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Bill Analysis
Legislative Service Commission

S.B. 269

127th General Assembly
(As Passed by the Senate)

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

BILL SUMMARY

- 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 or 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.

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 bill 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 this state.

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

Attorney General investigation

The bill 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 those powers specified in R.C. 1345.06 (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 above-described 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 (3) above and must consider any written testimony submitted pursuant to (3) above 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 above-described prohibition constitutes a separate offense. 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 paragraph, 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 above-described 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 above-described prohibition, under terms and conditions established by the court. (R.C. 1349.82(E).)

Consumer Protection Enforcement Fund

Current law creates in the state treasury the Consumer Protection Enforcement Fund. The Fund includes civil penalties ordered pursuant to R.C. 1345.07(A) (supplier has engaged or is engaging in an act or practice that violates the Consumer Sales Practices Act) and (D) (violation is 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 a court of this state to have violated R.C. 1345.02, 1345.03, or 1345.031 and committed after the decision containing the court's determination was made available for public inspection) and paid as provided in R.C. 1345.07(G), all civil penalties assessed under R.C. 1349.192(A) (civil action by

the Attorney General for violation of disclosure laws), all costs awarded to the Attorney General and all penalties imposed under R.C. 4549.48 (civil penalties imposed for violations of laws regarding odometers), and all money unclaimed under R.C. 4549.50. 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 bill 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 bill 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.

(C) "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 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 Consumer Sales Practices Act, the Attorney General may investigate.

The Attorney General may administer oaths, subpoena witnesses, adduce evidence, and require the production of relevant matter. If matter the Attorney General requires to be produced is located outside the state, the Attorney General may designate representatives, including officials of the state in which the matter is located, to inspect the matter on the Attorney General's behalf, and the Attorney

General may respond to similar requests from officials of other states. The person subpoenaed may make the matter available to the Attorney General at a convenient location within the state or pay the reasonable and necessary expenses for the Attorney General or the Attorney General's representative to examine the matter at the place where it is located, provided that expenses are not charged to a party not subsequently found to have engaged in an act or practice that violates the Consumer Sales Practices Act. (R.C. 1345.06(B).)

Within 20 days after a subpoena has been served, a motion to extend the return day, or to modify or quash the subpoena, stating good cause, may be filed in the Franklin County Court of Common Pleas or the county in which the person served resides or has the person's principal place of business (R.C. 1345.06(C)).

A person subpoenaed under R.C. 1345.06 must comply with the terms of the subpoena unless the parties agree to modify the terms of the subpoena or unless the court has modified or quashed the subpoena, extended the return day of the subpoena, or issued any other order with respect to the subpoena prior to its return day. If a person fails without lawful excuse to obey a subpoena or to produce relevant matter, the Attorney General may apply to the court of common pleas of the county in which the person subpoenaed resides or has the person's principal place of business for an order compelling compliance. (R.C. 1345.06(D).)

The Attorney General may request that an individual who refuses to testify or to produce relevant matter on the ground that the testimony or matter may incriminate the person be ordered by the court to provide the testimony or matter. With the exception of a prosecution for perjury and an action for damages under R.C. 1345.07 or 1345.09, an individual who complies with a court order to provide testimony or matter, after asserting a privilege against self-incrimination to which the person is entitled by law, cannot be subjected to a criminal proceeding or to a civil penalty or forfeiture on the basis of the testimony or matter required to be disclosed or testimony or matter discovered through that testimony or matter. (R.C. 1345.06(E).)

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 R.C. 1345.06;

(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 R.C. Chapter 1345.

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 R.C. Chapter 1345. An assurance of compliance given by a supplier is not evidence of a violation of R.C. Chapter 1345. 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 R.C. Chapter 1345. if presented after the violation in an action brought under R.C. Chapter 1345. An assurance of voluntary compliance may be filed with the court and, if approved by the court, entered as a consent judgment.

The procedures available to the Attorney General under R.C. Chapter 1345. are cumulative and concurrent, and the exercise of one procedure by the Attorney General does not preclude or require the exercise of any other procedure (R.C. 1345.06(G)).

HISTORY

ACTION	DATE
Introduced	01-03-08
Reported, S. Judiciary - Civil Justice	05-14-08
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