

1 **TRUTH IN MUSIC**

2 2009 GENERAL SESSION

3 STATE OF UTAH

4 **Chief Sponsor: Gregory H. Hughes**

5 Senate Sponsor: Howard A. Stephenson

7 **LONG TITLE**

8 **General Description:**

9 This bill prohibits certain deceptive advertising concerning a live musical performance.

10 **Highlighted Provisions:**

11 This bill:

- 12 ▶ defines terms;
- 13 ▶ prohibits the use of the name of a recording group to advertise the performance of a
- 14 performing group if it would be false, deceptive, or otherwise misleading because it
- 15 suggests an affiliation with the recording group;
- 16 ▶ provides exceptions;
- 17 ▶ provides for enforcement of a violation; and
- 18 ▶ makes technical changes.

19 **Monies Appropriated in this Bill:**

20 None

21 **Other Special Clauses:**

22 None

23 **Utah Code Sections Affected:**

24 AMENDS:

25 **13-11a-2**, as enacted by Laws of Utah 1989, Chapter 205

26 **13-11a-3**, as last amended by Laws of Utah 2007, Chapters 138 and 306

27 ENACTS:

28 **13-11a-6**, Utah Code Annotated 1953

29

30 *Be it enacted by the Legislature of the state of Utah:*

31 Section 1. Section **13-11a-2** is amended to read:

32 **13-11a-2. Definitions.**

33 As used in this chapter:

34 (1) "Advertisement" means any written, oral, or graphic statement or representation
35 made by a supplier in connection with the solicitation of business. It includes, but is not
36 limited to, communication by noncable television systems, radio, printed brochures,
37 newspapers, leaflets, flyers, circulars, billboards, banners, or signs. It does not include any
38 oral, in person, representation made by a sales representative to a prospective purchaser.

39 (2) To "clearly and conspicuously disclose" means:

40 (a) in the print media:

41 (i) to state in typeface that is sufficiently bold to be obviously seen;

42 (ii) to state in type size of at least 10 point type for a 14" x 23" document, and, in
43 larger documents, of a type size of proportionately the same size; and

44 (iii) to place in the text so as to be obviously seen;

45 (b) in radio advertising, to verbally state in the same volume as that used in the
46 advertisement;

47 (c) in television advertising, the method for print media or radio advertising is
48 acceptable unless contrary to other governing laws.

49 (3) "Generic good" means a product which is offered for sale under its common
50 descriptive name rather than under a trademark, trade name, brand name, house brand, or
51 other distinguishing appellation.

52 (4) "Goods and services" means all items which may be the subject of a sales
53 transaction.

54 (5) "Nondiscounted price" means a price at which the goods or services are offered at
55 the time of the price assessment without a temporary store reduction in price.

56 (6) "Performing group" means a vocal or instrumental group that performs live music
57 for a paying audience.

58 ~~[(6)]~~ (7) "Person" means an individual, including a consumer, corporation,
59 government, or governmental subdivision or agency, business trust, estate, trust, partnership,
60 unincorporated association, two or more of any of the foregoing having a joint or common
61 interest, or any other legal or commercial entity.

62 ~~[(7)]~~ (8) "Price assessment" means the determination of the prices underlying a price
63 comparison.

64 ~~[(8)]~~ (9) "Price assessor" means a firm or individual that determines the prices,
65 including the reference prices, underlying the price comparison, or who makes the price
66 comparison.

67 ~~[(9)]~~ (10) "Price comparison" means any express representation that a specific savings,
68 reduction, or discount exists or will exist between the supplier's advertised price and another
69 specific price. A representation which does not reasonably imply a comparison to identifiable
70 prices or items does not express a price comparison. Language constituting mere sales
71 "puffing" is not prohibited by this chapter.

72 ~~[(10)]~~ (11) "Product area" means the geographical area in which the prospective
73 purchasers to whom the advertisement is aimed could reasonably be expected to seek the
74 goods or services in question.

75 (12) "Recording group" means a vocal or instrumental group at least one of the
76 members of which has released a commercial sound recording under the group's name, if the
77 member has a legal right to use of the group's name.

78 ~~[(11)]~~ (13) "Reference price" means a higher price to which a supplier compares a
79 lower price to indicate that a reduction in price exists or will exist.

80 ~~[(12)]~~ (14) "Regular price" means the price at which a supplier has recently offered the
81 goods or services for sale in good faith in the regular course of business. Every price
82 represented in an advertisement is considered a regular price unless it is specifically
83 represented as a price other than a regular price, such as a discount price or a manufacturer's
84 suggested price. It is prima facie evidence that a price is other than a regular price when it was
85 not offered as the nondiscount price of the goods or services for the 15 days immediately

86 preceding an advertisement of the price, and the price change during the 15 day period was
87 not due to price changes inherent in the pricing of seasonal or perishable goods, due to
88 changes in cost of the goods or services to the supplier, or due to pricing changes made to
89 match a competitor's price.

90 ~~[(13)]~~ (15) "Sales transaction" means a sale, lease, assignment, award by chance, or
91 other written or oral transfer or disposition of goods, services, or other property, both tangible
92 and intangible (except securities and insurance), to a person or business, or a solicitation or
93 offer by a supplier with respect to any of these transfers or dispositions. It includes any offer or
94 solicitation, any agreement, and any performance of an agreement with respect to any of these
95 transfers or dispositions.

96 (16) "Sound recording" means a work resulting from the fixation on a material object,
97 such as a disk, tape, or phono-record, of musical or instrumental sounds.

98 ~~[(14)]~~ (17) "Supplier" means a seller, lessor, assignor, offeror, broker, or other person
99 who regularly solicits, engages in, or enforces sales transactions, whether or not he deals
100 directly with the purchaser.

101 Section 2. Section **13-11a-3** is amended to read:

102 **13-11a-3. Deceptive trade practices enumerated -- Records to be kept --**
103 **Defenses.**

104 (1) Deceptive trade practices occur when, in the course of a person's business,
105 vocation, or occupation that person:

106 (a) passes off goods or services as those of another;

107 (b) causes likelihood of confusion or of misunderstanding as to the source,
108 sponsorship, approval, or certification of goods or services;

109 (c) causes likelihood of confusion or of misunderstanding as to affiliation, connection,
110 association with, or certification by another;

111 (d) uses deceptive representations or designations of geographic origin in connection
112 with goods or services;

113 (e) represents that goods or services have sponsorship, approval, characteristics,

114 ingredients, uses, benefits, or qualities that they do not have or that a person has a
115 sponsorship, approval, status, affiliation, or connection that the person does not have;
116 (f) represents that goods are original or new if they are deteriorated, altered,
117 reconditioned, reclaimed, used, or second-hand;
118 (g) represents that goods or services are of a particular standard, quality, or grade, or
119 that goods are of a particular style or model, if they are of another;
120 (h) disparages the goods, services, or business of another by false or misleading
121 representation of fact;
122 (i) advertises goods or services or the price of goods and services with intent not to sell
123 them as advertised;
124 (j) advertises goods or services with intent not to supply a reasonable expectable
125 public demand, unless:
126 (i) the advertisement clearly and conspicuously discloses a limitation of quantity; or
127 (ii) the person issues rainchecks for the advertised goods or services;
128 (k) makes false or misleading statements of fact concerning the reasons for, existence
129 of, or amounts of price reductions;
130 (l) makes a comparison between the person's own sale or discount price and a
131 competitor's nondiscounted price without clearly and conspicuously disclosing that fact;
132 (m) without clearly and conspicuously disclosing the date of the price assessment
133 makes a price comparison with the goods of another based upon a price assessment performed
134 more than seven days prior to the date of the advertisement or uses in an advertisement the
135 results of a price assessment performed more than seven days prior to the date of the
136 advertisement without disclosing, in a print ad, the date of the price assessment, or in a radio
137 or television ad, the time frame of the price assessment;
138 (n) advertises or uses in a price assessment or comparison a price that is not that
139 person's own unless this fact is:
140 (i) clearly and conspicuously disclosed; and
141 (ii) the representation of the price is accurate;

142 (o) represents as independent an audit, accounting, price assessment, or comparison of
143 prices of goods or services, when the audit, accounting, price assessment, or comparison is not
144 independent;

145 (p) represents, in an advertisement of a reduction from the supplier's own prices, that
146 the reduction is from a regular price, when the former price is not a regular price as defined in
147 Subsection 13-11a-2[(12)](14);

148 (q) advertises a price comparison or the result of a price assessment or comparison that
149 uses, in any way, an identified competitor's price without clearly and conspicuously disclosing
150 the identity of the price assessor and any relationship between the price assessor and the
151 supplier;

152 (r) makes a price comparison between a category of the supplier's goods and the same
153 category of the goods of another, without randomly selecting the individual goods or services
154 upon whose prices the comparison is based;

155 (s) makes a comparison between similar but nonidentical goods or services unless the
156 nonidentical goods or services are of essentially similar quality to the advertised goods or
157 services or the dissimilar aspects are clearly and conspicuously disclosed in the
158 advertisements; or

159 (t) engages in any other conduct which similarly creates a likelihood of confusion or of
160 misunderstanding.

161 (2) (a) For purposes of Subsection (1)(i), if a specific advertised price will be in effect
162 for less than one week from the advertisement date, the advertisement must clearly and
163 conspicuously disclose the specific time period during which the price will be in effect.

164 (b) For purposes of Subsection (1)(n), with respect to the price of a competitor, the
165 price must be one at which the competitor offered the goods or services for sale in the product
166 area at the time of the price assessment, and must not be an isolated price.

167 (c) For purposes of Subsection (1)(o), an audit, accounting, price assessment, or
168 comparison shall be independent if the price assessor randomly selects the goods to be
169 compared, and the time and place of the comparison, and no agreement or understanding

170 exists between the supplier and the price assessor that could cause the results of the assessment
171 to be fraudulent or deceptive. The independence of an audit, accounting, or price comparison
172 is not invalidated merely because the advertiser pays a fee for the audit, accounting, or price
173 comparison, but is invalidated if the audit, accounting, or price comparison is done by a full or
174 part-time employee of the advertiser.

175 (d) Examples of a disclosure that complies with Subsection (1)(q) are:

176 (i) "Price assessment performed by Store Z";

177 (ii) "Price assessment performed by a certified public accounting firm"; or

178 (iii) "Price assessment performed by employee of Store Y".

179 (e) For the purposes of Subsection (1)(r), goods or services are randomly selected
180 when the supplier has no advance knowledge of what goods and services will be surveyed by
181 the price assessor, and when the supplier certifies its lack of advance knowledge by an
182 affidavit to be retained in the supplier's records for one year.

183 (f) (i) It is prima facie evidence of compliance with Subsection (1)(s) if:

184 (A) the goods compared are substantially the same size; and

185 (B) the goods compared are of substantially the same quality, which may include
186 similar models of competing brands of goods, or goods made of substantially the same
187 materials and made with substantially the same workmanship.

188 (ii) It is prima facie evidence of a deceptive comparison under this section when the
189 prices of brand name goods and generic goods are compared.

190 (3) Any supplier who makes a comparison with a competitor's price in advertising
191 shall maintain for a period of one year records that disclose the factual basis for such price
192 comparisons and from which the validity of such claim can be established.

193 (4) It is a defense to any claim of false or deceptive price representations under this
194 chapter that a person:

195 (a) has no knowledge that the represented price is not genuine; and

196 (b) has made reasonable efforts to determine whether the represented price is genuine.

197 (5) Subsections (1)(m) and (q) do not apply to price comparisons made in catalogs in

198 which a supplier compares the price of a single item of its goods or services with those of
199 another.

200 (6) To prevail in an action under this chapter, a complainant need not prove
201 competition between the parties or actual confusion or misunderstanding.

202 (7) This chapter does not affect unfair trade practices otherwise actionable at common
203 law or under other statutes of this state.

204 Section 3. Section **13-11a-6** is enacted to read:

205 **13-11a-6. Truth in music advertising -- Exemptions -- Penalties.**

206 (1) A person may not advertise or conduct a live musical performance by a performing
207 group by using a false, deceptive, or otherwise misleading affiliation between a performing
208 group and a recording group of the same name.

209 (2) This section does not apply to:

210 (a) a performing group that is the registrant and owner of a registered federal service
211 mark for the group name;

212 (b) a performance by a performing group that is clearly identified in all advertising
213 and promotional materials as a salute or tribute;

214 (c) a performing group at least one member of which was a member of the recording
215 group and has a legal right to use of the group name;

216 (d) the advertising does not relate to a live musical performance occurring in this state;

217 or

218 (e) a performance authorized in writing by the recording group.

219 (3) (a) This section may be enforced by bringing an action in the district court for any
220 county in which the live musical performance is advertised or conducted.

221 (b) A party injured by a violation of this section may obtain an injunction and recover
222 actual damages.

223 (c) The prevailing party in an action under Subsection (3)(a) may be awarded costs
224 and attorney fees.