



Ohio Legislative Service Commission

Final Analysis

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S.B. 84

129th General Assembly
(As Passed by the General Assembly)

Sens. Oelslager, Skindell, Kearney, Wagoner, Bacon, Beagle, Daniels, Hughes, Jones, LaRose, Obhof, Patton, Sawyer, Seitz, Smith, Stewart, Wilson

Reps. Garland, Winburn, Coley, Slaby, Anielski, Bubp, Carney, Combs, Letson, Patmon, Yuko, Batchelder

Effective date: September 30, 2011

ACT SUMMARY

- Designates as an unfair or deceptive act or practice the offense of 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.
- Declares that a performing group that is the owner of a valid trademark under the federal Lanham Act for that group is exempt from the offense described in the prior dot point.
- Provides a civil penalty of not less than \$5,000 and not more than \$15,000 for each day of violating a temporary restraining order, preliminary injunction, or permanent injunction to restrain and prevent acts that violate the offense described in the second prior dot point.
- Eliminates the duties of the Attorney General under former law regarding investigations of persons violating the offense and instead authorizes enforcement actions to be commenced under the Consumer Sales Practices Act.

CONTENT AND OPERATION

Deceptive affiliation between a performing and recording group

Law generally unchanged by the act prohibits a person from advertising or conducting a live musical performance or production in Ohio through the use of false,

deceptive, or misleading affiliation, connection, or association between a performing group and a recording group.¹ This prohibition does not apply to a person in various circumstances, including if the performing group is the authorized registrant and owner of a federal service mark for that group (presumably the recording group) registered in the United States Patent and Trademark Office. The act applies this exception to a performing group that is the owner of a valid trademark for that group (presumably the recording group) under the federal Lanham Act.² The act also provides that a violation of this prohibition is an unfair or deceptive act or practice in violation of R.C. 1345.02 of the Consumer Sales Practices Act.³

Lanham Act

The Lanham Act, in part, establishes civil liability against any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading misrepresentation of fact, that:

(1) Is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person; or

(2) In commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods or services, or commercial activities.⁴

Enforcement

The act alters the enforcement procedures applicable to the prohibition described above. First, the act repeals the authority under former law for the Attorney General to enforce that prohibition. The act then authorizes the Attorney General to bring an action under the Consumer Sales Practices Act against persons violating the prohibition. The act also adds additional provisions to that Act that are specific to a violation of the prohibition described above.

¹ R.C. 1349.81(A).

² R.C. 1349.81(B)(1).

³ R.C. 1349.82 (new).

⁴ 15 U.S.C. 1125(a)(1).

Consumer Sales Practices Act

Under continuing provisions of the Consumer Sales Practices Act, if the Attorney General, by the Attorney General's own inquiries or as a result of complaints, has reasonable cause to believe that a person has engaged or is engaging in an act or practice that would violate the Act, the Attorney General may bring an action, with notice against the person. The actions authorized include obtaining a temporary restraining order, preliminary injunction, or permanent injunction to restrain the act or practice. If the Attorney General shows by a preponderance of the evidence that the person has violated or is violating R.C. 1345.02 (unfair or deceptive acts or practices), 1345.03 (unconscionable consumer sales acts or practices), or 1345.031 (unconscionable acts by supplier), the court may issue a temporary restraining order, preliminary injunction, or permanent injunction to restrain and prevent the act or practice.⁵

Under the act, the court, on motion of the Attorney General, or on its own motion, may impose on a person a civil penalty of not less than \$5,000 and not more than \$15,000 if both of the following apply:

(1) The court issues a temporary restraining order, preliminary injunction, or permanent injunction to restrain and prevent an act or practice that is an unfair or deceptive act or practice and a violation of the prohibition against 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.

(2) The person violates the temporary restraining order, preliminary injunction, or permanent injunction.⁶

The civil penalty may be imposed for each day of violation. The person that is the subject of the action must receive notice of the action in order for the court to impose the civil penalty.⁷ Under the act, one-fourth of the amount of the civil penalties must be paid to the treasurer of the county in which the action is brought and three-fourths to the Consumer Protection Enforcement Fund.⁸

⁵ R.C. 1345.07(A)(2).

⁶ R.C. 1345.07(A)(2)(b)(ii).

⁷ R.C. 1345.07(A)(2)(b)(ii).

⁸ R.C. 1345.07(A)(2)(b)(ii) and (G).

Repealed enforcement procedures

As stated above, the act repeals the Attorney General's enforcement authority related to the prohibition governing deceptive affiliation between a performing group and a recording group. Under prior law, the Attorney General was authorized to investigate any person who had allegedly violated the prohibition. The Attorney General had the same powers to investigate an alleged violation of that prohibition as the Attorney General's investigatory powers under the Consumer Sales Practices Act.⁹

If, after an investigation, the Attorney General determined that reasonable evidence existed of a violation of the prohibition, the Attorney General, within seven days after that determination, was required to send the party who was the subject of the investigation, a written notice, by regular mail, that included all of the following:¹⁰

(1) A description of the activity in which the party was engaging or had engaged that allegedly violated the prohibition;

(2) A statement that the Attorney General would 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 could appear in person at the hearing and present evidence and examine witnesses appearing for and against the party, or the party could submit written testimony stating any positions, arguments, or contentions.

The Attorney General was required to conduct a hearing to hear the testimony of all parties present pursuant to (3) above and to consider any submitted written testimony. Further, the Attorney General was required to determine whether there had been a violation of the prohibition. The Attorney General was required to 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 grounds for any action taken.¹¹

If the Attorney General found, pursuant to a hearing held in accordance with the provisions described in the previous paragraph, that a violation of the prohibition described above had occurred, the Attorney General was permitted to 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 described above constituted a separate violation. The Attorney General was required to determine the terms of

⁹ R.C. 1349.82(A).

¹⁰ R.C. 1349.82(B).

¹¹ R.C. 1349.82(C).

payment. The Attorney General was required to deposit any civil penalty assessed by the Attorney General into the Consumer Protection Enforcement Fund. The civil penalty assessed by the Attorney General was in addition to any other relief granted pursuant to the provision described below.¹²

In addition to any other action the Attorney General had taken pursuant to procedures described in the prior paragraphs, if the Attorney General had reason to believe that any person was violating or was about to violate the prohibition and that proceedings would be in the public interest, the Attorney General was allowed to bring an action in the name of the state against the person in the court of common pleas in the county where the violation was occurring or was about to occur to restrain by temporary or permanent injunction the activity that resulted in the person violating the prohibition. Whenever a court issued a permanent injunction to restrain and prevent violations of the prohibition, the court could, 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.¹³

HISTORY

| ACTION | DATE |
|--|----------|
| Introduced | 02-22-11 |
| Reported, S. Judiciary – Civil Justice | 04-05-11 |
| Passed Senate (32-0) | 04-06-11 |
| Reported, H. Criminal Justice | 05-18-11 |
| Passed House (93-3) | 06-21-11 |

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¹² R.C. 1349.82(D).

¹³ R.C. 1349.82(E).

