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Final Analysis
Legislative Service Commission

S.B. 269

127th General Assembly
(As Passed by the General Assembly)

Sens. Schuler, Jacobson, Goodman, Schuring, Mason, Fedor, Kearney, Buehrer, Cafaro, Carey, Padgett, Schaffer, Wagoner, Stivers, D. Miller, Cates, Sawyer, R. Miller, Smith, Harris

Reps. Bacon, Batchelder, Bubp, DeBose, Domenick, Garrison, R. Hagan, Harwood, Huffman, Hughes, Letson, Luckie, Miller, Oelslager, Schneider, Slesnick, D. Stewart, Ujvagi, Yuko

Effective date: *

ACT SUMMARY

- Generally prohibits a person from advertising or conducting a live musical performance or production in Ohio through the use of a false, deceptive, or misleading affiliation, connection, or association between a performing group and a recording group.
- Permits the Attorney General to investigate any person who allegedly violates this prohibition and permits the Attorney General to assess a civil penalty of not less than \$5,000 and not more than \$15,000 if the Attorney General finds at a hearing that a violation of this prohibition occurred.
- Authorizes the Attorney General who has reason to believe that any person is violating or is about to violate the above-described prohibition and that proceedings would be in the best interest, to bring an action in the name of the state against the person in the court of common pleas to restrain by injunction the activity that results in the violation.

* The Legislative Service Commission had not received formal notification of the effective date at the time this analysis was prepared. Additionally, the analysis may not reflect action taken by the Governor.

CONTENT AND OPERATION

Prohibition against advertising or conducting a live musical performance or production through the use of a false, deceptive, or misleading affiliation, connection, or association between a performing group and a recording group

The act generally prohibits a person from advertising or conducting a live musical performance or production in Ohio through the use of a false, deceptive, or misleading affiliation, connection, or association between a "performing group" and a "recording group" (R.C. 1349.81(A)). (See "*Definitions*," below, for the definitions of the terms in quotation marks.) This prohibition does not apply to a person if any of the following circumstances apply (R.C. 1349.81(B)):

(1) The performing group is the authorized registrant and owner of a federal service mark for that group registered in the United States Patent and Trademark Office.

(2) At least one member of the performing group is a member of the recording group and has a legal right to that group name by virtue of use or operation under the group name without having abandoned the name or affiliation with the group.

(3) The live musical performance or production is identified in all advertising and promotion for the performance as a salute or tribute to the recording group.

(4) The advertising does not relate to a live musical performance or production that the performing group conducts in Ohio.

(5) The performance or production is authorized expressly in writing by at least one member of the recording group.

Attorney General investigation

The act permits the Attorney General to investigate any person who has allegedly violated the prohibition described above. The Attorney General has the same powers to investigate an alleged violation of the above-described prohibition as the Attorney General's investigatory powers under the Consumer Sales Practices Act (CSPA) (see **COMMENT**) (R.C. 1349.82(A)). If, after an investigation, the Attorney General determines that reasonable evidence exists of a violation of the above-described prohibition, the Attorney General, within seven days after that determination, must send the party who is the subject of the investigation a written notice by regular mail that includes all of the following (R.C. 1349.82(B)):

(1) A description of the activity in which the party is engaging or has engaged that allegedly violates the prohibition;

(2) A statement that the Attorney General will hold a hearing regarding that alleged violation and the date and place of that hearing;

(3) A statement informing the party that the party or the party's attorney may appear in person at the hearing and present evidence and examine witnesses appearing for and against the party, or the party may submit written testimony stating any positions, arguments, or contentions.

The Attorney General must conduct a hearing to hear the testimony of all parties present pursuant to the provision described in (3), above, and must consider any written testimony submitted pursuant to that provision and determine whether there has been a violation of the above-described prohibition. The Attorney General must maintain a transcript of the proceedings of the hearing and issue a written opinion to all parties, citing the findings of the Attorney General and the grounds for any action taken. (R.C. 1349.82(C).)

If the Attorney General finds, pursuant to a hearing, that a violation of the above-described prohibition has occurred, the Attorney General may assess a civil penalty of not less than \$5,000 nor more than \$15,000 per violation. Each performance or production performed in violation of the prohibition constitutes a separate violation. The Attorney General must determine the terms of payment. A civil penalty assessed by the Attorney General must be deposited into the Consumer Protection Enforcement Fund. The civil penalty assessed by the Attorney General is in addition to any other relief that may be granted pursuant to the provision described below. (R.C. 1349.82(D).)

In addition to any other action the Attorney General takes pursuant to the procedures described in the prior paragraphs, if the Attorney General has reason to believe that any person is violating or is about to violate the above-described prohibition and that proceedings would be in the public interest, the Attorney General may bring an action in the name of the state against the person in the court of common pleas in the county where the violation is occurring or is about to occur to restrain by temporary or permanent injunction the activity that results in the person violating the prohibition. Whenever a court issues a permanent injunction to restrain and prevent violations of the prohibition, the court may, in its discretion, direct that the defendant restore to any person in interest any moneys or property, real or personal, that may have been acquired by means of any violation of the prohibition, under terms and conditions established by the court. (R.C. 1349.82(E).)

Consumer Protection Enforcement Fund

Continuing law creates in the state treasury the Consumer Protection Enforcement Fund. The Fund includes civil penalties ordered pursuant to the laws dealing with: (1) an act or practice of a supplier that violates the CSPA, (2) an act or practice that was declared to be unfair, deceptive, or unconscionable by rule before the consumer transaction on which the action is based occurred or an act or practice that was determined by an Ohio court to have violated certain provisions of the CSPA and committed after the decision containing the court's determination was made available for public inspection, (3) a civil action by the Attorney General for violation of certain disclosure laws, and (4) a violation of the law regarding odometers, and includes all money unclaimed under the law dealing with the surety bond posted for certain violations by motor vehicle dealers, auction owners, or salespersons. The money in the Consumer Protection Enforcement Fund must be used for the sole purpose of paying expenses incurred by the Consumer Protection Section of the Office of the Attorney General. The act provides that the Consumer Protection Enforcement Fund must also include all civil penalties assessed for a violation of the above-described prohibition. (R.C. 1345.51.)

Definitions

The act provides definitions for the following terms (R.C. 1349.80):

(1) "Performing group" means a vocal or instrumental group seeking to use the name of a recording group that previously released a commercial sound recording under the recording group's name.

(2) "Recording group" means a vocal or instrumental group that includes at least one member who satisfies both of the following criteria:

(a) The member previously released a commercial sound recording under the vocal or instrumental group's name.

(b) The member has a legal right to the vocal or instrumental group's name by virtue of use of or operation under that group name or affiliation with that group.

(3) "Commercial sound recording" means a work that results from the fixation on a material object of a series of musical, spoken, or other sounds, regardless of the nature of the material object, including, but not limited to, a compact disc, cassette tape, or phonograph album in which sounds are embodied.

COMMENT

R.C. 1345.06, not in the act, provides that if, by the Attorney General's own inquiries or as a result of complaints, the Attorney General has reasonable cause to believe that a person has engaged in or is engaging in an act or practice that violates the CSPA, the Attorney General may investigate. The Attorney General may administer oaths, subpoena witnesses, adduce evidence, and require the production of relevant matter in accordance with the procedures described in that section.

The Attorney General may do either of the following (R.C. 1345.06(F)):

(1) During an investigation under R.C. 1345.06, afford, in a manner considered appropriate to the Attorney General, a supplier an opportunity to cease and desist from any suspected violation. The Attorney General may suspend the Attorney General's investigation during the time period that the Attorney General permits the supplier to cease and desist; however, the suspension of the investigation or the affording of an opportunity to cease and desist cannot prejudice or prohibit any further investigation by the Attorney General under that section;

(2) Terminate an investigation under R.C. 1345.06 upon acceptance of a written assurance of voluntary compliance from a supplier who is suspected of a violation of the CSPA.

Acceptance of an assurance may be conditioned upon an undertaking to reimburse or to take other appropriate corrective action with respect to identifiable consumers damaged by an alleged violation of the CSPA. An assurance of compliance given by a supplier is not evidence of a violation of the CSPA. The Attorney General may, at any time, reopen an investigation terminated by the acceptance of an assurance of voluntary compliance if the Attorney General believes that further proceedings are in the public interest. Evidence of a violation of an assurance of voluntary compliance is prima-facie evidence of an act or practice in violation of the CSPA if presented after the violation in an action brought under the CSPA. An assurance of voluntary compliance may be filed with the court and, if approved by the court, entered as a consent judgment.

HISTORY

ACTION	DATE
Introduced	01-03-08
Reported, S. Judiciary - Civil Justice	05-14-08
Passed Senate (33-0)	05-21-08
Reported, H. Civil & Commercial Law	12-11-08
Passed House (95-2)	12-16-08

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