

DOUGLAS F. GANSLER
ATTORNEY GENERAL

KATHERINE WENFEE
Chief Deputy Attorney General

JOHN B. HOWARD, JR.
Deputy Attorney General



DAN FRIEDMAN
Counsel to the General Assembly

SANDRA BENSON BRANTLEY
BONNIE A. KIRKLAND
KATHRYN M. ROWE
Assistant Attorneys General

THE ATTORNEY GENERAL OF MARYLAND
OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

April 16, 2008

The Honorable Martin J. O'Malley
Governor of Maryland
State House
Annapolis, Maryland 21401-1991

Re: Senate Bill 711

Dear Governor O'Malley:

We have reviewed and hereby approve the constitutionality and legal sufficiency of Senate Bill 711, which prohibits a person from advertising or conducting "a live musical performance or production in the State through the use of a false, deceptive, or misleading affiliation, connection, or association between a performing group and recording group."

The First Amendment states that "Congress shall make no law ...abridging the freedom of speech." U.S. Const. amend. I. "The command of the first amendment...is directed with equal force, by way of the fourteenth amendment, to state and local governments." *Eanes v. State*, 318 Md. 436, 445 (1990). The First Amendment, however, does not protect fraud or deceptive speech. *See Illinois v. Telemarketing Assoc., Inc.*, 538 U.S. 600, 611-612 (2003).

Moreover, the speech that is being regulated here is commercial. The intent of the legislation is to lessen the likelihood that the public will be misled into believing that they are seeing one singing group, when in fact they are seeing another group. The legislation's intent is not to prohibit the musical act from occurring; rather, it is clear that the legislation imposes reasonable conditions to lessen the likelihood that the public will be deceived and that a performing or record group's rights will be violated. *See Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976)(announcing that it may be "appropriate to require that a commercial message appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive"). Thus, SB 711 does not violate the First Amendment.

Federal and State law already prohibit false statements made in a commercial advertisement that have a tendency to deceive the recipients of the message. *See Mid South Bldg. Supply of Maryland v. Guardian Door and Window*, 156 Md. App. 445 (2004)(recognizing that both the federal Lanham Act and Maryland's trademark law are based on the same theory and examine whether there is a likelihood of confusion). SB 711 furthers this goal by providing

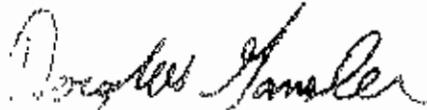
The Honorable Martin J. O'Malley
April 16, 2008
Page 2

that a person may not use a false, deceptive, or misleading representation that a performing group is affiliated with a recording group. Therefore, SB 711 furthers the State's interest in reducing the likelihood that consumers will be misled or confused about the group they are seeing.

Moreover, SB 711 explicitly exempts persons who have a legal entitlement to use the recording group's name such as a valid trademark, and the prohibition does not apply to a performance identified as a tribute or salute to, or a parody or satire of the recording group, provided the identification does not confuse the public. These exemptions narrow the bill and substantially reduce the danger that a broad range of protected conduct will be prohibited. See *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 796 (1984). "There must be a realistic danger that the statute itself will significantly compromise recognized first amendment protections..." *Eanes*, 318 Md. at 465. Such a danger is not present with SB 711, thus the bill is constitutional.

In accordance with the foregoing, we hereby approve the constitutionality and legal sufficiency of Senate Bill 711

Very truly yours,



Douglas F. Gansler
Attorney General

DFG/SB/kk

cc: The Honorable Mike Lenett
The Honorable Dennis C. Schnepfe
Joseph Bryce
Karl Aro