

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1049 False, Deceptive, or Misleading Advertising
SPONSOR(S): Davis
TIED BILLS: **IDEN./SIM. BILLS:** SB 426

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) <u>Committee on Tourism & Trade</u>	<u>5 Y, 0 N</u>	<u>Vogt</u>	<u>Hoagland</u>
2) <u>Economic Expansion & Infrastructure Council</u>	_____	_____	_____
3) _____	_____	_____	_____
4) _____	_____	_____	_____
5) _____	_____	_____	_____

SUMMARY ANALYSIS

HB 1049 prohibits a person from advertising or conducting a live musical performance by using a false, deceptive, or misleading statement of an affiliation, connection, or association between a performing group and a recording group, with exceptions. Violation of these prohibitions will result in the committing of a misdemeanor, and gives authority for the court to impose a civil penalty of up to \$5,000 for each violation.

The bill appears to have a minimal fiscal impact on state and local governments. The bill creates a new misdemeanor offense which could result in more criminal convictions with potential costs for prosecution and punishment. The bill also authorizes the court to award court costs to the prevailing party which could offset the costs associated with litigation.

The bill provides an effective date of July 1, 2007.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Safeguard individual liberty- This bill creates a new misdemeanor offense for misleading or deceptive advertising by musical groups.

B. EFFECT OF PROPOSED CHANGES:

Background

Currently throughout the state and nation musical groups are performing under names similar to or the same as original groups popular in years past. These bands often times advertise themselves as the original band and do not distinguish themselves as a tribute band or salute to the performer. These types of practices have misled many event organizers and concert goers. These conditions have led to public dissatisfaction, as well as the original groups seeking relief and legislation to combat these issues. The passing of legislation similar to HB 1049 has occurred in 7 states and 12 other states are currently considering it during their legislative session.¹

Chapter 817, F.S., governs fraudulent practices. More specifically part 1 of chapter 817 deals with false pretenses and frauds relating to advertising, reselling of tickets, and insurance claims among other practices. The penalties for violation of these prohibitions are also named.

Trademark registration and protection are governed within the state of Florida by Chapter 495, F.S., which provides registration requirements, classification, infringement provisions and remedies for trademark owners.

A trademark protects the words, names, symbols, sounds, or colors that distinguish goods and services from those manufactured or sold by others and to indicate the source of the goods. Trademarks, unlike patents, can be renewed forever as long as they are being used in commerce. A service mark is a word, name, symbol or device that is to indicate the source of the services and to distinguish them from the services of others. A service mark is the same as a trademark except that it identifies and distinguishes the source of a service rather than a product. The terms "trademark" and "mark" are often used to refer to both trademarks and service marks.²

The Lanham Act contains the federal statutes governing the registration of trademarks, trade names, and other identifying marks. The act defines the scope of a trademark, the process by which a federal registration can be obtained from the patent and trademark office and the penalties from interference and infringement. Any person who, without the consent of the registrant, uses a registered mark when such use is likely to cause confusion, or to cause mistake, or to deceive may be liable in a civil action by the registrant.³ Further, the act prohibits the use of a false or misleading description or representation in commercial advertising or promotion that "misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities."⁴

¹ Currently in law in Pennsylvania, Connecticut, Illinois, Michigan, Massachusetts, South Carolina, and North Dakota. Other states considering the law are New York, Vermont, Virginia, Delaware, Minnesota, Maryland, New Jersey, California, Nevada, Texas, Wisconsin, and Tennessee.

² <http://www.uspto.gov/main/glossary/index.html#t>

³ 15 U.S.C Section 1114

⁴ 15 U.S.C Section 1125

Proposed Changes

HB 1049 creates s. 817.4115, F.S., to prohibit a person from advertising or conducting a live musical performance by using a false, deceptive, or misleading statement of affiliation, connection or association between a performing group and a recording group. This section defines:

- “Performing person or group” as a vocal or instrumental performer using or attempting to use the name of a recording person or group.
- “Recording person or group” as a vocal or instrumental performer that has previously produced or released, or both, a commercial recording.

The bill provides the following exceptions:

- The performing person or at least one member of the performing group was a member of the recording group and has the legal right to use the name of the recording group by not abandoning the affiliation with the recording group or its name;
- The performing person or group is the authorized registrant and owner of a federal service mark for that person or group which is registered with the United States Patent and Trademark Office;
- The live musical performance or production is identified as a “salute” or “tribute” to, and is otherwise unaffiliated with, the recording person or group;
- The advertising does not relate to a live musical performance taking place in this state; or
- The performance is expressly authorized in the advertising by the recording person or group.

This bill provides that any person who violates the prohibition commits a second degree misdemeanor and a first degree misdemeanor for subsequent violations. The section authorizes the Department of Legal Affairs or a state attorney to file a civil action for injunctive relief and authorizes a court to impose a civil penalty of up to \$5,000 for each violation.

The bill provides an effective date of July 1, 2007.

C. SECTION DIRECTORY:

Section 1: Creates s.817.4115, F.S, prohibiting a person from advertising or conducting a live musical performance by using a false, deceptive, or misleading statement of an affiliation, connection, or association between a performing group and a recording group, with exceptions. Provides that violation of these prohibitions will result in the committing of a misdemeanor, and gives authority for the court to impose a civil penalty of up to \$5,000 for each violation.

Section 2: Provides an effective date of July 1, 2007.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None

2. Expenditures:

See fiscal comments below.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

See fiscal comments below.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

The bill appears to have a minimal fiscal impact on state and local governments. The bill creates a new misdemeanor offense which could result in more criminal convictions with potential costs for prosecution and punishment. The bill also authorizes the court to award court costs to the prevailing party which could offset the costs associated with litigation.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds. This bill does not reduce the percentage of a state tax shared with counties or municipalities. This bill does not reduce the authority that municipalities have to raise revenue.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

D. STATEMENT OF THE SPONSOR

No statement provided.

IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES