



Ohio Legislative Service Commission

Bill Analysis

Andrea Holmes

S.B. 84

129th General Assembly
(As Reported by H. Criminal Justice)

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

Reps. Garland, Winburn, Coley, Slaby

BILL SUMMARY

- Designates as an unfair or deceptive trade 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" is exempt from the offense.
- Provides a civil penalty for violating a temporary restraining order, preliminary injunction, or permanent injunction to restrain and prevent acts that violate the offense.
- Eliminates the duties of the Attorney General 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

Existing law generally 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 bill 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 bill also provides that a violation of this prohibition is an unfair or deceptive act or practice.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, which:

(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 bill alters the enforcement procedures applicable to the prohibition described above. First, the bill repeals the existing authority for the Attorney General to enforce that prohibition. The bill then authorizes the Attorney General to bring an action under the Consumer Sales Practices Act against persons violating the prohibition. The bill 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 the current requirements 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 bill, 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

(2) The person advertises or conducts 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.⁶

A 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.⁷ Under the bill, 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

Repealed enforcement procedures

As stated above, the bill repeals the Attorney General's existing enforcement authority related to the prohibition governing deceptive affiliation between a performing group and a recording group. Under that existing authority, the Attorney

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).

General is authorized to investigate any person who has allegedly violated the prohibition. The Attorney General has 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 determines that reasonable evidence exists of a violation of the 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:¹⁰

(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; and

(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 submitted written testimony. Further, the Attorney General must determine whether there has been a violation of the 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 grounds for any action taken.¹¹

If the Attorney General finds, pursuant to a hearing held in accordance with provisions described in the previous paragraph, that a violation of the prohibition described above 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 described above 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

⁹ R.C. 1349.82(A).

¹⁰ R.C. 1349.82(B).

¹¹ R.C. 1349.82(C).

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.¹²

In addition to any other action the Attorney General takes pursuant to 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 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.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

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¹² R.C. 1349.82(D).

¹³ R.C. 1349.82(E).

