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Lip Sync Disclosure Legislation

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52. *Id. See* Gilliam v. American Broadcasting Co., Inc., 538 F.2d 14 (2d. Cir. 1976).

53. ENT. LITIG. REP., *supra* note 13. These rights would also potentially modify the first-sale doctrine 17 U.S.C. § 109 (West 1977 & Supp. 1992).

54. ENT. LITIG. REP., *supra* note 13.

55. S. 2256, *supra* note 4, at § 3(c)(1)(D)(ii).

56. *See* Kwall, *supra* note 51, at 24 n.89.

57. *See generally* S. 2256, *supra* note 4, at § 3.

58. 15 U.S.C.A. § 1125(a)(1) (1988).

59. Gilliam, 538 F.2d 14. *See also* King v. Innovation Books, 976 F.2d 824 (2nd Cir. 1992) (the court found that, under the Lanham Act, the author's name and reputation were his major assets which he had the right to preserve from wrongful attribution).

60. Gilliam, 538 F.2d at 24.

61. *Id.* at 18.

62. *Id.* at 25.

63. *Id.* at 19.

64. Follett v. New American Library Inc., 497 F. Supp. 304, 313 (S.D.N.Y. 1980).

65. The label would denote: THIS FILM IS NOT THE VERSION ORIGINALLY RELEASED. Followed by a brief description of the number of minutes edited or the colorization process used. S. 2256, *supra* note 4, at § 3(6)(a). If necessary, a subsequent line will inform the viewer: The director and cinematographer object to this alteration because it removes visual information [or] . . . eliminates the black and white photography and changes the photographic images of the actors. *Id.* at § 3(c)(2)(B). *See also* Senate Bill Would Amend Lanham Act to Protect Moral Rights of Film Artists, BNA Wash. Insider, Feb. 27, 1992, at A-13.

66. S. 2256, *supra* note 4, at § 3(c)(1)(B) and § 3(c)(2)(B).

67. *Id.* at § 3(c)(1)(D)(ii) (artist's failure to respond relieves distributor of liability).

68. *Id.* at § 3(c)(4).

69. *Id.* at §3 (c)(1)(C)(i-ii).

70. John Harding, *Missing the Big Picture: How Video Cramps Film's Style*, THE WASH. POST, May 17, 1992, at G1.

71. *Id.*

72. *Id.*

73. 138 CONG. REC. S2215 (daily ed. Feb. 25, 1992).

74. *Id.*

75. David J. Fox, *Power Play for Artists' Rights*, L.A. TIMES, Dec. 6, 1991, at F1.

76. Randall M. Sukow, *DGA Pans Altered States of Movies*, BROADCASTING, March 9, 1992, at 14 (*quoting* film director Martin Scorsese testimony before the House Copyright Subcommittee, March 5, 1992).

77. *Id.* Echoing Scorsese's belief is director and producer George Lucas who stated, "It's not going to be too long in the future before an actor, who has become unacceptable for . . . politics or marketability, might be electronically replaced by another actor." Fox, *supra* note 75.

78. Members of the Committee for America's Copyright include, among others: the Motion Picture Association of America, Paramount Communications, the Recording Industry Association of America, Turner Broadcasting, and the American Film Market Association. Fox, *supra* note 75.

79. Harding, *supra* note 70.

80. David Kelly, Film, *Media Coalition Charges Pic Labeling is 'Prior Restraint'*, BPI ENTERTAINMENT NEWS WIRE, Sept. 18, 1991. The CACC is wary of a film artist's "personal preferences" that could delay or thwart the availability of film in video form, thus delaying the economic benefit to the copyright holder. *Id.*

81. *VSDA Notes Objections to Proposal to Label Copies of 'Altered Films'*, BILLBOARD, March 21, 1992, at 66.

82. Harding, *supra* note 70.

83. *Film Labeling Legislation is Debated Before Senate Subcommittee*, BNA DAILY REPORT FOR EXECUTIVES, Sept. 23, 1992, at d37.

84. Marshall, *supra* note 39.

85. Kelly, *supra* note 80.

86. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952).

87. Under the terms of the Foreign Agents Registration Act (FARA)(22 U.S.C. §§ 611-621 (1988)), any agent who intended to transmit films, among other documents, for public viewing in the United States, was required to register the films with the U.S. Attorney General and each film was to bear a label which included the term "political propaganda." The Supreme Court found that the labeling requirement under FARA placed no excessive burden on protected speech nor did it limit the public's access to the films, but the labeling merely "required the disseminators of such material to make additional disclosures that would better enable the public to evaluate the import of the propaganda." Meese v. Keene, 481 U.S. 465, 480 (1987).

88. Meese v. Keene, 481 U.S. at 475.

89. *See* Interstate Circuit v. Dallas 390 U.S. 676 (1963) (Court held a prior restraint was created by a system where an administration board classified films as "suitable for young people" or "not suitable for young people"). *See also* Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963) (Court held as a prior restraint a systems whereby a commission reviewed "material tending to corrupt youth").

90. David Kelly, *Bush Opposes Film Labeling Bill*, THE HOLLYWOOD REPORTER, March 6, 1992 (*citing* letter dated March 5, 1992 from Wendell Willkie II, general counsel of U.S. Commerce Department).

91. *Id.* Several members of Congress share the Bush Administration's concern that the Disclosure Bill is not in the interest of the public but merely in the interest of Hollywood's players.

92. Sukow, *supra* note 76; commentary of Howard Sherman, Senior V.P., National Association of Broadcasters.

93. S. 2256, *supra* note 4, at § 3(c)(1)(F)(i).

94. *Id.* at § 3(c)(1)(D)(ii).

95. *Id.* at § 3(c)(2)(B).

96. *Id.* at § 3(c)(1)(B)(i) (requires distributors to make a good faith effort to contact the artist); *Id.* at § 3(c)(2)(A) (injunctive relief is possible for an artist who believes he is likely to be damaged by a film released in violation of the Act).

97. VIDEO WEEK, *Supra* note 38.

Lip Sync Disclosure Legislation

INTRODUCTION

On January 1, 1993, New Hampshire will be the first state to have a lip sync law.[1] The statute requires disclosure to consumers whenever a vocalist is lip syncing to prerecorded music rather than singing the vocals live.[2] This disclosure is to be made by: 1) concert promoters; 2) venues, from the largest stadium to the smallest club, and 3) ticket agents.[3]

Similar bills have been submitted in other states, despite criticism from those in the industry. Some argue that because satisfied consumers outnumber the unhappy consumers, the laws are unnecessary. Others complain that some of the bills, which cover prerecorded instrumental performances in addition to vocal performances, are both vague and overly broad and fail to take into account technological advances in musical instruments.

This update describes the circumstances which led to the drafting of lip sync legislation. It then analyzes the New Hampshire law and the bills of other states and the possible impact such laws may have on all the affected parties.

BACKGROUND

The focal point of the lip sync controversy was the group Milli Vanilli. Rob Pilatus and Fab Morvan, who allegedly fronted the pop music group, appeared on album covers, in music videos and at live concert performances. It was rumored that they lip synced their vocals during live concerts. On November 15, 1990, Pilatus admitted that not only did Milli Vanilli lip sync their vocals in concert, but they did not even record the vocals heard on their recordings.[4] After their confession, the duo was stripped of its Grammy Award for Best New Artist and subsequently became the target of numerous class action suits.[5]

Other performers, such as Janet Jackson, New Kids on the Block, Madonna and Paula Abdul, were accused of lip syncing vocals in concert. Some admitted they lip synced.[6] Others didn't have to. During a concert, the lead singer for the group the Perfect Gentleman was hit in the face with a pie and dropped his microphone while the lead vocal was still being heard by the audience.[7]

Lawmakers throughout the country responded by introducing bills which required promoters, venues and ticket agents to disclose when the vocals performed at live concerts were in fact prerecorded.[8] The bills, termed by one legislator "Milli Vanilli" bills,[9] were introduced at or around the time of the confession by Pilatus and Morvan. Lawmakers were motivated by two concerns: 1) consumer protection and 2) complaints from musicians.

Many state representatives equated lip syncing with consumer fraud. As Massachusetts state representative Kevin Poirer put it, "If you pay real money for a concert, you ought to get real music in return."[10] Legislators said that even if complaints were minimal, public policy demands disclosure. "It's not censorship," said New Jersey state assemblyman Neil M. Cohen, "All [this legislation] does is inform the public."[11]

However, concert promoters said that concertgoers were happy with the status quo. Carl Freed, executive director of the North American Concert Promoters Association, asked, "If [these laws] are to protect the consumers, why haven't I heard from any?"[12] Critics of the bill said that lip syncing is justified because it allows contemporary performers to do complex dance routines on stage.[13] Freed estimated that approximately 90% of all dance, pop and rap acts rely heavily on prerecorded music tracks.[14] According to Freed, fewer rock and country acts use prerecorded tracks, while jazz, blues and bluegrass performers, who do not have complex dance routines, rarely use prerecorded music.[15]

Such estimates bother musicians. Some musicians are upset with the lack of artistry involved in lip syncing at concerts. George Harrison, former member of the Beatles, said that performers who lip sync in concert are performing "cheap music" that has "certainly lost a lot of human feel."[16] Musicians are worried that jobs are disappearing, with tapes replacing people.[17] Accordingly, seven state chapters of the American Federation of Musicians support lip sync disclosure legislation.[18]

Currently, New Hampshire is the only state to pass such a law. In most states, the proposed legislation has stalled in various committees.[19] In California and Pennsylvania, bills have passed in one house of the legislature, and then stalled.[20]

LEGISLATIVE PROVISIONS

In substance, the proposed lip sync disclosure bills are similar. The New Hampshire bill is the only one to become law, and an analysis of it provides a useful tool for comparison to the other bills.

A. The New Hampshire Statute

The New Hampshire bill was signed into law on May 13, 1992 and will take effect at the beginning of 1993.[21] It regulates the use of prerecorded vocals at "any musical performance, show, concert or other cultural event which includes vocal performances."[22] It imposes a duty upon concert promoters,[23] venues,[24] and ticket agents[25] to disclose to the public that the lead vocals will be lip synced.

The statute places most of the burden upon the concert promoter. The promoter has the duty to disclose when he knows that all or a portion of a performer's vocals are prerecorded.[26] The promoter then must give written notification to the venue and all ticket agents selling tickets to the performance.[27] The venue and all ticket agents must then disclose the use of prerecorded vocals to the public. The venue must "print on the face of the ticket" a conspicuous disclosure.[28] The venue also must provide prominent disclosures in all of its advertising.[29] Similarly, the ticket agent must have disclosure notices: 1) for walk up sales, with signs placed in prominent places, indicating the use of prerecorded vocals; and 2) for phone sales, with salespeople providing a verbal disclosure before accepting a ticket order.[30] Such disclosures would read: The lead vocals will not actually be sung by [lead singer] during the show.[31]

Violation of the statute is a misdemeanor.[32] New Hampshire's maximum penalty for misdemeanor convictions is a $1000 fine for individuals and a $20,000 fine for corporations or unincorporated associations.[33]

B. Bills from other states

The bills from other states have provisions that either clarify vague portions of the New Hampshire statute or broaden the scope of its protection. For example, the New Hampshire law states that if a concert promoter "knows" that a performer lip syncs, then he must tell this to the venue and the ticket agents.[34] The statute fails to define what the term

"knows" means—it could be a reasonable suspicion, or it could mean the promoter has actual knowledge. By contrast, the Illinois and Massachusetts bills would require the promoter to inquire if the performer is using prerecorded vocals.[35] In Illinois, the inquiry must take place prior to the sale of tickets, whereas Massachusetts requires an inquiry as soon as reasonably possible.[36] The Massachusetts bill also relieves the promoter from any liability if the promoter inquires and is given either false or mistaken information from the performer.[37] Legislation proposed in California extinguishes promoter liability if the promoter makes a good faith effort to determine if a performer is lip syncing.[38]

Many state bills are broader in scope than the New Hampshire law. Whereas New Hampshire's statute applies only to vocals, some bills attempt to regulate prerecorded instrumental performances too. For example, bills in Massachusetts, Michigan, Illinois and California would require promoters, venues and ticket agents to disclose when a performer is using tapes instead of playing its instruments.[39] California's bill recognizes the increased use of computerized instruments in pop music, and allows them to be used in live concerts without requiring disclosure to the public.[40]

The New Hampshire law only requires disclosure when all lead vocals are prerecorded.[41] By contrast, most other bills require disclosure when only part of the performance is lip synced. However, the Massachusetts bill will allow for limited use of prerecorded music. The bill requires disclosure if a performer uses more than five minutes of prerecorded music.[42]

The proposed penalties are similar, with two exceptions. The Illinois and Michigan bills both allow for a maximum fine of $50,000 for promoters.[43] The Michigan bill classifies a violation as a felony.[44]

IMPACT

The impact of the New Hampshire law will be slight, unless it leads larger states like California and New York to pass their bills. This minimal impact may be fortunate.

The bills were designed to protect consumers. However, the bills may not be necessary because: 1) consumers may be able to go to court if they feel they have been unlawfully deceived; and 2) consumers may not be concerned about lip syncing. Musicians were also supposed to be protected by the bills. Yet most bills fail to acknowledge technological advances in music. Many sound recordings employ complex electronics and computers, but the bills are not clear as to whether their use in concert would require disclosure to consumers. Furthermore, the bills do not recognize practical, non-deceptive reasons for using prerecorded music. Meanwhile, the burden of disclosing is put on the party who has the least to do with lip syncing—the promoter.

A. Consumers

Despite their good intentions, lip sync laws may be unnecessary because of the threat of litigation by consumers against performers. In Illinois, a settlement was reached in a class action lawsuit against Milli Vanilli.[45] The plaintiffs sued Milli Vanilli and Arista Records, basing their claims under Illinois consumer protection and deceptive trade practice laws.[46] The class consisted of all persons nationwide who bought Milli Vanilli recording, merchandise or concert tickets. The settlement required Arista Records to send booklets with rebate coupons to record stores, for purposes of consumer availability. The consumer had to send in the coupon along with a proof of purchase of a Milli Vanilli item to receive a rebate on her next purchase of a cassette or compact disc.[47]

The threat of future lawsuits and large settlements may deter performers from lip syncing. Indeed, none of the bills precludes a consumer from filing a civil suit against a performer.[48] But there is no guarantee that consumers will ultimately prevail in such litigation.[49] Thus, disclosure on tickets and in advertisements provides a more consistent method of public information. Criminal statutes, like those discussed above, may provide a more effective means of deterring lip syncing.

On the other hand, some argue that the public prefers seeing the performers dance just like they do on MTV.[50] As entertainment reporter David Handelman points out "[w]hat this lofty debate ignores is the fact few consumers would pay and hear Madonna sing lousily."[51] If consumers do not want to see a performer lip sync, they will not buy tickets the next time the performer comes to town.[52] If so, the disclosure on a ticket will be as effective as the surgeon general's warning on a pack of cigarettes.

However, lip sync laws will inform the consumers that do care, even if such consumers are in the minority. The law does not overburden the promoter, who must only make a minimal inquiry. Furthermore, the cost of including the disclosure on tickets and advertisements is insignificant.

B. Musicians

Musicians now benefit from advanced technology, which allows them to use computers and electronics to simulate the sounds of familiar instruments.[53] These devices are used on many popular recordings. The use of such electronics has been seen by some as analogous to the evolution from typewriter to word processor.[54] Yet, with one exception, the bills do not indicate if the use of a preprogrammed computerized instrument represents prerecorded music, therefore requiring disclosure if used on stage.

Only the California bill addresses technological advances. It does not require disclosure of "[m]usic

which is played by a performer during a live performance on any digitally recorded or synthesized prerecorded musical instrument, equipment, or other device."[55] The California bill recognizes that if a recording utilizes a computer program or synthesized instrument, a consumer hearing that same program or synthesizer in concert is not being deceived.

Bills that do not recognize technology may actually prevent some performers from touring. These bills need to better define what constitutes an unauthorized use of prerecorded music to protect these artists. For example, the group the Rascals used horns on some of their records, although none of their members play horns. Because the Rascals cannot afford to take a horn section on the road, they utilize a synthesizer to play the horn parts.[56] Keith Beccia, the group's manager, said that the group would lose money if the disclosure laws forced them to hire a horn section.[57] The only other alternatives would be to avoid states that had disclosure laws or to stop playing the songs with horn parts.[58]

If the point of the lip sync bills is to insure that the audience hears the artist perform, groups like the Rascals should be exempted from disclosure. A disclosure on a ticket indicates that someone on stage is faking their performance, and this may deter consumers from going to see a band such as the Rascals. Only California's bill would exempt the Rascals from disclosure. The other bills that cover instrumental performances must clarify when the use of prerecorded music is acceptable. The bills should guarantee that when a performer is on stage, he is performing his part live. Otherwise, bands like the Rascals, who do play their instruments on stage, will be penalized for not being able to afford extra musicians.

C. Promoters

Promoters are now at risk if a performer lip syncs and the promoter failed to disclose this to consumers. Some feel this is wrong. Promoter Carl Freed points out that "[t]he promoter has minimal, if any, creative input into a performance" yet promoters stand to be punished.[59] While this is true, the only alternatives to having the promoters police performers is to have the state do it (which would be time consuming) or rely on consumer lawsuits (which are even more costly and time consuming). Because such bills do not place the burden on the true wrongdoer—the performer—they should, like the Massachusetts and California bills, allow the promoter to avoid liability when he or she makes a reasonable inquiry.[60]

Lip sync disclosure bills could further ease the burden on promoters by defining prerecorded music and then setting limits on how much can be legally used. Only the Massachusetts bill draws a line, requiring disclosure if more than five minutes of prerecorded music is used.[61] And only California adequately defines prerecorded music.[62] Without such distinctions a promoter will have difficulty following the law. If a performer uses a synthesizer in concert, a promoter will not know if its use amounts to prerecorded music which must be disclosed. Furthermore, if the performer uses a recording for only a minute or two, a promoter may have to disclose and then risk decreased ticket sales due to concerned consumers. If the promoter has the burden to inquire, notify and disclose, the laws need to be more narrowly tailored to establish exactly when a promoter should be liable.

CONCLUSION

Milli Vanilli put lip syncing and related legislation in the spotlight. However, there is no evidence that increased public attention has led to a decrease in performers using prerecorded music instead of their own talents. The bills drafted to prevent lip syncing have put the burden of disclosure on concert promoters, rather than performers. The promoter must find out if a performer is lip syncing, then notify the concert venue and ticket agents. Then the promoter, venue and ticket agents must conspicuously disclose to the public that the performer will be lip syncing. New Hampshire is the first state to sign such a bill into law.

New Hampshire's act may revive dormant lip sync bills in other states. If this does happen, lawmakers must consider whether consumers want and need such protection, or if alternatives such as litigation will suffice. Lawmakers should also clarify what a deceptive use of prerecorded music is, so that musicians who do not intend to deceive consumers will not be prevented from touring. As it stands, the New Hampshire law is not narrowly tailored, and may leave both consumers and musicians unprotected.

Michael C. Bennett

1. H.B. 1430, 152nd Leg., 1992 New Hampshire Law.
2. *Id.*
3. *Id.*
4. Richard Harrington, *Pop Duo Milli Vanilli Didn't Sing Hit Album; Grammy Winners Lip-synced their Act,* WASH. POST, Nov. 16, 1990, at A1.
5. *See* Siegel v. Pilatus, No. 90 Ch 11439 (Cir. Ct., Cook County 1991).
6. *Milli Vanilli Bills Proposed in Several States,* ENT. LITIG. REP., Jan. 28, 1991.
7. The Perfect Gentlemen are a teenage vocal act on Sony Records. *See* Salvatore Caputo, *Forget My Lips: This is a Pop Show, Live Music Gets Unplugged from Concerts,* ARIZ. REPUBLIC, Oct. 30, 1990, at B4.
8. Jeff Jolson-Coburn, *Concert Business Draws Crowd of Regulatory-minded Lawyers,* THE HOLLYWOOD REP., July 17, 1991.
9. Spencer Hunt, GANNETT NEWS SERVICE, Mar. 6, 1991. (Illinois Representative John Matijevich referred to a proposed lip sync law as a "Milli Vanilli bill.")
10. *See supra,* note 6.
11. Edna Gundersen, *Style over Sound: Pop Stars Take Canned Music on Tour,* USA TODAY, May 25, 1990, at 1D.
12. David Handelman, *It's Lip-Synced, But is it Fraud?,* ST. LOUIS POST-DISPATCH, Sept. 4, 1990, at 4D.
13. Gundersen, *supra* note 11.
14. Handelman, *supra* note 12.