

## MEMORANDUM

TO: State Bar of Texas Legislative Policy Subcommittee

FROM: State Bar of Texas Entertainment & Sports Law Section  
(TESLAW)

CC: Distribution

DATE: June 29, 2020

RE: Proposed “Texas True Origin of Digital Goods Act” to Update  
“Improper Labeling” Provision of Business and Commerce Code

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### A. Bill Description and TESLAW Section Request

The Entertainment & Sports Law Section asks that the Legislative Policy Subcommittee consider and approve the draft bill entitled the “Texas True Origin of Digital Goods Act” attached as Exhibit A (the “*Proposed Bill*”) as part of the State Bar of Texas legislative package for the 2021 session of the Texas Legislature.

The Proposed Bill has been approved by the Council of the Entertainment & Sports Law Section. The Proposed Bill is consistent with comparable statutes bringing the law into the digital age that were enacted in Florida (2015) and Tennessee (2014) with bipartisan support and that have each remain unchallenged for over five years. The Proposed Bill is therefore believed to be a proper role for a large commercial state like Texas, and to be non-controversial.

The Proposed Bill would create a new Section 642 to update the existing “Improper Labeling” provisions of Section 641 of the Business and Commerce Code which remain unchanged. The Proposed Bill simply provides that websites substantially engaged in the business of distributing commercial sound recordings or audiovisual recordings disclose their true name, address, telephone number and email address, just as disclosure of origin is required on physical goods. The disclosure requirements included in the Proposed Bill are garden variety informational items that are commonly disclosed by any legitimate website.

The Proposed Bill is narrowly focused and expressly excludes interactive services, communications services, commercial mobile services, or information services, such as an Internet access service providers,

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advertising networks or exchanges, domain name registration providers, and hosting service providers providing material support to the offender. (See Proposed Bill Sec. 652.053(b).) Violations are deemed to be a false, misleading, or deceptive act or practice under Business and Commerce Code Section 17.46 and may be pursued as an unlawful deceptive trade practice. (Sec. 652.054.)

The Proposed Bill also expressly excludes persons who use short clips of these recordings, such as for literary criticism or reviewing. Those users may elect to remain anonymous. (Sec. 642.002.)

### B. Information Required By §§ 8.01.06(C)(1-6) of the State Bar of Texas Board of Directors Policy Manual (Jan. 2020)

#### (1) Narrative Explanation of the Legislation

The Proposed Bill updates the requirements of Texas Business and Commerce Code Section 641.05 (entitled “Improper Labeling”) by establishing a new Section 642.051 entitled the “Texas True Origin of Digital Goods Act”. Improper labeling laws for physical goods exist in all 50 states and are routinely upheld (see, e.g., *State v. Awawdeh*, 864 P.2d 965 (1994), cert. denied, 513 U.S. 970 (1995)). We wish to emphasize that the Proposed Bill is a consumer protection bill and *not* a copyright bill. (See Sec. 642.053.)

The Proposed Bill simply requires that anyone who owns or operates a website or online service dealing in substantial part in the electronic dissemination of commercial recordings or audiovisual works owned by a third party, and who electronically disseminates such works to consumers in Texas, shall disclose his or her true and correct name, physical address, telephone number and e-mail address. The owner/operator’s information shall be conspicuously displayed in readily accessible locations on the website or service. The required locations are based on the long-standing custom and practice for legitimate websites generally.

The Proposed Bill requires that the owner of those commercial recordings or audiovisual works must make reasonable efforts to put the owner/operator of the offending website on notice of any violation, and only after a 14-day opportunity to cure may seek a private cause of action to obtain a declaratory judgment that the owner/operator has violated the Proposed Bill.

The Proposed Bill is modeled on the Florida “True Origin of Digital Goods Act” Florida Title XXXIII, Chapter 501, Section 501.155 (2015). By way of background, the Florida legislation went through several drafts before three

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committees of the Florida House of Representatives. Those committees reported out the bill on unanimous votes from two committees and a 16-2 vote from the third. The floor vote was 78-38 in favor, and it has been in effect since 2015 without challenge to our knowledge. Tennessee adopted a similar law in 2014 and it, too, has been in effect without challenge to our knowledge. (Tennessee Title 47 Commercial Instruments And Transactions; Chapter 18 Consumer Protection; Part 4 True Origin of Goods Act §47-18-401 et seq.)

(2) Identification of, reference to, or copies of similar legislation, if any, proposed to or being considered by the same legislative or administrative body

We are not aware of similar legislation to the Proposed Bill.

(3) A verification that all sections and committees of the State Bar have been sent the legislation for comment and the comments received (copy of form letter and copy of return receipt from each committee and section).

We provided a copy of this memorandum and the Proposed Bill to the State Bar staff on June 17, 2020 for distribution to all State Bar sections and committees. We requested that we receive any comments or questions from the sections by June 25 to allow for a reasonable period of time to respond so that the Legislative Policy Committee might have a full record.

The only response we received was from the Business Law Section. We received informally two questions and a comment from two members of the Business Law Section which we addressed. In one case, a somewhat similar issue was resolved in related legislation in Florida back in 2015. Since the Proposed Bill is modeled after that Florida legislation, we felt that the Proposed Bill already addressed the concern due to the “stepped up” nature of the Proposed Bill. One other comment was incorporated into the attached draft of the Proposed Bill. This informal email exchange occurred on June 25 and 26, which we appreciated in order to comply with the June 29 deadline we received from the State Bar staff.

The Chair of the Business Law Section informed us that their Council had not yet voted on our whether to oppose the Proposed Bill and might not. If they do, we would appreciate the opportunity to provide contemporaneous responses.

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(4) A statement indicating whether the proposed legislation had been introduced in either the House or Senate during prior legislative sessions, as well as a statement of any amendments proposed to the proposed legislation during the prior legislative sessions and the status of the proposed legislation.

To the best of our knowledge, the Proposed Bill has not been previously introduced in either the House or Senate.

(5) A statement of the known position on the legislative proposal taken by any section or committee of the State Bar that has considered the same proposal, including the principal reasons for support of or opposition to the proposal.

To the best of our knowledge, no section or committee of the State Bar has considered the Proposed Bill.

(6) Such other information as the Executive Director may reasonably request from time to time.

We will be happy to provide any other information requested. For supplemental information, please contact:

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