House
Legislative
Analysis
Section

House Office Building, 9 South
Lansing, Michigan 48909
Phone: 517/373-6466

MUSIC ROYALTY PRACTICES ACT

House Bill 4937 as introduced
First Analysis (12-2-99)

Sponsor: Rep. Andrew Raczkowski
Committee: Regulatory Reform

THE APPARENT PROBLEM:

Under federal copyright laws, anytime a business plays a song, whether over a radio, television set, telephone answering machine, tape or CD, or has a live singer perform the song, the business must pay the copyright owner a royalty fee. Exemptions to the copyright law exist for educational and charitable purposes, music used during worship services, and for businesses playing music over a radio or television set if certain criteria are met. To get permission to play copyrighted musical works, businesses can either contact a copyright owner directly to negotiate a contract (e.g., use of a single song or a single artist's works), or contract with one or more performing rights societies which act as clearinghouses for copyrighted music. A performing rights society is a voluntary membership association that protects the rights of composers, lyricists, and music publishers under the federal copyright laws by licensing businesses that offer music for the enjoyment of their patrons or employees and collecting royalty fees. Because it is difficult to keep a record of exactly which songs or artist's works a business plays, or how many times a particular song is played, a royalty contract is typically a "blanket" license that covers the entire inventory of a society's repertoire. To protect itself from possible violations or infringement of the copyright laws, a business owner often must contract with one, two, or all three of the major performing rights societies and thus pay three licensing fees.

Reportedly, business owners have found both the federal copyright laws and the fee structures within royalty contracts to be confusing. Some business owners have been frustrated to find requests denied for written lists of the material and artists licensed by a performing rights society. Without access to such a list, they cannot check to see whether they need to be licensed by only one of the societies, and so may needlessly contract with two or more just to protect themselves against the fines for copyright infringements which can range as high as $100,000 per piece of music. Further, anecdotal stories have surfaced through the last several years of heavy-handed techniques and scare tactics used by employees of performing rights societies to force or coerce business owners to sign royalty contracts, including conduct that disrupted the business of the establishment.

On the other hand, the performing rights societies are charged with the difficult task of enforcing the federal copyright laws and seeing that the composers, lyricists, publishers and others with copyright protection receive the compensation due them under current laws. Some business owners may not realize that the establishment needs to be licensed in order to have musical works performed or broadcasted, where others may deliberately avoid paying licensing fees. However, composers and others rely on royalties for income. Unlicensed play of their works unfairly robs them of income. The three largest societies - the American Society of Composers, Authors, and Publishers (ASCAP), Broadcast Music Incorporated (BMI), and Society of European Stage Authors and Composers (SESAC) - maintain that their blanket licensing fees are fair (the reported average range is approximately $400 to $600 per year for the typical restaurant, bar, or retail store). Further, since ASCAP's repertoire includes over 4 million copyrighted musical works, and BMI represents another 3 million, supplying written lists of repertoires is not easy or financially feasible. For instance, BMI's annual update of its written list fills 20 volumes. However, both BMI and ASCAP provide for public access of their repertoires through an electronic database and provide a toll-free number for requests for information. Further, the societies point out that their standards of business practice are governed by a federal consent decree, and employees must work within the guidelines established by the decree.

The last few years have seen many attempts at the state and federal levels to resolve conflicts between the performing rights societies and the interests of business owners. For example, recent changes to the federal copyright law now allow retail businesses and food establishments to play music over the radio or television without a license if the business is under a specified square footage or uses four or fewer speakers on a radio or three or fewer television screens. (All

other uses of copyrighted musical works, including background music on telephones; use of records, tapes, and CDs; and live performances, as well as the use of radio or television using more than four speakers or three television screens still require a license.) In addition, about two dozen states have enacted some form of legislation in recent years to regulate contracts between performing rights societies and businesses affected by the federal copyright law. Last session, House Bill 5576, which addressed many concerns of business owners, was passed by the House but did not see Senate action. Though the recent changes to the federal statute give some relief to businesses, and though greater access to the repertoire of musical works represented by the societies has been provided, some people still have concerns over the standards of business practice used by the performing rights societies. Legislation has been offered to address these concerns.

THE CONTENT OF THE BILL:

Performing rights societies protect the rights of composers, songwriters, lyricists, and music publishers by licensing businesses for the public performance of copyrighted works and collecting and paying royalties to their members. House Bill 4937 would create the Music Royalty Practices Act to regulate contracts between owners of certain bars, restaurants, and retail stores and performing rights societies (e.g., ASCAP and BMI) for the rights to publicly perform or broadcast copyrighted nondramatic works. The bill would apply to proprietors of retail or food establishments, bars, inns, taverns, sports or entertainment facilities, not-for-profit organizations, or any other place of business or professional office "in which musical works are publicly and nondramatically performed, broadcast, or transmitted for the enjoyment of the members of the public assembled in that place." The "nondramatic public performance, broadcast, or transmittal of musical works" is not defined in the bill, but, according to industry literature, would apply to the use of music transmitted over radio and television and would also apply to the use of tapes, CDS, records, and videos. The bill would not apply to contracts between performing rights societies and broadcasters licensed by the Federal Communications Commission such as radio and television stations, nor would it apply to investigations by law enforcement agencies or others regarding violations of Public Act 210 of 1994, which prohibits the unauthorized duplication of recordings for commercial advantage or financial gain. Specifically, the bill would do the following:

Contracts. A contract for the payment of royalties between a proprietor and a performing rights company would have to be in writing, be signed by both parties, and include the duration of the contract, the name and business address or addresses of both parties, and the schedule of rates and terms of royalties to be collected under the contract. Unless otherwise agreed to, contracts would be for a term of one year. Contracts between a performing rights society and a bona fide trade association representing a substantial percentage of proprietors of the same type would not be affected by the bill's requirements.

At least 72 hours before entering into a contract for royalties, a performing rights society would have to provide written information to a proprietor, including a schedule of the rates and terms of royalties, and a statement that a proprietor may be exempt from liability under federal copyright laws, that the proprietor may review in electronic form the most current available list of members or affiliates represented by the performing rights society, and that failure by the performing rights society to provide the required information would be a violation of the bill. (Note: Under federal copyright law, certain retail businesses, such as small businesses with only a few speakers or television sets, do not have to be licensed to play music over a radio or television.)

Duties of a performing rights society. A performing rights society that conducted business within the state would have to maintain an electronic computer database of it repertoire. A current list, updated monthly, of the names of its authors, publishers, and titles of all of its copyrighted musical works would have to be available for review in electronic form. The list in existence at the time of a contract with a proprietor, including subsequent additions and deletions, would be binding for the period of the contract. The performing rights society would also have to establish and maintain a toll-free telephone number to answer inquiries regarding musical works and copyright owners represented by that society. A copy of the list would have to be provided at cost to anyone requesting it.

Prohibited conduct. A performing rights society or its agents, employees, or representatives could not do any of the following:

• Enter a business to discuss a contract for payment of royalties without first identifying himself or herself to the proprietor or his or her employees. Identification would include a business photo-i.d. card issued by the

performing rights society, disclosing that he or she was acting on behalf of the society, and disclosing the purpose of the visit.

• Collect or attempt to collect a royalty payment or any other fee except as provided in a contract that was executed in compliance with the bill.

• In negotiations with respect to a contract for the payment of royalties, engage in unfair or deceptive acts or practices; engage in coercive acts or practices that disrupt a proprietor's business; or commence or threaten to commence a legal action in connection with an alleged copyright violation unless the society had advised the proprietor that he or she could comply with copyright laws by obtaining a license from the performing rights society for the musical works in its repertoire, by discontinuing playing any musical works in the society's repertoire, or by obtaining authorization directly from the copyright owners.

The bill would not prohibit a performing rights society or its employees from informing a proprietor of obligations imposed by federal copyright laws, nor would it prevent a copyright owner from exercising any exclusive rights granted by the copyright laws.

Remedies. A person who suffered injury due to a violation of the bill could bring a civil action to recover actual damages and reasonable attorney's fees, or to seek injunctive or any other relief available at law or in equity.

FISCAL IMPLICATIONS:

Fiscal information is not available.

ARGUMENTS:

For:

With only a few exceptions, anytime that music is played by a proprietor of an establishment for the enjoyment or entertainment of employees or patrons, the federal copyright law requires that royalties be paid to the writers and others who own the copyrights to the songs. Because of the difficulty of tracking down multiple copyright owners, performing rights societies act as clearinghouses for multiple artists. Typically, a business will contract with one or more performing rights societies such as ASCAP, BMI, or SESAC for the rights to play music in their establishments. The federal copyright law affects business owners of all sizes, retail stores as well as doctors' offices, bars and restaurants, not-for-profit organizations, those who conduct professional seminars, and so on. A business must hold a license even for the right to play background music on the telephone when a caller is placed on hold.

An inadvertent consequence of the copyright law has been animosity that has risen as a result of conflicting interests between performing rights societies who are trying to protect their members by collecting royalties due them, and business owners who seek to contain operating costs or who may not understand the complexities of the copyright law or the licensing structures used by the societies. Some business owners have reported incidents of society employees using threatening or coercive techniques to force them into signing royalty contracts. Others have received form letters threatening legal action for violations that may or may not have occurred. Compounding matters for business owners has been the fact that disputes with ASCAP and BMI must be settled in the U.S. District Court for the Southern District of New York or other venue as provided by federal law. In the past, business owners felt compelled to sign a contract or pay a fine rather than incur the expense of traveling to New York to attend legal proceedings. Of particular concern to business owners has been the right to obtain access to the repertoire of ASCAP and BMI to see if it were necessary or not to sign contracts with both companies or, if the music played were represented by only one of the companies, if just one contract would suffice.

Since some of the concerns between the societies and proprietors lie under the purview of federal law and federal court decisions, the bill cannot address all concerns. However, the bill does represent a significant compromise between the two groups. For example, the bill would establish a standard of business practice for professional rights society employees. Under the bill's provisions, a society employee could not use coercive or threatening behavior, or disrupt the establishment's business by his or her conduct. Further, the bill's requirement that the societies maintain a database of their repertoires, along with a toll-free number to field requests for information, should ensure that the societies' current practice of making such information available would continue. If someone wanted a printed copy, one could be provided at cost. Also of importance is the requirement for society employees to inform proprietors of the existence of licensing exemptions under the federal copyright laws. Even though the agents are not required to detail the information, or to make a decision whether the business fits the exemptions, at least proprietors will be aware of the existence of exemptions and can take responsibility to research to

see if their businesses meet the exemption criteria. Most importantly, if a business suffers loss due to the conduct of an ASCAP or BMI employee, or by a violation of any of the other provisions in the bill, a business owner could bring a civil suit to recover actual damages and attorney fees in a circuit court within the state of Michigan.

Meanwhile, from the point of view of the performing rights societies, the bill's provisions closely follow current business standards established by a federal court consent decree to which the societies are required to adhere. Also, several provisions already reflect the societies' current business practices, such as maintaining an accessible database and updating it regularly. Perhaps the strongest point in the bill's favor is that it clearly outlines responsibilities on both sides, and therefore should foster an amiable working relationship that balances the interests of proprietors with the responsibility of the performing rights societies to collect royalties for copyright holders.

Response:

Some people feel that the term "proprietor" should be expanded to also include a "manager or authorized representative," because not-for-profit organization do not legally have proprietors.

Rebuttal:

For the purposes of the bill, "proprietor" is any owner. An "owner" can be an entity or corporation, as well as a single individual. Therefore, in regards to a not-for-profit organization, the holder of the 501(c)(3) classification under the Internal Revenue Code would be considered the "owner".

POSITIONS:

The Small Business Association of Michigan supports the bill. (12-1-99)

The Michigan Restaurant Association supports the bill. (11-30-99)

The Michigan Hotel, Motel & Resort Association supports the bill. (11-30-99)

The American Society of Composers, Authors, and Publishers feels that the legislation is not necessary, but does not oppose the bill as introduced. (11-30-99)

Broadcast Music Incorporated (BMI) feels strongly that the legislation is not necessary, but does not oppose the bill as introduced. (11-30-99)

The Department of Consumer and Industry Services has no formal position on the bill. (12-1-99)

Analyst: S. Stutzky

#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.