

HOUSE BILL REPORT

E2SHB 1763

As Amended by the Senate

Title: An act relating to regulating music licensing agencies.

Brief Description: Regulating music licensing agencies.

Sponsors: House Committee on General Government & Information Technology (originally sponsored by Representatives Van De Wege, Lytton, Riccelli and Tharinger).

Brief History:

Committee Activity:

Business & Financial Services: 2/17/15, 2/18/15 [DPS];

General Government & Information Technology: 2/23/15, 2/25/15 [DP2S(w/o sub BFS)].

Floor Activity:

Passed House: 3/5/15, 92-6.

Floor Activity:

Passed House: 2/10/16, 72-25.

<p>Brief Summary of Engrossed Second Substitute Bill</p> <ul style="list-style-type: none">• Establishes regulatory requirements for music licensing agencies.

HOUSE COMMITTEE ON BUSINESS & FINANCIAL SERVICES

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 10 members: Representatives Kirby, Chair; Stanford, Vice Chair; Vick, Ranking Minority Member; McCabe, Assistant Ranking Minority Member; Parker, Assistant Ranking Minority Member; Blake, Kochmar, Ryu, Santos and G. Hunt.

Staff: Linda Merelle (786-7092).

HOUSE COMMITTEE ON GENERAL GOVERNMENT & INFORMATION TECHNOLOGY

Majority Report: The second substitute bill be substituted therefor and the second substitute bill do pass and do not pass the substitute bill by Committee on Business &

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Financial Services. Signed by 7 members: Representatives Hudgins, Chair; MacEwen, Ranking Minority Member; Caldier, Assistant Ranking Minority Member; McCabe, Morris, Senn and Takko.

Staff: Meghan Bunch (786-7119).

Background:

Music licensing agencies, also known as performing rights organizations, license for a fee the music of songwriters and music publishers that they represent. These music licensing agencies may collect royalties on the performance rights whenever the music is played in a public setting. Venues that are subject to the royalties include bars, nightclubs, funeral parlors, grocery stores, sports arenas, skating rinks, and fitness centers, among others.

Three of the most prominent music licensing agencies are the American Society of Composers, Authors and Publishers; Broadcast Music, Incorporated; and the Society of European Stage Authors and Composers. The license fees may range from amounts in the hundreds of dollars per year for smaller businesses into the thousands of dollars, per location per year, for larger operations. The music licensing agencies may file legal action to enforce the copyright claims on behalf of the persons that they represent.

Disciplinary Authority.

The Department of Licensing (Department) has the authority to investigate for complaints or reports of unprofessional conduct, to hold administrative hearings, and to discipline holders of licenses issued under its authority.

Business & Professions Account.

All receipts from business or professional licenses, registrations, certifications, renewals, examinations, or civil penalties assessed and collected by the Department must be deposited into the Business & Professions Account (Account) within the State Treasury.

Consumer Protection Act.

The Consumer Protection Act (CPA) prohibits unfair methods of competition and unfair or deceptive practices in commerce. The act may be enforced by private legal action, or through a civil action brought by the Office of the Attorney General. A court may award private individuals injured by an unfair or deceptive practice actual damages, court costs, and additional damages up to triple the actual damages amount. In addition, a court may enjoin a business from conducting further unfair practices.

Summary of Engrossed Second Substitute Bill:

Licensing.

As a prerequisite for operating in Washington, a music licensing agency must:

- annually file with the Office of the Secretary of State a certified copy of each performing rights contract or license agreement made available from the music licensing agency or copyright owner to any user within the state;
- complete an initial or renewal application for a music licensing agency license;
- have a valid Washington Unified Business Identifier number; and
- pay an annual fee to be set by the Department.

The Department may adopt reasonable rules for the proper operation and enforcement of the provisions of this act. It also has disciplinary authority over music licensing agencies. Funds from fees and penalties under this act must be deposited into the Account.

Requirements and Prohibitions.

A person employed by or working as a contractor or agent for a music licensing agency, before entering the premises of a proprietor's business for purpose of seeking payment or a contract for payment of royalties for the use of copyrighted works, must first:

- provide 24 hours' notice before entering the premises.
- identify himself or herself to the proprietor or the proprietor's employees;
- disclose that he or she is acting on behalf of a music licensing agency; and
- disclose the purpose for being on the premises.

Music licensing agencies are required to make available to business proprietors the most current list of members and affiliates and the list of performed works that the agency licenses.

A representative or agent of a music licensing agency must not:

- use obscene, abusive or profane language when communicating with the proprietor or his or her employees;
- communicate at an unusual time or place known or which should be known to be inconvenient to the proprietor;
- engage in any coercive conduct, act or practice that is substantially disruptive to a proprietor's business; or
- use or attempt to use any unfair or deceptive act or practice in negotiating with a proprietor.

Before conducting an investigation to substantiate a claim for use of copyrighted music by the proprietor, a representative or agent of a music licensing agency must communicate with the proprietor of a business at least once in person.

The Department may adopt reasonable rules for the proper operation and enforcement of the provisions of this act. It also has disciplinary authority over music licensing agencies.

Penalties.

A music licensing agency is subject to a civil penalty of up to \$1,000 for each separate violation of this chapter. Multiple violations on a single day may be considered separate violations. The penalty may be imposed by the Department or in any court of competent

jurisdiction. It may be imposed separately and in addition to any private party claims permitted for violations of this act.

A violation of this act is a violation of the CPA.

Consumer Awareness.

The Department, in collaboration with the Office of the Attorney General, must conduct a consumer awareness campaign to inform business proprietors of their rights and responsibilities regarding the public performance of copyrighted music.

Any fees or penalties collected pursuant to this act must be used to fund the consumer awareness campaign.

The provisions of this act constitute a new chapter in Title 19 RCW.

EFFECT OF SENATE AMENDMENT(S):

References to "music licensing agency" are changed to "performing rights society," which is defined. The license requirement is eliminated and a registration requirement is added. A requirement is added to the civil penalties provision so that only "knowing" violations of the act may result in civil penalties. The authorization for civil penalties to be imposed by the Department of Licensing (DOL) or in any court of competent jurisdiction is removed and added is authorization for the Office of the Attorney General to impose civil penalties. The annual filing requirement is changed so that a performing rights society must annually file with the DOL (instead of with the Office of the Secretary of State) an electronic copy of each performing rights form agreement (instead of an electronic copy of each performing rights contract or license form agreement) providing for the payment of royalties made available from the performing rights society to any proprietor in Washington.

The requirement that a representative or agent of a performing rights society communicate with a proprietor at least once in person before conducting an investigation to substantiate a claim for the use of copyrighted music by the proprietor is removed. The requirement that a performing rights society or its agent notify a proprietor at least 24 hours before entering the proprietor's business for purposes of seeking payment or a contract for payment of royalties is removed. The requirement that a representative or an agent of a performing rights organization not communicate at an unusual time or place known or which should be known to be inconvenient to a proprietor is removed. Added is a requirement that a representative or an agent of a performing rights organization not communicate by telephone or in person with a proprietor other than at the proprietor's place of business during the hours when the proprietor's business is open to the public, unless the proprietor authorizes communication at different times or locations. Added is a requirement that a representative or agent of a performing rights society not communicate with an unlicensed proprietor about licensing performances of musical works at the proprietor's establishment after receiving notice in writing from an attorney representing the proprietor that all further communications related to the licensing of the proprietor's establishment by the performing rights society should be addressed to the attorney; however, the performing rights society may resume communicating directly with the proprietor if the attorney fails to respond to communications

from the performing rights society within 60 days, or the attorney becomes nonresponsive for a period of 60 days or more.

The directive to the DOL and the Office of the Attorney General to collaborate and conduct a consumer awareness campaign to inform proprietors of their legal rights is removed; added is a both a directive to the Department of Revenue to inform proprietors of their rights and responsibilities as well as encouragement for performing rights societies to conduct outreach campaigns to educate proprietors concerning their rights and responsibilities regarding the public performance of copyrighted music.

Added is a requirement that no performing rights society enter into, or offer to enter into, a contract for the payment of royalties by a proprietor unless at least 72 hours prior to the execution of that contract the performing rights society provides to the proprietor, in writing, a schedule of the rates and terms of royalties under the contract and notice that the proprietor is entitled to view electronically the most current available list of members and affiliates represented by the performing rights society and the most current available list of the performed works that the performing rights society licenses. Added is a requirement that a contract for the payment of royalties executed in Washington must be in writing and signed by the parties and include the name and location of each place of business to which the contract applies, the duration of the contract, and the schedule of rates and terms of the royalties to be collected under the contract, including any sliding scale or schedule for any increase or decrease of those rates for the duration of that contract

A violation of the act is no longer a violation of the state CPA. Added is a provision that nothing in the act may be construed to prohibit a performing rights society from conducting investigations to determine the existence of music use by a proprietor's business or informing a proprietor of the proprietor's obligations under federal copyright law. The effective date is changed from January 1, 2016, to January 1, 2017.

Appropriation: None.

Fiscal Note: Available.

Effective Date: The bill takes effect on January 1, 2016.

Staff Summary of Public Testimony (Business & Financial Services):

(In support) Music licensing agencies are approaching many businesses about licensing agreements. It is not just restaurants and bars, it is also churches, dance schools, and farmers' markets. The proprietors have been approached in a harassing way, and the licensing agencies are intimidating. Legislation has been developed that will regulate them. The licensing fee will be used to fund communications with business owners so that they know what their rights are. This will be more useful for business owners. It won't prohibit these licensing agencies from trying to get licenses, but it will help regulate them so that they do it in a fair way. It is difficult to identify who are the good players and who are not. These music agencies intimidate people, they call people thieves, and they tell them that they are ignorant. Sometimes the music licensing agencies send three contracts per day. They also pick and choose which bar and restaurant to harass. There is no way to tell whether the

licensing fee is legitimate. The licensing agencies, when asked, say that they do not give out information regarding the songs and writers they represent. If this is legitimate, something should be done so that proprietors know that it is not a scam. This bill is not about copyright. It is about conduct. These music licensing agencies engage in activities that would never be permitted by bill collectors or sales people. The agencies send a series of letters, one after another. Then they make phone calls. These rights organizations have monopoly status. They are unsupervised and can do what they want without repercussions. The music agencies should have a code of conduct for the people who call on shops, retail stores, churches, and farmers' markets. Proprietors should have recourse if the employees of the licensing agencies violate their code of conduct. Businesses need to be educated regarding their rights and responsibilities, and the music licensing agencies need to be more transparent. It is important to know where the money is going. They take millions out of Washington and there is no accountability.

(With concerns) The provisions in section four of the bill may impede the ability of a music licensing agency to investigate. Federal courts have found that this kind of impediment is unconstitutional. There are over 520,000 composers, and the repertory consists of millions of copyrighted works. Music licensing agencies operate on a nonprofit basis, and over 85 percent of the proceeds are passed onto the members. Music licensing agencies exist because thousands of songwriters have created music and want people to play it. Wherever music is performed publicly, copyright owners are entitled to be paid, but they cannot collect royalties on their own. The music licensing agencies try to educate people in terms of their needs and offer licenses on an economical basis. Business owners pay a fee and get to use any of the compositions. There is a team of prospectors that go through the liquor license rolls and survey establishments so that they can be fair. Some of it is looking through the newspaper, and some of it is calling proprietors and asking them about their business. The licenses are issued pursuant to a consent decree. There is a standard rate and certain calculations. The licenses are on the website. The costs vary, but they are not random. They are structured to be easily digestible. With any law, the devil is in the details. There is a balanced approach to this law to effectively protect its members' copyrights. The proposed amendatory language is based on other states that have passed laws. There is no opposition to making sure that employees abide by rules of good conduct.

(Opposed) None.

Staff Summary of Public Testimony (General Government & Information Technology):

(In support) None.

(With concerns) Owners of bars, taverns and restaurants have to have a license to play music. This is dictated at the federal level. This includes karaoke, live music, jukebox, etc. Section five of the substitute bill uses the terms proprietor's business," but only the term "user" is defined. The term "royalties" is also not defined. These terms should be clarified in the definition section. Another concern is that the bill may arguably preempt the federal copyright law, since there is a notice requirement. Twenty-five states have regulated licensing music agencies. Of these, 11 have expressed exemptions for investigations. No states affirmatively require performing rights agencies to announce their presence when investigating in a public area. Only one state, Oklahoma, requires an investigation to

announce their presence, but that is only if they go beyond the public area. In 1996 New York passed a notice provision similar to, but less restrictive than, this proposal. That notice requirement was overturned because they felt that it was a violation of rights to do an investigation to determine whether there has been infringement of copyright laws.

The consumer protection provisions should also be removed. This is a licensing bill. The bill structures for licensees to pay for a license. There are also very high penalties of up to a \$1,000 for each offense, and multiple offenses are possible in a day.

(Opposed) None.

Persons Testifying (Business & Financial Services): (In support) Representative Van De Wege, prime sponsor; Trent House, Washington Restaurant Association; Elda Brandt, The Dam Bar; and Dale Dunning, The Oasis.

(With concerns) Richard Reimer and Holly McCormack, American Society of Composers, Authors, and Publishers; Michael Hepburn; John Ellwood and Lisa Thatcher, Broadcast Music, Incorporated; and Bryan Case, Riddell Williams P.S.

Persons Testifying (General Government & Information Technology): Lisa Thatcher, Broadcast Music Incorporated; and Holli Johnson, American Society of Composers, Authors and Publishers.

Persons Signed In To Testify But Not Testifying (Business & Financial Services): None.

Persons Signed In To Testify But Not Testifying (General Government & Information Technology): None.