. The underground economy hurts legitimate businesses, creates an enormous tax gap and hurts all California due to the loss of revenue. The Board of Equalization estimates that the State of California losses about \$8.5 billion dollars annually in tax revenue due to the underground economy.

(http://www.boe.ca.gov/info/underground_economy.htm.) This revenue is needed to fund critical programs such as education, public safety, infrastructure and social services.

5. Legislative and Judicial Functions as regards Criminal Sentencing

Setting the penalty, or range of penalties, for a crime is an inherently legislative function. The Legislature does have the power to require a minimum term or other specific sentence. (*Keeler v. Superior Court* (1970) 2 Cal.3d 619, 631.) Sentencing, however, is solely a judicial power. (*People v. Tenorio* (1970) 3 Cal.3d 89, 90-93; *People v. Superior Court (Fellman)* (1976) 59 Cal.App.3d 270, 275.) California law effectively directs judges to impose an individualized sentence that fits the crime and the defendant’s background, attitude, and record. (Cal. Rules of Court, rules 4.401-4.425.) This bill limits judicial discretion and requires a minimum fine of \$1,000 to be imposed in each case in which a defendant has already suffered a prior conviction for piracy, regardless of the facts.

Although requiring a minimum fine of \$1,000 for a second or subsequent conviction is within the authority of the Legislature to set penalties for crimes, the sentencing judge has the discretion to impose this amount, and much more, under existing law. The maximum fine under existing law is \$200,000 – approximately \$800,000 with penalty assessments. There is no evidence that this amount is not already being imposed in these types of cases.

6. Mandatory Penalty Assessments Effectively Quadruple a Criminal Fine

Penalty assessments and fees must be assessed on the base fine for a crime. Assuming a defendant was fined \$1,000 as the fine for a criminal offense, the following penalty assessments would be imposed pursuant to the Penal Code and the California Government Code:

Base Fine:	\$ 1,000
Pen. Code § 1464 state penalty on fines:	\$1,000 (\$10 for every \$10)
Pen. Code § 1465.7 state surcharge:	\$ 200 (20% surcharge)
Pen. Code § 1465.8 court operation assessment:	\$40
Gov. Code § 70372 court construction penalty:	\$500 (\$5 for every \$10)
Gov. Code § 70373 assessment:	\$30

Gov. Code § 76000 penalty:	\$700 (\$7 for every \$10)
Gov. § 76000.5 EMS penalty:	\$200 (\$2 for every \$10)
Gov. § Code § 76104.6 DNA fund penalty:	\$100 (\$1 for every \$10)
Gov. § Code § 76104.7 addt'l DNA fund penalty:	\$400 (\$4 for every \$10)
 Total Fine with Assessments:	 \$4,170

It should be noted that this figure does not include victim restitution, or the restitution fine, and that other fines and fees, such as the jail booking fee, attorney fees, OR release fees, probation department fees, may also be applicable.

7. Prioritization of Court-Ordered Debt and the Extent of Uncollected Fines

Current law under Penal Code section 1203.1d prioritizes the order in which delinquent court-ordered debt received is to be satisfied. The priorities are 1) victim restitution, 2) state surcharge, 3) restitution fines, penalty assessments, and other fines, with payments made on a proportional basis to the total amount levied for all of these items, and 4) state/county/city reimbursements, and special revenue items.

The fine at issue in this bill has a fairly low priority in the collection order, falling in the third category. Given that victim restitution in these types of cases is to be on the aggregate wholesale value of lawfully manufactured and authorized devices or articles, and to also include reasonable costs incurred as a result of the investigation undertaken by the owner, lawful producer, or trade association acting on behalf of the owner (Pen. Code, § 1202.4, subd. (r)(1)), it could very well be the case that this fine is unlikely to be collected, especially if the defendant is ordered to pay special restitution based on the value of unsold pirated works.

A recent San Francisco Daily Journal article noted, "California courts and counties collect nearly \$2 billion in fines and fees every year. Nevertheless, the state still has a more than \$10.2 billion balance of uncollected debt from prior years, according to the most recent date from 2012." (See Jones & Sugarman, *State Judges Bemoan Fee Collection Process*, San Francisco Daily Journal, (January 5, 2015).) "The annual growth in delinquent debt partly reflects a supply of money that doesn't exist to be collected." (*Ibid.*) In the same article, the Presiding Judge of San Bernardino County was quoted as saying "the whole concept is getting blood out of a turnip." (*Ibid.*)