

STATE OF TENNESSEE

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Opinion No. 10-82

Pirated and Bootlegged Movies and Music

QUESTIONS

1. Under Tenn. Code Ann. § 39-14-139(b)(2) (Supp. 2009), is it unlawful to create or sell (a) pirated movies and (b) pirated music that was originally recorded after February 15, 1972?
2. Does Tenn. Code Ann. § 39-14-139 (Supp. 2009) decriminalize the creation and sale of bootleg movie and music recordings unless the copy was created to look like an original commercial recording?

OPINIONS

1. No. While Tenn. Code Ann. § 39-14-139(b)(1) (Supp. 2009) provides that it is unlawful to duplicate, transport, or sell any recording “for commercial advantage or private financial gain” without the consent of the owner, Tenn. Code Ann. § 39-14-139(b)(2) (Supp. 2009) specifically excludes “audiovisual recordings” from prosecution for violations of subsection (b)(1) of the statute. Furthermore, subsection (b)(1) “applies only to sound recordings that were initially fixed before February 15, 1972.”
2. No. Bootleg movies and music recordings are unlawful under Tenn. Code Ann. § 39-14-139(c) (Supp. 2009), which prohibits the creation and sale of unauthorized recordings of live performances. Counterfeit media are unlawful under Tenn. Code Ann. § 39-14-115 (Supp. 2009).

ANALYSIS

In 2009, the legislature amended Tenn. Code Ann. § 39-14-115 by deleting the prohibition against the creation and sale of pirated recordings and adding it as an offense under Tenn. Crim. Ann. § 39-14-139.¹ As amended, Tenn. Crim. Ann. § 39-14-139(b)(1) states:

¹As defined by the Recording Industry Association of America (RIAA), a trade group representing the United States recording industry, a “pirate” recording is the “[u]nauthorized duplication of sounds from one or more

It is unlawful for any person to:

- (A) Knowingly reproduce for sale or cause to be transferred any recording with intent to sell it or cause it to be sold or use it or cause it to be used for commercial advantage or private financial gain through public performance without the consent of the owner;
- (B) Transport within this state, for commercial advantage or private financial gain, a recording with the knowledge that the sounds on the recording have been reproduced or transferred without the consent of the owner; or
- (C) Advertise, offer for sale, sell or rent, cause the sale, resale or rental of, or possess for one (1) or more of these purposes any recording that the person knows has been reproduced or transferred without the consent of the owner.

The amendment also added subsection (b)(2), which specifically excludes audiovisual recordings from prosecution for violations of subsection (b)(1) and states that (b)(1) “applies only to sound recordings that were initially fixed before February 15, 1972.”² Thus, a person may not be prosecuted under this statute for unauthorized duplication of sound recordings that were initially fixed on or after February 15, 1972, or any audiovisual recording.

In your letter, you expressed concern that the legislature had “inadvertently removed criminal penalties” for unauthorized duplication of recordings. While the amendment does exclude prosecution for audiovisual recordings and some sound recordings, the exclusion likely was not inadvertent. Section 301 of the Copyright Act of 1976 expressly preempts state criminal prosecutions for pirated media, except for sound recordings fixed before February 15, 1972. *See People v. Williams*, 920 N.E.2d 446, 457 (Ill. 2009) (citing decisions from several states agreeing that the preemption provisions of section 301 were intended to apply to state criminal prosecutions). The production of pirated movies and sound recordings may be prosecuted as copyright violations under federal law, which provides civil and criminal penalties for the unauthorized reproduction, distribution, rental, or digital transmission of copyrighted recordings under Title 17, United States Code, Sections 501 and 506.

legitimate recordings”; a “bootleg” recording is the “[u]nauthorized recording of a performance that has been broadcast on radio or television, or of a live concert”; and a “counterfeit” recording is the “[u]nauthorized duplication of not only the sounds and track listing, but also of the original artwork, label, trademark, and packaging of a legitimate recording.” Recording Ind. Assoc. of Am., <http://76.74.24.142/D9972A64-2FAC-2698-E24A-FB5246807065.pdf> (last visited May 28, 2010). *See also United States v. Moghadam*, 175 F.3d 1269, 1271 (11th Cir. 1999).

Section 39-14-139(a)(6) (Supp. 2009) defines “recording” as “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, memory card, flash drive, hard-drive, data storage device, 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.”

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.” Tenn. Code Ann. § 39-14-139(a)(2) (Supp. 2009).

The creation and sale of bootleg movies and music recordings may be prosecuted under Tenn. Code Ann. § 39-14-139(c)(1) (Supp. 2009). This subsection prohibits the recording or fixing of a “live performance” without the consent of the owner, as well as the sale, transport, or possession of such unauthorized recordings for “commercial advantage or private financial gain.” A “live performance” is defined as “a recitation, rendering or playing of a series of images, musical, spoken or other sounds, or a combination of images and sounds, in an audible sequence.” Tenn. Code Ann. § 39-14-139(a)(3) (Supp. 2009).

Finally, the creation of counterfeit movie and music recordings, which duplicate not only the sound or video but also the original artwork, labels, and packaging, may be prosecuted as a violation of Tenn. Code Ann. § 39-14-115(a)(1) (Supp. 2009). This statute provides that a person commits the offense of criminal simulation who, “with intent to defraud or harm another”:

- (A) Makes or alters an object, in whole or in part, so that it appears to have value because of age, antiquity, rarity, source or authorship that it does not have;
- (B) Possesses an object so made or altered, with intent to sell, pass or otherwise utter it; or
- (C) Authenticates or certifies an object so made or altered as genuine or as different from what it is.

Id.

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