House
Legislative
Analysis
Section

Romney Building, 10th Floor
Lansing, Michigan 48909
Phone: 517/373-6466

MUSIC ROYALTY PRACTICES

House Bill 5576 (Substitute H-2)
First Analysis (3-12-98)

Sponsor: Rep. Tom Alley
Committee: Commerce

THE APPARENT PROBLEM:

Throughout the marketplace of ideas, and now most especially in the enhanced electronic and technologic segments of the education and entertainment economies, there is a raging dispute about ownership and the origination of ideas, what are sometimes called intellectual property rights, and also about the distribution or dissemination of those ideas. Once stolid and venerable traditions of patent, copyright, and trademark put in place to protect innovators and to ensure their fair compensation now are open to challenge and reinterpretation, as businesses vie for market share and a more profitable bottom line. As the information age holds out the promise of direct sales--the direct transmission of object or idea from producer to customer--a re-tooling or sometimes the outright elimination of mid-level distribution networks is underway, networks that have heretofore served creators of products, creators as diverse as manufacturers of durable goods and creative artists. However, the size and nature of some markets prevent creative artists from participating in the day-to-day sales of their work.

As information- and idea-based products are rendered through sound and image, and then disseminated through far-flung networks that lack any semblance of the traditional accountability trail, the developers of a wide variety of products and materials, perhaps most especially those who make their living by sharing ideas in the literary and performing arts (for example, writers and musicians), find their livelihoods in jeopardy.

Historically, the products these workers design or create have been protected by federal copyright law, laws that have been in place since early in this century. Federal copyright laws require users of the product (in this case a set of ideas embodied in a composition) to obtain the permission of and to pay a royalty fee to the copyright owner. Given the size of the U.S. economy, usually the copyright owner seeks a middleman who assists the artist to collect royalties, and who distributes the work for a fee. In the case of authors, the middlemen are usually publishers (although sometimes well-known authors are able to retain copyrights on their own work). In the case of musicians who often hold their own copyrights, the middlemen are known as performing rights societies.

In order to protect the development and distribution process for songs in the music industry, performing rights societies were created, some more than 80 years ago. They provide a clearing house for collective contracts and royalty collections between music users and music copyright owners. There are three major performing rights societies which songwriters and composers can join: the American Society of Composers, Authors, and Publishers (ASCAP); Broadcast Music, Inc. (BMI); and, the Society of European Stage Authors and Composers (SESAC).

Typically, a performing rights society provides music users (for example, the proprietors of restaurants and taverns) with a "blanket license" which permits the proprietor to publicly perform any work in the society's repertoire--in the case of BMI, any of three million titles. According to testimony, a society's license costs about $500 a year, and sometimes a proprietor purchases two in order to ensure broad title coverage. (The Michigan Restaurant Association reports the average cost of a license among its members to be $580, while ASCAP reports that its average annual license fee for Michigan restaurants and taverns is about $420.) The license does not require the proprietor to keep track of the music that is being performed. Instead, the proprietor may use one or many of the songs, and is not billed "per song." These kinds of license agreements have been upheld in a number of court challenges, since the courts tend to see them as a fitting way to encourage adjustment of controversies that arise under the federal copyright statute, without litigation. Today, well over 3,000 Michigan businesses are licensed to perform ASCAP music. And according to testimony, each year the society distributes in royalties 80 cents of every dollar collected in license fees.

Music copyrights are not regulated by government, but instead rely on a self-enforcing regulatory system undertaken by performing rights societies. The enforcement system is superintended by federal law enacted by the U.S. Congress, and by a consent decree administered by a federal district court. Consequently, it is the practice of the performing rights societies from time to time to send an investigator to a business premises to make a written report of the musical compositions being performed in an unauthorized manner.

For example, it is the custom that a proprietor's license renews automatically, usually over a period of five years (adjusted in accordance with the increase in the CPI), unless the performing rights society is notified the contract is canceled. If payment is not forthcoming from a business, and there has been no notice, a performing rights society representative might visit the establishment to ascertain whether the former licensee continues to use music in the business. In this way, the representatives sometimes seem like bill collectors to proprietors. In these instances when licenses lapse, the investigators do not announce their arrival.

This enforcement activity is required by both federal copyright law and consent decree. The consent decree governing ASCAP was entered in 1950 under an antitrust action, *United States v. ASCAP*. A federal district court in southern New York has been charged with administering the consent decree. The consent decree governing BMI was entered in 1966, although substantially modified in 1994. The self-regulating enforcement system acknowledges that the federal government does not have the ability or the funds to restrain infringement of copyright. In the alternative, the Copyright Act contemplates that copyright owners themselves will undertake enforcement.

Some argue that legislation should be adopted to establish a code of conduct for the representatives of performing rights societies. They argue the conduct code should, among other things, ensure that proprietors are provided with basic product information (the list of music represented), and basic contract and rate information (a rate schedule and the comparable rates others are paying in the same community). Some argue further that representatives from the societies should announce their visits when they enter a business establishment to ascertain compliance with federal copyright laws.

THE CONTENT OF THE BILL:

House Bill 5576 would create a new act, to be known as the Music Royalty Practices Act, in order to create a statewide inventory for certain copyrighted music, to regulate royalty contracts, and to better identify agents and prescribe their business practices. Generally, it would regulate relationships between "performing rights societies" and the proprietors of restaurants, bars, and concert halls where music is performed. [Performing rights societies are associations that license the public performance or broadcast of musical works on behalf of copyright holders, including organizations such as the American Society of Composers, Authors, and Publishers (ASCAP); Broadcast Music, Inc. (BMI); and, the Society of European Stage Authors and Composers (SESAC).]

The bill would require a performing rights society to make available in electronic form a current list of the titles and the names of its authors and publishers of all its copyrighted nondramatic musical works and the copyrighted musical works that have been publicly performed, or for which it has collected royalties on behalf of copyright owners within the past five years. The bill would require that the list be updated at least weekly, that it be provided to the Department of Consumer and Industry Services electronically, and that it be available for review upon request. Further, the bill would require a performing rights society to provide a copy of its most current copyright list at cost, and to maintain a toll-free telephone number that can be used to answer inquiries.

The bill would regulate royalty contracts to require that at the time of any offer of royalties, the proprietor would receive certain information in writing, including a) a schedule of rates and terms of royalties, b) upon request, a schedule of rates and terms of comparable businesses, c) notice of the state inventory including the electronic address and toll-free number, d) an explanation of any exemptions, and e) upon request, the opportunity to review the list of members or affiliates represented by the performing rights society. The bill also sets forth certain provisions of any contract for the payment of royalties.

House Bill 5576 also would require agents or other employees acting on behalf of a performing rights society to apply to the department for a pocket identification card that would be valid for three years. The application for the card would be on a form

prescribed by the department, and accompanied by a $50 fee. Fees collected would be credited to the general fund and could be used by the department only to offset the cost of administering the bill. The agent would be required to show the pocket identification card to the proprietor of copyrighted works (or to the proprietor's management employees) whenever he or she entered onto the premises of a proprietor's business. (Under the bill "proprietor" means the owner of a retail establishment, restaurant, inn, bar, tavern, sports or entertainment facility, not-for-profit organization, or any other place of business or professional office located in this state in which the public may assemble and in which nondramatic musical works are publicly performed, broadcast, or transmitted for the enjoyment of the members of the public assembled in that place.)

The bill also would proscribe an agent's practices in certain circumstances. Specifically, the agent would be prohibited from collecting a royalty payment or any other fee except as provided in a contract, and also would be prohibited from other negotiations, or retaliatory or coercive or disruptive acts, and from threatening to commence legal action in connection with copyright violations. The agent would be required to announce his or her purpose upon entry into an establishment, and to provide written notice to a proprietor within 72 hours of investigating a copyright violation.

Finally, the bill would allow a person suffering injury by a violation of the bill to bring a civil action to recover treble damages and reasonable attorney's fees or any other relief at law or in equity.

The bill would not apply to contracts between performing rights societies that are not licensed by the Federal Communications Commission (FCC) and broadcasters licensed by the FCC, nor to investigations by a law enforcement agency or other person regarding a suspected violation of the act governing unauthorized duplications of recordings.

Under the bill, "copyright owner" means the owner of a copyright of a nondramatic musical work recognized and enforceable under the copyright laws of the United States pursuant to title 17 of the United States Code. Copyright owner would not include the owner of a copyright in a motion picture or audiovisual work or in any portion of a motion picture or audiovisual work.

[Note: ASCAP points out that throughout this bill, the word "nondramatic" is mistakenly applied. (Performances may be either nondramatic or dramatic, but the work that is sung--the musical compositions, themselves--cannot be accurately characterized in this manner.) Apparently, this "nondramatic"/"dramatic" distinction first appeared in 1996, in legislation introduced in New Jersey, a bill that was vetoed by Governor Whitman. The law eventually enacted in that state corrected the mistaken use of the words.]

BACKGROUND INFORMATION:

Proprietors of restaurants, taverns, bowling centers, hotels, dentists' offices, and other retailers have joined together (first at the national level in an attempt to influence Congress and more recently in 23 of the states to influence legislatures) to argue that performing rights societies are the music industry's equivalent of a "monopolistic and unregulated public utility," and that "for decades the giant performing rights societies have used the federal copyright law as a license to intimidate and threaten small businesses." Although the proprietors perceive monopolistic practices on the part of the societies, and also seek redress through government intervention, the proprietors nonetheless list among their grievances 1) the variety among the societies' rate schedules, and 2) their need to obtain licenses from more than one society. It would seem, then, that competition, the alternative to monopoly, is not what proponents seek, since during committee testimony, business owners expressed a preference for rate uniformity, or the opportunity to deal only with one society.

To play music, proprietors sign contracts with societies, and pay an annual license fee. In the case of ASCAP, the rates are determined by assigning similar kinds of establishments a base rate, and then adding an amount, set on a rate schedule, which correlates the size of an establishment (using number of seats) to type of music: (live music/instrumentalist; live music/2 or more instrumentalists; no live music. The 'no live music' category is separated into music/audio only; and music/audio and visual. One of many exemptions, called the 'home type' exemption, allows proprietors to play a radio, or operate one television (excepting some all music stations) without a license.

FISCAL IMPLICATIONS:

Fiscal information is not available.

ARGUMENTS:

For:

This legislation, as introduced, is "model" legislation. It was originated at the national level by the representative agents of business interests, in an effort to achieve changes in state statutes throughout the country that would echo changes in federal copyright laws sought by the National Restaurant Association in the U. S. Congress. State legislatures often adopt "model" statutes that are researched and developed by special interests at the national level, in an effort to ensure systematic and uniform regulatory practices among the various states. If this bill is passed, Michigan would join more than 20 other states in helping to eliminate the harassment of business owners who play music to entertain and attract customers.

For:

Given committee testimony, what is more at issue than either monopolistic practices or the amount of money that proprietors pay for the license, is the performing rights societies' enforcement activity, since testifying proprietors seem to be seeking *one* price consistent across-the-board among the three societies, and few cited the license costs as being extraordinarily excessive. Specifically, proprietors resent the societies' unannounced visits to ascertain compliance with federal copyright laws. Indeed, the idea of surveillance is, for some, unacceptable and even un-American. As Crain's Detroit Business wrote on 3-2-98,"What strikes a sour note isn't so much the amount (of the license); it's the confusing and heavy-handed billing practices by music royalty companies and groups."

Currently, pending federal legislation addresses the same issues as those raised by proponents of the bill. A spokesperson for the National Restaurant Association says that the association has two aims in passing federal legislation: "If you have a dispute over the amount you're being charged, we want you to have somewhere to go locally, in your state, where it can be heard. The second thing we want to do is clarify what's already the law. If you play a radio or TV in your business, we feel you should not have to pay additional music royalties." (Detroit Free Press, 3-3-98)

For:

This legislation will help small business people. It will establish a code of professional conduct for those who enforce federal copyright laws on behalf of composers, song writers, and performers. It will protect users of music, and provide that people who suffer a violation of the statute can recover actual damages and reasonable attorneys' fees, and seek an injunction or any other remedy available at law or in equity. What's more, the legislation ensures that proprietors are provided with basic product information--the list of music represented--and basic contract and rate information--a rate schedule and the comparable rates others are paying in the same community. These are legitimate concerns of small business people as they struggle to contain their costs and provide a quality product to their customers.

Response:

Many proponents of this legislation are small business people who use music to entertain customers. Likewise, many opponents of the legislation also are small business people who are independently employed as song writers. One song writer who testified during committee deliberations noted that even with copyright protection, it takes 30,000 plays for a song writer to earn $1,000. As the song writers seek a fair compensation for their work, they "employ" a middleman by joining one of the professional rights societies. As one composer testified: "Given the enormous size of the U.S. economy, it would be impossible, without the resources, expertise, and vigilance of ASCAP and similar organizations, for individual artists and publishers to keep track of the use of their intellectual property." One of the ways the professional rights societies help musicians is to check establishments, unannounced, to determine if music licensed by their organization is being used for business purposes, and if so, whether the proprietor has a contract and license. This legislation will make that job more difficult.

Against:

Some provisions in this legislation will likely be found to be in violation of federal copyright laws, and for ASCAP and BMI, the largest of the three performing rights societies, certain provisions of the legislation will force them out of compliance with court consent decrees. The imposition of additional conditions on copyright enforcement--specifically the requirements to announce an investigation and to provide 72-hour written notice after entering a proprietor's business (instead of unannounced compliance visits)--would violate federal court rulings in New York, Wisconsin, and other states [*ASCAP v. Pataki*, 930 F. Supp. 873 (S.D.N.Y. 1996); *Leo Feist, Inc. V. Young*, 138 F.2d

972 (7th Cir. 1943); *Milene Music, Inc. V. Gotauco,* 551 F. Supp. 1288, 1291 (D.R.I. 1982)].

Response:

Should this legislation become law, ASCAP has stated in its written testimony that it "would have no choice but" to ask the court to relieve ASCAP of its obligation under the consent decree to offer licenses to Michigan proprietors. ASCAP points out that just such an order was entered in 1975 when Wyoming enacted legislation designed to severely hamper licensing activities, with the result that ASCAP ceased to license Wyoming bars and restaurants; Wyoming bar and restaurant owners nevertheless continued to use ASCAP music, resulting in many being sued for copyright infringement in federal court; and at the next session of the legislature, the onerous provisions of the legislation were repealed.

Against:

This legislation is unnecessary, and is an example of government intervention in what are more appropriately contractual arrangements between private parties for business purposes. To require the Department of Consumer and Industry Services to maintain an updated repertoire for performing rights societies would be a duplication of already current practice within the performing rights societies. For example, BMI's repertoire runs, in print, to 20 volumes. Consequently BMI provides the list to its current and prospective members electronically, updating it regularly (usually weekly) so that it is accessible via computer, and also provides information via a toll-free telephone line.

POSITIONS:

A coalition of organizations, including the Michigan Restaurant Association, National Federation of Independent Business-Michigan; Bowling Centers Association of Michigan; Michigan Chamber of Commerce; Michigan Dental Association; Michigan Grocers Association; Michigan Floral Association; Michigan Hotel, Motel, and Resort Association; Michigan Retailers Association and the Small Business Association of Michigan supports the bill. (3-11-98)

The Michigan Society of Association Executives supports the bill. (3-11-98)

The Department of Consumer and Industry Services does not support the bill (3-10-98).

Broadcast Music, Inc. (BMI) opposes the bill. (2-25-98)

The American Society of Composers, Authors, and Publishers (ASCAP) opposes the bill. (3-11-98)

Analyst: J. Hunault

■This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.