

MICROFILM DIVIDER

OMB/RECORDS MANAGEMENT DIVISION

SFN 2053 (2/85) 5M



ROLL NUMBER

DESCRIPTION

1284

2005 HOUSE JUDICIARY

HB 1284

2005 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1284

House Judiciary Committee

☐ Conference Committee

Hearing Date 1/19/05

Tape Number	Side A	Side B	Meter #
1	xx		0-28.8
2		xx	18.2-20.7

Committee Clerk Signature



Minutes: 13 members present, 1 member absent (Rep. Onstad).

Chairman DeKrey: We will open the hearing on HB 1284.

Rep. Wrangham: Explained the bill. Support of bill.

Chairman DeKrey: Thank you. Further testimony in support of HB 1284.

Sen. Traynor: I am in support of HB 1284. It is a truth in performance bill. If you buy a ticket to a performance, you're entitled to have the real thing there to see and to hear.

Chairman DeKrey: Thank you. Further testimony in support of HB 1284.

Rick LeFleur: We are trying to clarify as to who you would see when you go to a concert. This has a passion of mine, trying to help correct. Having been in the music industry, I have nothing to do with booking any of these performances. I'm just a consumer, I attend them, and I have seen firsthand, where you go to the concert and there might be a 35 year old singing a song that was a #1 hit forty years ago. This is to correct that.

Representative Klemin: Does the group get permission from somebody in the original group, do you know what they do as far as getting approval before they make those performance, relating to trademark infringement, etc.

Rick LeFleur: It is all over the spectrum. Many of the groups are legitimate and they do have members. But there are groups where the name of the group is owned by someone that was never in the group, and that is where the problem arises. Some of the groups can have as many as 7 or 8 groups traveling the country that use that name, but do not have anyone that was a part of the original group.

Representative Kingsbury: How are these rights transferred, to they have a franchise type thing, do they buy rights, or how do they hang onto these names. Is it just passed down, is there some contract.

Rick LeFleur: I am not aware, it is all over the spectrum. I think you can find examples of where they get a percentage of the gate for using the name. That's fine. We aren't here to address that. I'm not saying that we don't want these groups to come into our state and perform. We are saying that if they come in and bill themselves as the original group, or your expectations through advertising is that who you are going to see. They should really have a disclaimer on there, so you are aware of who you are going to see. Giving the consumer, up front, the knowledge, of who will be performing.

Representative Koppelman: Page 2, item 3d in the bill, that you're not violating this act if the performance is expressly authorized, in the advertising, by the recording individual or group. So does that mean.

Rick LeFleur: That was the effort in the amendment, to try to clarify that portion of it. So that you don't have a situation where there can be some negotiation that removes the responsibilities to notify the general public.

Representative Zaiser: I am too concerned with this issue. You have been to concerts where this has been a problem.

Rick LeFleur: Yes, I have been to a few. In one case it was not in ND; however, I had a discussion with the representative in ND at the State Fair. They were talking about coming to Branson, MO. I have been to Branson, MO, and I have been to the Platter's show at Branson, and there isn't one original member of the Platters. My discussion with the person at the State Fair, well is this the original Platters, and he said yes. I told him that I had been there and there wasn't an original person from the original group. We are trying to address what the consumer themselves, expectations should be. This is only to protect the consumer.

Representative Zaiser: I have been involved in booking groups. I would even like to make this a little more strict, because I think the consumer, often is, burned on this situation. I share your concern. Have we gone far enough.

Rick LeFleur: I appreciate that, I would love to see us correct all of the misgivings. Our effort here today, was to try to keep it as simple as possible and address it just from the consumer's standpoint. Any amendment that would be offered to tighten the bill to the betterment, I am all for it.

Representative Delmore: What is the penalty for doing this.

Chairman DeKrey: It is a Class B misdemeanor.

Representative Klemin: I've got a question about line 21 on this bill, the use of the word "unaffiliated". We look at section 1 of the bill, line 8, a person may not advertise a live musical performance or production through the use...or misleading affiliation. That's the part that says you can't do this. Then we go down the line 17, the advertisement does not violate subsection 1 that I just referred to, if going down to line 20, the live musical performance or production is identified...unaffiliated with the recording individual or group. It seems to me that it is a little inconsistent to say that you are violating this law if it is a misleading affiliation, but then to say on line 21, that you're not violating the law if they are unaffiliated with the group. Am I misreading that.

Rick LeFleur: I have read this extensively, I can see some ambiguity in there. I know that often times you will see a nationally known group sing a song of another nationally known group right at a performance, as long as they don't say that they are affiliated or they have the performing rights, they can still perform the songs. Any clarification to the bill that would help, would be welcome.

Representative Klemin: It's the advertising that's the deception. It's not the singing of someone else's songs during the performance.

Rick LeFleur: Right, that would be the thing. This is not intended to prevent that at all. Many artists sing many other artists' songs. The idea of this bill is to keep someone from advertising themselves as someone they never were.

Rep. Wrangham: I will address Rep. Koppelman's question, that was on d. Again the purpose of this bill is not to stifle the expansion or use of things, but to avoid deceptive advertising. I believe that this sentence is intended to do, is to say that if you have an agreement, written

agreement or something, with the group stating that you can do this, then you would not be in violation of the law.

Representative Koppelman: I appreciate that. The only concern that raises is if the purpose is to protect consumers from deception, even if you have the permission.

Rep. Wrangham: I agree with you 100%, except for one thing, the more rights you give one person, we take away some rights of the other. We certainly don't want to step on the toes of those who have a legitimate right to contract out their name.

Representative Koppelman: We have a general statute on false advertising, did you review that to see if this might already be covered. It looks to me like it might be covered. Did you feel that didn't cover it.

Rep. Wrangham: I did review some sections of law, I don't recall.

Representative Koppelman: If we've got a general statute on the books, and if we start amending for every specific matter, it might be burdensome. I like the intent of the bill.

Representative Klemin: Just to follow up on Rep. Koppelman's question, on page 2, I guess I thought I heard from Mr. LeFleur, was that we are talking about someone owning the rights to the group and has 7 or 8 groups traveling around the country using the same name, well they own the rights to that name and it would seem to me that the person that had those rights originally, which sold them, must have consented to the other person using that name, as a part of selling the rights. What else are the rights. So, then looking at page 2 here, where it has to be expressly authorized, are you talking about them getting something else in addition to whatever they acquired by the sale of those rights, do they have to go back to that person and say that I bought all of the rights to this name, but in order to comply with ND law, you have to expressly

authorize me to do this too or is that included with buying the rights. If it is the latter, what are they accomplishing.

Rep. Wrangham: I think we need to be specific in our definitions here. The recording individual or group who is the one we speak about on page 2. That may not be the same individual(s) as the individual(s) who own the name. The definition we have in for recording individual or group is the actual people who the song famous and performed it.

Representative Maragos: If someone owned the rights to the name of a group, and advertised themselves as that group, the only thing that would make it illegal, is if they advertised themselves as the original group. Is that correct.

Rep. Wrangham: I don't believe that is correct.

Representative Maragos: If a group went around saying they were the Platters and had the right to use the name, and they advertised themselves as the Platters because they had a legal right to use the name. If they did not advertise themselves as the original Platters, would they be doing anything illegal. Then would it be up to the consumer to find out if these are the original Platters and if they would be interested in attending.

Rep. Wrangham: I am not sure if inserting the word "original" makes a difference one way or the other. What we are looking at here is two separate issues, 1) the owner of the name of the Platters, has the absolutely perfect right to sell that name to someone else and use that name. We're saying that if they sell that name, when someone comes to ND to perform as the Platters, they will need to have one member of the Platters, who made the Platters recordings famous with them or else they are going to have to, in their advertising, disclaim that there aren't any of the original Platters who made that recording famous in the group.

Representative Maragos: So what you are saying is that these groups that have the legal right to use the name, must make a disclaimer, even though it's not really their obligation. They're just saying they are the Platters, but unless they claim they are the original Platters, I'm not sure if we are forcing them to make a statement that really isn't necessary; unless they make the statement purporting to be somebody they aren't. But if they have the legal right to use the name, the Platters, then they are not purporting to be something they're not.

Rep. Wrangham: Again, I believe that if they say that they are coming advertised as being the Platters, I think they are holding out at that point, that they are the original Platters. Again, we're not trying to stop them from doing that, we certainly recognize the right to do that, we would just like them to acknowledge in their advertising, that there are no members of the group who made the Platters recordings famous in the group.

Rick LeFleur: I think we are getting off of the intent. The intent of this bill is not about the group themselves, it's the consumer and what they're led to believe. I think that is all we need to focus on. When the consumer reads something about a performance, what should there expectations be and that's what we need to do. It's not about who has what rights or who is doing what, it is about what I am buying a ticket to see.

Representative Maragos: I appreciate the intent Mr. LeFleur, but you are making this a criminal offense; I don't know if you intentionally wanted to make criminals out of these people simply because consumer's expectations, "buyer beware", we might have a lot of different issues that might come into play here. We need to craft a good bill, not create unanticipated problems.

Mr. LeFleur: I think everybody here knows that. There has been a lot of misinformation out, and it just needs to be corrected. I think that based upon the historical nature of how things have

been, there has been an attempt to mislead the public here, by those that know it's not right, even though they may have today, the legal right to say whatever they want to. I guess it's fine, I guess, if we want to leave it the way it is. I just think that is wrong. I think it's wrong for us in ND not to correct something if we can, as far as the expectations of someone from out of state of what we are going to see. It's not to stop a venue from bringing in the best bands they can afford, etc. It's an effort to correct what the expectations of the consumer is. That's what this bill should live or die on, is what the consumer's expectations are.

Chairman DeKrey: Thank you. Further testimony in support of HB 1284. Testimony in opposition to HB 1284.

Glenn Elliott: I will say that I am neutral, simply because I favor the intent of this bill. I agree with Rep. Maragos about crafting a good bill, so you don't end up with unintended consequences. I have reservations about the language of the bill as it stands makes a connection between who is the original group who made the songs famous, who is the group that is performing now, what warnings or disclaimers are being made to the public regarding the nature of the group that is performing at a particular venue, are there any members of the original group.

Chairman DeKrey: Thank you. Further testimony in opposition to HB 1284. We will close the hearing.

(Reopened later in the same day)

Chairman DeKrey: We will have Rep. Klemin take a look at the language of this bill.

2005 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1284

House Judiciary Committee

☐ Conference Committee

Hearing Date 1/24/05

Tape Number	Side A	Side B	Meter #
1		xx	47-end
2	xx		0-2.5

Committee Clerk Signature



Minutes: 12 members present, 2 members absent.

Chairman DeKrey: What are the committee's wishes in regard to HB 1284.

Representative Klemin: Explained the amendments.

Representative Maragos: I move the amendments.

Representative Delmore: Second.

Chairman DeKrey: Motion carried.

Representative Klemin: I move a Do Pass as amended.

Representative Zaiser: Second.

11 YES 1 NO 2 ABSENT

DO PASS AS AMENDED

CARRIER: Rep. Zaiser

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1284

Page 1, line 2, remove “;and to provide a”

Page 1, line 3, remove “penalty”

Page 1, line 21, remove “,or is otherwise unaffiliated with,”

~~Page 1, line~~

Page 1, line 23, remove “or”

Page 2, line 2, delete the period and insert “; or”

Page 2, line 2, insert

- “e. The advertising contains a disclaimer that the performing individual or group is not the recording individual or group or is not affiliated with the recording individual or group.”

Renumber accordingly

VR
1/24/05

HOUSE AMENDMENTS TO HOUSE BILL NO. 1284 JUD 1-25-05

Page 1, line 2, remove "; and to provide a"

Page 1, line 3, remove "penalty"

Page 1, line 21, remove ", or is otherwise unaffiliated with,"

Page 1, line 23, remove "or"

HOUSE AMENDMENTS TO HB 1284 JUD 1-25-05
Page 2, line 2, replace the period with "; or"

Page 2, after line 2, insert:

- "e. The advertising contains a disclaimer that the performing individual or group is not the recording individual or group or is not affiliated with the recording individual or group."

Renumber accordingly

Date: 1/24/05
Roll Call Vote #: 1

2005 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1284

HOUSE JUDICIARY COMMITTEE

☐ Check here for Conference Committee

Legislative Council Amendment Number

Action Taken

Do Pass as Amended

Motion Made By

Rep. Klemm

Seconded By

Rep. Zaiser

Representatives	Yes	No	Representatives	Yes	No
Chairman DeKrey	✓		Representative Delmore	✓	
Representative Maragos		✓	Representative Meyer	✓	
Representative Bernstein	✓		Representative Onstad	A	
Representative Boehning	✓		Representative Zaiser	✓	
Representative Charging	✓				
Representative Galvin	✓				
Representative Kingsbury	✓				
Representative Klemm	✓				
Representative Koppelman	A				
Representative Kretschmar	✓				

Total (Yes)

11

No

1

Absent

2

Floor Assignment

Rep. Zaiser

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HB 1284: Judiciary Committee (Rep. DeKrey, Chairman) recommends AMENDMENTS AS FOLLOWS and when so amended, recommends **DO PASS** (11 YEAS, 1 NAY, 2 ABSENT AND NOT VOTING). HB 1284 was placed on the Sixth order on the calendar.

Page 1, line 2, remove "; and to provide a"

Page 1, line 3, remove "penalty"

Page 1, line 21, remove ", or is otherwise unaffiliated with,"

Page 1, line 23, remove "or"

Page 2, line 2, replace the period with "; or"

Page 2, after line 2, insert:

- "e. The advertising contains a disclaimer that the performing individual or group is not the recording individual or group or is not affiliated with the recording individual or group."

Renumber accordingly

2005 SENATE JUDICIARY

HB 1284

2005 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1284

Senate Judiciary Committee

☐ Conference Committee

Hearing Date March 15, 2005

Tape Number	Side A	Side B	Meter #
1	X		3870 - End
			0.0 - End
3	X		2900 - End

Committee Clerk Signature

Maria L. Salberg

Minutes: Relating to the deceptive use of a musical performer's name.

Senator John (Jack) T. Traynor, Chairman called the Judiciary committee to order. All

Senators were present. The hearing opened with the following testimony:

Testimony In Support of the Bill:

Rep. Dwight Wrangham - Introduced the bill (meter 3870) Gave Testimony - Att. #1 This is a truth in advertising bill.

Senator Syverson questioned the situation of a group under the same name, having many "sub" groups who legally go around the country representing the main group. How do we address these? As I see it this would not interfere with there right to do that. It only requires them to put a disclaimer in.

Senator Triplett asked to what extent this is a problem in ND? I do not have any statistics or knowledge of it other then my own experiences of this. Sited an example using the 4 aces.

Senator Triplett questioned that if this is happening why has legal action not been taken in a personal law suit? They may have the legal right to use the name. The intent of this legislation is not to prevent this but only to inform the public of it.

Rick LaFleur, Third Generation Music and Game Company owner Devils Lake ND - This has nothing to do with the performers themselves this has to do with the consumers right to know that at least one of the people being in the original group is their. This is a consumer protection issue. Sited an example of a popular group from 1949, the "Platters" and the 8 licensed groups have no original members, discussed. I have become a close friend to one of the original members of the Platters. Compared it to the Cadillac trademark. The house made several changes on this bill to make it a better bill. There are legal terms i.e.; new vs original discuss who owns royalties. This is not to make the "Platters" the poster child for the bill this is a consumer right protection bill.

Sen. Nelson stated that the new owners of the performers are not the band members but they are attorneys. **Senator Hacker** discussed if this should be pertaining to bands with members still living? Some discussion of how you could do this or would time take care of it.

Glenn Elliot, Citizen (meter 390) Gave Testimony - Att. #2..

Testimony in Opposition of the Bill

None

Senator John (Jack) T. Traynor, Chairman closed the Hearing

Senator John (Jack) T. Traynor, Chairman reopened the Hearing

The committee discussed Mr. LeFleur background (meter 2900, tape 3, side 2)

Page 3

Senate Judiciary Committee

Bill/Resolution Number HB 1284

Hearing Date March 15, 2005

Senator Syverson questioned the print advertising concept of the bill but what about electronic, radio, tv.. **Sen. Trenbeath** stated that lines 16-18 do not read well or make sense in its current language discussed a way to use better language. (meter 3600) "The performing individual is the recording individual; " and "at least one member of the performing group was a member of the recording group."

Senator Syverson made the motion to Do Pass the amendment to change lines 16-17 and Sen.

Nelson seconded the motion. All members were in favor of the amendment and the motion passes.

Senator John (Jack) T. Traynor, Chairman closed the Hearing

2005 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1284

Senate Judiciary Committee

☐ Conference Committee

Hearing Date March 21, 2005

Tape Number	Side A	Side B	Meter #
1	X		5170 - End 0.0 - 1220

Committee Clerk Signature *Mona L. Selby*

Minutes: Relating to the deceptive use of a musical performer's name

Senator John (Jack) T. Traynor, Chairman called the Judiciary committee to order. All

Senators were present. The hearing opened with the following committee work:

Sen. Traynor - Reviewed the first amendment of the performing individual was the recording individual and... reintroduced an amendment starting a new paragraph. The committee discussed what do you do if all the original members had passed away and the licensing was given to other individuals who are not original members.

Senator Triplett made the motion to DO NOT Pass and **Sen. Trenbeath** seconded the motion.

Sen. Trenbeath stated that while the amendment was not a bad idea it would be too hard to pin down the control without interfering with the right of the contract. **Sen. Nelson** made the statement that there is no penalty if they are in violation. Who would be in charge of enforcing it? Discussed that if, I were the 'Platters' and current law says that I am the "platters" by contract. I am not in violation of any law.

Sen. Traynor stated that it would be nice for the public to be aware of what they were seeing.

The committee discussed the importance of making people aware but how?

Senator Triplett said that she would withdraw her motion if someone could come up with better language to improve the bill. In its current form it invites problems leaving to many questions unanswered, no penalty and not well written. I have no objection to the concept but it needs to be fixed.

Sen. Nelson stated that this may be covered under 51-12 01 "False and Misleading Advertising".

Committee reviewed this code along with 51-12 02 that contains a penalty of a class B misdemeanor. **Sen. Trenbeath** stated that perhaps we could put a few words into this law to include this? Committee reviewed. Discussed making the amendment to place in this law.

Musical rights would already fall under "patented and proprietary product" in the existing law.

Discussion: If the groups removing the word "original" in the name of the group. They do not use the word but have legal contracts to use the name. You can't advertise the performance through the use of false deceptive or misleading association. The point is if you are not making a false statement in the first instance (under contract) but still do not fall under one of these exceptions then where are you? You have not violated the law. Someone may assert that you are in violation of the law due to not falling into one of the subsections. You still have not done anything in the first place. This is a badly written law because the exception should relate to the initial statement of the prohibition. If there is room to fit between those two that a neither prohibited nor within the exception then that is bad drafting. This needs to be fixed.

If we include it with the existing law then it would be written correctly. This bill was originally passed in 1913 and was updated 1963. **Sen. Trenbeath** discernment of the original intent of the

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Senate Judiciary Committee

Bill/Resolution Number HB 1284

Hearing Date March 21, 2005

bill that musical performances, concerts and that sort of things you would be "consuming" those that would fit. Do we want to limit it to musical performers or do you want to call it artistic performers or performance? Discussed High School Plays. The committee combined it into 51-12 01. Discussed 51-12 08 False Advertising.

Sen. Nelson made the motion to "Hog House" the bill to 51-12 01 to add "Performance" and

Sen. Trenbeath seconded the motion. All members were in favor and motion passes.

Sen. Nelson made the motion to Do Pass As Amended and **Sen. Trenbeath** seconded the motion. All but **Senator Syverson** were in favor of the motion and it passes.

Carrier: **Sen. Nelson**

Senator John (Jack) T. Traynor, Chairman closed the Hearing

Date: 3/15/05
Roll Call Vote #: 1

2005 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. HB 1284

Senate Judiciary

Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number

Action Taken *Do Pass Amendment to Change line 16 & 17*

Motion Made By Senator *Syverson* Seconded By Senator *Nelson*

Senators	Yes	No	Senators	Yes	No
Sen. Traynor	✓		Sen. Nelson	✓	
Senator Syverson	✓		Senator Triplett	✓	
Senator Hacker	✓				
Sen. Trenbeath	✓				

Total (Yes) 6 No 0

Absent 0

Floor Assignment Senator

If the vote is on an amendment, briefly indicate intent:

Date: 3/21/05
Roll Call Vote #: X

2005 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. HB 1284

Senate Judiciary

Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number

Action Taken Do Not Pass

Motion Made By Senator Triplet Seconded By Senator Trenbeath

Senators
Sen. Traynor
Senator Syverson
Senator Hacker
Sen. Trenbeath

Yes No

Senators
Sen. Nelson
Senator Triplet

Yes No

W M already

Total (Yes) 6 No 0

Absent 0

Floor Assignment

If the vote is on an amendment, briefly indicate intent:

Date: 3/21/
Roll Call Vote #: 1

2005 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. HB 1284

Senate Judiciary

Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number

Action Taken *Hog House to 51-12-01 "Performance"*

Motion Made By Senator *Nelson* Seconded By Senator *Trenbeath*

Senators	Yes	No	Senators	Yes	No
Sen. Traynor	✓		Sen. Nelson	✓	
Senator Syverson	✓		Senator Triplett	✓	
Senator Hacker	✓				
Sen. Trenbeath	✓				

Total (Yes) 6 No 0

Absent 0

Floor Assignment

If the vote is on an amendment, briefly indicate intent:

Date: 3/21/05
Roll Call Vote #: 2

2005 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. HB 1284

Senate Judiciary

Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number

Action Taken Do Pass As Amended

Motion Made By Senator Nelson Seconded By Senator Trenbeath

Senators	Yes	No	Senators	Yes	No
Sen. Traynor	✓		Sen. Nelson	✓	
Senator Syverson		✓	Senator Triplett	✓	
Senator Hacker	✓				
Sen. Trenbeath	✓				

Total (Yes) 6 No 0

Absent 0

Floor Assignment Sen Nelson

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HB 1284, as engrossed: Judiciary Committee (Sen. Traynor, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (5 YEAS, 1 NAY, 0 ABSENT AND NOT VOTING). Engrossed HB 1284 was placed on the Sixth order on the calendar.

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to amend and reenact section 51-12-01 of the North Dakota Century Code, relating to false and misleading advertising; and to provide a penalty.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Section 51-12-01 of the North Dakota Century Code is amended and reenacted as follows:

51-12-01. False and misleading advertising prohibited. No person, firm, corporation, limited liability company, or association with intent to sell, dispose of, increase the consumption of, or induce the public to enter into an obligation relative to, or to acquire title or interest in any food, drug, medicine, patent and proprietary product, merchandise, security, service, performance, medical treatment, paint, varnish, oil, clothing, wearing apparel, machinery, or anything offered to the public, may make, publish, disseminate, circulate, or place before the public, or directly or indirectly shall cause to be made, published, disseminated, circulated, or placed before the public in a newspaper, or other publication, or in the form of a book, notice, handbill, poster, bill, circular, pamphlet, tab, label, letter, or in any other way, an advertisement which contains any assertion, representation, or statement of fact, including the price thereof, which is untrue, deceptive, or misleading regarding such food, drug, medicine, patent and proprietary product, merchandise, security, service, performance, medical treatment, paint, varnish, oil, clothing, wearing apparel, machinery, or anything offered to the public."

Renumber accordingly

2005 HOUSE JUDICIARY

COFERENCE COMMITTEE

HB 1284

2005 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1284

House Judiciary Committee

☒ Conference Committee

Hearing Date 4/1/05

Tape Number

1

Side A

xx

Side B

Meter #

39-53.5

Committee Clerk Signature

Dawn Penrose

Minutes: 6 members present.

Representative Klemin: Attendance was taken. Called to order. We have before us, HB 1284, which was amended in the Senate and the House did not concur with the Senate amendments. I distributed a proposed amendment that was prepared by Rep. Wrangham. I understand that Sen. Traynor had an amendment prepared also. I would like to ask the Senate to state their reasons for the Senate amendments to HB 1284.

Sen. Syverson: For the purpose of brevity, and not creating an extensive new piece of legislation, and feeling as a committee of the whole, that the objective of the legislation could be served by including it in the false and misleading advertising section of the code. For that reason, the Senate Judiciary Committee proceeded in the direction that they did.

Representative Klemin: You're saying that adding the word "performance" in two places in Section 51-12-01 is what you're referring to.

Sen. Syverson: That's correct.

Representative Klemin: As I understand the House bill, actually created a new section to that same chapter, so both the amendment that was made in the Senate, and the bill as proposed by the House, actually affect the same chapter.

Sen. Traynor: I think also what influenced the Senate committee was the fact that 51-12-02, provides the penalty. It says "any person who violates any of the provisions of 51-12-01 is guilty of a class B misdemeanor. So 12-01 is the section that we used to add the word "performance" and our thought was there that we made it a crime, so that there would be some teeth in the legislation.

Representative Klemin: Section 51-12-02, penalty provision, I don't have that in front of me, but that only refers to section 01.

Sen. Traynor: Yes, that's right, only section 51-12-01.

Representative Koppelman: First, the proposed amendment that you handed out that Rep. Wrangham proposed, if I understand correctly, what that would do is basically insert the Senate bill into the House Bill.

Sen. Traynor: Yes, that's correct.

Representative Koppelman: Just a comment beyond that, reading this, when this bill was heard in the House Judiciary Committee, frankly it was my feeling that current law probably covered the activity, that if interpreted and applied accordingly, would probably cover the activity that they were concerned with in this bill, but I think the Senate made sure of that, in the way they amended it, just by inserting the word performance, so frankly I don't have a problem with the Senate version.

Sen. Traynor: Could I pass out the Senate amendments, version .0203, which I think would further define what "performance" is.

Representative Klemin: Please explain your amendment, Sen. Traynor.

Sen. Traynor: What I asked Legislative Council to do, was to combine the Senate amendments, adding "performance" to 51-12-01, and then further define "performance" and using some of the language of the original bill as it was introduced in the House. I understand that the chairman had some concerns about #2, and I would be open to discussion of that.

Representative Klemin: Well, just to explain what I was talking about there, I had received a copy of this just prior to conference committee, and your amendment of subdivision 2, only contained the reference to a group that previously produced or released a commercial recording. The House bill distinguishes between the performing individual group and a recording individual group. It seems to me that this subsection 2 that you have in your amendment, only covers the recording individual group or groups. I was thinking that it should maybe include both of those, because the problem as I understood it, at least, comes from the performing group who is not the recording group and doing a performance in a manner which misleads the public into thinking that it is actually somebody, or the original group that's doing the performance. So, in looking at your amendment, I think if we took the definition that's in the House bill, in subsections 2a and 2b, you've already got 2b, which is what you had. If you put both of them in, it would cover both situations. I guess what I was thinking was that we have "performance means" and then we'd have an a) and b).

Representative Koppelman: I think we might be in peril of making some sausage here unintentionally. If we look at item 2, I don't think it's wise for us to put that definition. I don't

mind the amendment Sen. Traynor has just passed out with two exceptions. One is that I think section 2, if we put the definition, in the bill that would be created by this amendment, we are kind of defining down what performance means, whereas if we put it in law as the Senate version did, or as we could if we just eliminate item 2 here in this proposed amendment, we are taking it back to performance meaning almost anything, for example if in the Senate version, it seems to me that if somebody advertised that they were going to be performing Hamlet, and they performed Oklahoma instead, they could be violating the false advertising statute; whereas this definition takes it specifically to what the bill sponsor originally intended for this bill, and I'm not sure if we want to just make sure that performances are covered under false advertising, which it seems to me is what the Senate did, if we want to get that definition here, because it kind of muddied the water.

Sen. Traynor: I think that was one of the things that was voiced in our committee, that performance was all encompassing, it would cover everything.

Representative Klemin: Well, what if we had, as Representative Koppelman suggested, and used your amendment, but deleted section 2 out of there, so we're not defining performance but we're leaving in section 3 about the disclaimer

Representative Zaiser: I can see in section 2, really talks about vocal and instrumental group, whereas I think a tiger training group, someone could steal the Sigfried & Roy name, so I think it would be wise to take out the reference to instrumental and vocal.

Representative Klemin: So what we'd end up with, is Sen. Traynor's amendment, minus #2 in here, and change #3 to #2.

Sen. Traynor: That would be agreeable to me.

Representative Koppelman: I certainly agree, and I would have one other suggestion; however, and I think we're looking at another LC style change here, the chairman and I have discussed these in House Judiciary, and frequently when they tend to, sometimes unintentionally change the meaning of the statute, and I see a shall changed to a may here. It seems to me, and I realize that LC is just trying to clean things up, but it seems to me that could change the whole meaning of this statute and turn it on it's ear, and could mean that we are loosening the standard or lowering the standard greatly, of what we call false advertising, and we could be seeing people pursued for things that we never dreamt, if we change the shall to a may.

Representative Klemin: You're talking about the middle of section 1.

Representative Koppelman: That is correct.

Sen. Traynor: I did not discuss that, that is LC creation.

Representative Klemin: So your suggestion is that we leave it as "shall".

Representative Koppelman: Yes, and with that I guess I would move that the Senate recede from the Senate amendments, that the committee further amend with Sen. Traynor's suggested amendment, minus section 2, and with the "may" left as a "shall" as it is in current law in section 1.

Sen. Traynor: I'll second that.

Representative Klemin: The motion has been made and seconded that the Senate recede from the Senate amendments and that the bill be further amended in the manner presented by Sen. Traynor, with the exceptions described by Representative Koppelman. Vote was taken.

Representative Klemin: The amendment proposed by Sen. Traynor, as modified by conference committee has been approved. Adjourned.

Page 6
House Judiciary Committee
Bill/Resolution Number HB 1284
Hearing Date 4/1/05

6 YES 0 NO 0 ABSENT

SENATE RECEDE FROM SENATE AMENDMENTS AND FURTHER AMEND

**(This motion was later changed by LC to read, "Senate recede from Senate amendments
and adopt amendments.)**

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1284

That the Senate recede from its amendments as printed on page 1321 of the House Journal and page 1018 of the Senate Journal and that Engrossed House Bill No. 1284 be amended as follows:

Page 1, line 2, after "name" insert "; to amend and reenact section 51-12-01 of the North Dakota Century Code, relating to false and misleading advertising; and to provide a penalty"

Page 1, after line 3, insert:

"SECTION 1. AMENDMENT. Section 51-12-01 of the North Dakota Century Code is amended and reenacted as follows:

51-12-01. False and misleading advertising prohibited. No person, firm, corporation, limited liability company, or association with intent to sell, dispose of, increase the consumption of, or induce the public to enter into an obligation relative to, or to acquire title or interest in any food, drug, medicine, patent and proprietary product, merchandise, security, service, performance, medical treatment, paint, varnish, oil, clothing, wearing apparel, machinery, or anything offered to the public, may make, publish, disseminate, circulate, or place before the public, or directly or indirectly shall cause to be made, published, disseminated, circulated, or placed before the public in a newspaper, or other publication, or in the form of a book, notice, handbill, poster, bill, circular, pamphlet, tab, label, letter, or in any other way, an advertisement which contains any assertion, representation, or statement of fact, including the price thereof, which is untrue, deceptive, or misleading regarding such food, drug, medicine, patent and proprietary product, merchandise, security, service, performance, medical treatment, paint, varnish, oil, clothing, wearing apparel, machinery, or anything offered to the public."

Page 1, underscore lines 6 through 24

Page 2, underscore lines 1 through 3

Renumber accordingly

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1284

That the Senate recede from its amendments as printed on page 1321 of the House Journal and page 1018 of the Senate Journal and that Engrossed House Bill No. 1284 be amended as follows:

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to amend and reenact section 51-12-01 of the North Dakota Century Code, relating to false and misleading advertising; and to provide a penalty.

SECTION 1. AMENDMENT. Section 51-12-01 of the North Dakota Century Code is amended and reenacted as follows:

51-12-01. False and misleading advertising prohibited.

- Koppelman put back in "shall"*
1. No person, firm, corporation, limited liability company, or association with intent to sell, dispose of, increase the consumption of, or induce the public to enter ~~into~~ an obligation relative to, or to acquire title or interest in any food, drug, medicine, patent and proprietary product, merchandise, security, service, performance, medical treatment, paint, varnish, oil, clothing, wearing apparel, machinery, or anything offered to the public; may make, publish, disseminate, circulate, or place before the public, or directly or indirectly ~~shall~~ *may* cause to be made, published, disseminated, circulated, or placed before the public in a newspaper, or other publication, or in the form of a book, notice, handbill, poster, bill, circular, pamphlet, tab, label, letter, or in any other way, an advertisement ~~which that~~ contains any assertion, representation, or statement of fact, including the price thereof, which is untrue, deceptive, or misleading regarding such food, drug, medicine, patent and proprietary product, merchandise, security, service, performance, medical treatment, paint, varnish, oil, clothing, wearing apparel, machinery, or anything offered to the public.

Remove

- ~~2. As used in this section, "performance" means an exhibition or presentation by a vocal or instrumental group that has previously produced or released a commercial recording.~~

- ~~2. 3.~~ It is not a violation of this section to advertise a performance by a performing group if at least one member of the performing group was a member of the recording group, the performance is identified as a "salute" or "tribute" to the recording group, the performance is expressly authorized in the advertising by the recording group, the advertising does not relate to a live music performance taking place in this state, or the advertising contains a disclaimer that the performing group is not the recording group or is not affiliated with the recording group."

Renumber accordingly

Conference Committee Amendments to Engrossed HB 1284 (50425.0204) - 04/04/2005

That the Senate recede from its amendments as printed on page 1321 of the House Journal and page 1018 of the Senate Journal and that Engrossed House Bill No. 1284 be amended as follows:

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to amend and reenact section 51-12-01 of the North Dakota Century Code, relating to false and misleading advertising; and to provide a penalty.

SECTION 1. AMENDMENT. Section 51-12-01 of the North Dakota Century Code is amended and reenacted as follows:

51-12-01. False and misleading advertising prohibited.

1. No person, firm, corporation, limited liability company, or association with intent to sell, dispose of, increase the consumption of, or induce the public to enter ~~into~~ an obligation relative to; or to acquire title or interest in any food, drug, medicine, patent and proprietary product, merchandise, security, service, performance, medical treatment, paint, varnish, oil, clothing, wearing apparel, machinery, or anything offered to the public; may make, publish, disseminate, circulate, or place before the public, or directly or indirectly shall cause to be made, published, disseminated, circulated, or placed before the public in a newspaper, or other publication, or in the form of a book, notice, handbill, poster, bill, circular, pamphlet, tab, label, letter, or in any other way, an advertisement ~~which that~~ contains any assertion, representation, or statement of fact, including the price thereof, which is untrue, deceptive, or misleading regarding such food, drug, medicine, patent and proprietary product, merchandise, security, service, performance, medical treatment, paint, varnish, oil, clothing, wearing apparel, machinery, or anything offered to the public.
2. It is not a violation of this section to advertise a performance by a performing group if at least one member of the performing group was a member of the recording group. the performance is identified as a "salute" or "tribute" to the recording group. the performance is expressly authorized in the advertising by the recording group. the advertising does not relate to a live music performance taking place in this state. or the advertising contains a disclaimer that the performing group is not the recording group or is not affiliated with the recording group."

Renumber accordingly

**REPORT OF CONFERENCE COMMITTEE
(ACCEDE/RECEDE)**

Bill Number HB 1284 as engrossed:

Date: April 4, 2005

Your Conference Committee HOUSE JUDICIARY

For the Senate:

For the House:

	Yes/No		Yes/No
Sen. Syverson	xx	Rep. Klemin	xx
Sen. Traynor	xx	Rep. Koppelman	xx
Sen. Nelson	xx	Rep. Zaiser	xx

recommends that the SENATE RECEDE from

XX the (Senate) amendments on (HJ) page(s) 1321 -- _____

_____ and place _____ on the Seventh order.

XX and adopt amendments as follows, and place HB 1284 on the
Seventh order:

_____ having been unable to agree, recommends that the committee be discharged
and a new committee be appointed.

Engrossed 1284 was placed on the Seventh order of business on the calendar. _____

DATE: 4/4/05

CARRIER: Rep. Klemin

LC NO. 50425.0204 of amendment

LC NO. _____ of engrossment

Emergency clause added or deleted

Statement of purpose of amendment _____

6 YES 0 NO 0 ABSENT

SENATE RECEDE FROM SENATE AMENDMENTS AND AMEND

REPORT OF CONFERENCE COMMITTEE

HB 1284, as engrossed: Your conference committee (Sens. Syverson, Traynor, Nelson and Reps. Klemin, Koppelman, Zaiser) recommends that the **SENATE RECEDE** from the Senate amendments on HJ page 1321, adopt amendments as follows, and place HB 1284 on the Seventh order:

That the Senate recede from its amendments as printed on page 1321 of the House Journal and page 1018 of the Senate Journal and that Engrossed House Bill No. 1284 be amended as follows:

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to amend and reenact section 51-12-01 of the North Dakota Century Code, relating to false and misleading advertising; and to provide a penalty.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Section 51-12-01 of the North Dakota Century Code is amended and reenacted as follows:

51-12-01. False and misleading advertising prohibited.

1. No person, firm, corporation, limited liability company, or association with intent to sell, dispose of, increase the consumption of, or induce the public to enter ~~into~~ an obligation relative to; or to acquire title or interest in any food, drug, medicine, patent and proprietary product, merchandise, security, service, performance, medical treatment, paint, varnish, oil, clothing, wearing apparel, machinery, or anything offered to the public; may make, publish, disseminate, circulate, or place before the public, or directly or indirectly shall cause to be made, published, disseminated, circulated, or placed before the public in a newspaper, or other publication, or in the form of a book, notice, handbill, poster, bill, circular, pamphlet, tab, label, letter, or in any other way, an advertisement ~~which~~that contains any assertion, representation, or statement of fact, including the price thereof, which is untrue, deceptive, or misleading regarding such food, drug, medicine, patent and proprietary product, merchandise, security, service, performance, medical treatment, paint, varnish, oil, clothing, wearing apparel, machinery, or anything offered to the public.
2. It is not a violation of this section to advertise a performance by a performing group if at least one member of the performing group was a member of the recording group, the performance is identified as a "salute" or "tribute" to the recording group, the performance is expressly authorized in the advertising by the recording group, the advertising does not relate to a live music performance taking place in this state, or the advertising contains a disclaimer that the performing group is not the recording group or is not affiliated with the recording group."

Renumber accordingly

Engrossed HB 1284 was placed on the Seventh order of business on the calendar.

2005 TESTIMONY

HB 1284

On page one, line 19, after the semi-colon insert

If an individual or group has rights to the original group name yet has no original recording artist of said group, a disclaimer must be given to indicate such.

Att #1

HB 1284

Representative Dwight Wrangham

March 15, 2005

Good Morning Chairman Traynor and Senators of the Judiciary Committee

HB 1284 is a consumer information protection bill dealing with a specific problem. When an advertisement, uses a well known popular group name, to entice us to attend a concert or other such performance, we should have reasonable assurance that at least one member of that original popular group expects to be present.

This bill is intended to say, if an event is advertised using the name of a popular recording group and no member of that recording group is expected to be present the advertisement must contain a disclaimer to that effect.

A performing group can still do a performance as a tribute to the Beach Boys without having a member of the recording group present. They would just have to advertise the event as a "tribute to" or some other such phrase.

Basically, when I buy a ticket for a future performance and possible travel a great distance to see the Platters, I have a right to know whether I will see at least one of the recording Platters, or not.

Thank You for your consideration.

Testimony in Favor of House Bill 1284

by Glenn A. Elliott, a private citizen and resident of Mandan, North Dakota, appearing on his own behalf on Tuesday, 15 March 2005

Before the Judiciary Committee of the North Dakota Senate

To the Chair and Senators of the Committee:

I am offering this testimony in favor of House Bill 1284.

1. American popular culture frequently does not only identify particular developments as significant, but also the individual(s) responsible for or associated with them, to the point where both are considered a whole. This is especially true for songs and those who performed them at the particular time when those songs became popular.

2. Many performers who performed under particular stage names, whether as individuals or groups, were required by contract to sign over the rights to those names to other parties, primarily the record companies that financed the recording and promotion of the music and performers. Those other parties have often sponsored other performers under a particular stage name, even when none of the performers involved were connected in any way with the original performers actually associated with popular music identified with that stage name.

3. It is reasonable that if people buy tickets for a live musical performance by an individual or group identified with particular popular music under a given stage name, those people expect that the individual performing is the actual original performer, or that at least one of the individuals performing was one of the original performers, of the music commonly associated with that individual or group. There is an element of particular presence that otherwise would not exist for those attending the performance.

4. A party other than the original performer or performers, who has obtained the rights to the stage name used by that performer or performers, retains those rights and is so protected under contract or trademark law. However, that party is not entitled to a legal status quo under such protection, and legislation regulating the use of a stage name by such a party is not forbidden or excessively restricted.

a. The United States Constitution prohibits any law that "impairs the obligation of contract." However:

(1) This provision "is no greater than other guarantees in the Constitution," and "cannot be construed to prohibit the exercise by the state legislature of its other constitutional powers" [American Jurisprudence (Second Series), Title 16B, Topic "Constitutional Law," Section 708, normally cited as 16B Am Jur 2d "Const Law" Sec 708].

(2) House Bill 1284 does not alter the contractual ownership of the name itself, or trademark interest in it. It only restricts how that name may be applied to particular subject matter, namely the performer or performers concerned. As such, the bill "does not violate the Contracts Clause solely because it upsets otherwise settled expectations, even though the effect of the legislation is to impose a new duty or liability based on past acts" [16B Am Jur 2d "Const Law" Sec 708].

(3) Even if House Bill 1284 would be held to substantially impair contract, it would still be permissible if the impairment is reasonable and necessary to serve a legitimate public purpose [16B Am Jur 2d "Const Law" Sec 708-709]. I believe that protection of consumer interests is legitimate, that this protection could not be secured without the imposition prescribed, and that the imposition is the minimum consistent with securing the protection.

b. Regarding impairment of trademark ownership:

(1) The owner of the stage name can still use it (within the limits of the bill) and prevent others from infringing or diluting it as a trademark or tradename.

(2) Even though trademark law proceeds from the common law (both in itself and from common law of unfair competition), trademark rights are essentially not natural but statutory, and are reasonably subject to the operation of other law.

(3) It is settled trademark jurisprudence that the owner of a mark/name does not have absolute control over its use.

(a) "Where a trademark incorporates a term that is the only reasonably available means of describing a characteristic of another's goods, the other's use of that term in a descriptive sense is protected by the fair use doctrine" [74 Am Jur 2d "Trademarks and Tradenames" Sec 142].

(b) See also Playboy Enterprises Inc. v. Terri Welles et al (162 F.3d 1169, 9th Circuit 2002), in which the court held that since Welles had been selected, published, and promoted by Playboy as a Playmate and Playmate of the Year (1981), Welles' use of the titles, including the word "Playboy," was protected as "nominative" fair use.

House Bill 1284 protects North Dakota consumers with minimal imposition on those involved in the organization and promotion of and performance in live musical events. I recommend that the Committee vote "do pass" on House Bill 1284.

CHAPTER 51-12

FALSE ADVERTISING

Section
51-12-01. False and misleading advertising prohibited.

51-12-02. Penalty.

51-12-02.1. Popcorn toppings — Advertisement — Sale — Penalty.

51-12-03. Enforcement of provision prohibiting false advertisement — Repealed.

51-12-04. Prohibiting use of certain federal and related names in sales of merchandise — Repealed.

51-12-05. Representation that article has federal relationship prohibited — Repealed.

Section

51-12-06. Penalty — Repealed.

51-12-07. Injunction — Repealed.

51-12-08. False advertising — Generally.

51-12-09. Representation as to worth or value.

51-12-10. Real estate.

51-12-11. Used merchandise or seconds.

51-12-12. Newspaper — Misrepresenting circulation.

51-12-13. Penalty.

51-12-14. Injunction.

51-12-01. False and misleading advertising prohibited. No person, firm, corporation, limited liability company, or association with intent to sell, dispose of, increase the consumption of, or induce the public to enter into an obligation relative to, or to acquire title or interest in any food, drug, medicine, patent and proprietary product, merchandise, security, service, medical treatment, paint, varnish, oil, clothing, wearing apparel, machinery or anything offered to the public, may make, publish, disseminate, circulate, or place before the public, or directly or indirectly shall cause to be made, published, disseminated, circulated, or placed before the public in a newspaper, or other publication, or in the form of a book, notice, handbill, poster, bill, circular, pamphlet, tab, label, letter, or in any other way, an advertisement which contains any assertion, representation, or statement of fact, including the price thereof, which is untrue, deceptive, or misleading regarding such food, drug, medicine, patent and proprietary product, merchandise, security, service, medical treatment, paint, varnish, oil, clothing, wearing apparel, machinery, or anything offered to the public.

Source: S.L. 1963, ch. 330, § 1; 1993, ch. 54, § 106.

Note:

Former section 51-12-01 (S.L. 1913, ch. 3, § 1; C.L. 1913, § 9989; R.C. 1943, § 51-1201), prohibiting false and misleading advertising, was repealed by section 2 of chapter 310 S.L. 1961. Section 1 of ch. 330, S.L. 1963 was assigned this section number because the subject and language are nearly identical.

Cross-References.

Unlawful advertising as to use tax, see § 57-40.2-08.

Civil Action for Damages.

Criminal penalties and injunctions are not

the exclusive remedies for false advertising. One injured by a violation of the false advertising statutes may bring an action to recover damages. *Fargo Women's Health Org., Inc. v. FM Women's Help & Caring Connection*, 444 N.W.2d 683 (N.D. 1989).

Where defendant engaged in false advertising, resulting in a decline in plaintiff's business and causing plaintiff to counteract with its own advertisements to mitigate damages, plaintiff was not limited to injunctive relief under the false advertising statutes, and was allowed to collect actual and punitive damages and court costs. *Fargo Women's Health Org., Inc. v. FM Women's Help & Caring Connection*, 444 N.W.2d 683 (N.D. 1989).

Standard of Proof.

When an action brought under this chapter or chapter 51-15 is based upon allegations of fraudulent conduct, the "clear and convincing evidence" standard does not apply; the alleged fraudulent conduct must be proved by a preponderance of the evidence. *State ex rel. Spaeth v. Eddy Furn. Co.*, 386 N.W.2d 901 (N.D. 1986).

Collateral References.

Trade Regulation \approx 870.

74 Am. Jur. 2d, Trademarks, Tradenames and Trade Practices, §§ 102, 108.

87 C.J.S. Trade-Marks, Trade-Names and Trade Practices, § 238.

Federal Trade Commission, what constitutes false, misleading, or deceptive advertising or promotional practices subject to action by, 65 A.L.R.2d 225.

Bait-and-switch: validity, construction, and effect of state legislation regulating or controlling "bait-and-switch" or "disparagement" advertising or sales practices, 50 A.L.R.3d 1008.

Consumer class actions based on fraud or misrepresentation, 53 A.L.R.3d 534.

Temporary relief against unfair trade practices under 15 USCS sec. 53, 34 A.L.R. Fed. 507.

51-12-02. Penalty. Any person who violates any of the provisions of section 51-12-01 is guilty of a class B misdemeanor.

Source: S.L. 1963, ch. 330, § 2; 1975, ch. 106, § 557.

Civil Action for Damages.

Criminal penalties and injunctions are not the exclusive remedies for false advertising. One injured by a violation of the false advertising statutes may bring an action to recover damages. *Fargo Women's Health Org., Inc. v. FM Women's Help & Caring Connection*, 444 N.W.2d 683 (N.D. 1989).

Effect of False Advertising on Contracts. False and misleading newspaper advertis-

ing concerning child photography contest made contracts between photographer and merchants, whereby the latter had agreed to honor merchandise certificates issued to winners, unenforceable. *Voss v. Becko*, 192 F.2d 827 (8th Cir. 1951).

Scope of Statute.

False representation that party was a certified public accountant did not subject such party to the criminal sanctions contained in former statute. *Brissman v. Thistlethwaite*, 49 N.D. 429, 192 N.W. 90 (1922).

51-12-02.1. Popcorn toppings — Advertisement — Sale — Penalty. No person advertising, offering for sale, or selling popcorn intended for consumption on the premises where purchased may use the word butter, or any derivative of the word butter, to describe a topping placed on popcorn, unless the topping is real butter or unless the word butter, or derivative of the word butter, is a part of the commercial brand name of the topping product. The allowable use under this section of the word butter, or any derivative of the word butter, as part of the commercial brand name of a topping product is limited to use in that manner and popcorn with such a topping may not be described as buttered popcorn. Any person who violates this section is guilty of an infraction.

Source: S.L. 1991, ch. 526, §§ 1, 2.

51-12-03. Enforcement of provision prohibiting false advertisement. Repealed by S.L. 1961, ch. 310, § 2.

51-12-04. Prohibiting use of certain federal and related names in sales of merchandise. Repealed by S.L. 1975, ch. 106, § 673.

51-12-05. Representation that article has federal relationship prohibited. Repealed by S.L. 1975, ch. 106, § 673.

51-12-06. Penalty. Repealed by S.L. 1975, ch. 106, § 673.

51-12-07. Injunction. Repealed by S.L. 1975, ch. 106, § 673.

51-12-08. False advertising — Generally. It is unlawful for any person with intent, directly or indirectly, to dispose of real or personal property or to perform services, professional or otherwise, or anything of any nature whatsoever or to induce the public to enter into any obligation relating thereto, to make or disseminate or cause to be made or disseminated before the public in this state, in any newspaper or other publication, or any advertising device, or by public outcry or proclamation, or in any other manner or means whatever, any statement, concerning such real or personal property or services, professional or otherwise or concerning any circumstance or matter of fact connected with the proposed performance or disposition thereof, which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading.

Source: S.L. 1961, ch. 310, § 1.

Standard of Proof.

When an action brought under this chapter or chapter 51-15 is based upon allegations of fraudulent conduct, the "clear and convincing

evidence" standard does not apply; the alleged fraudulent conduct must be proved by a preponderance of the evidence. State ex rel. Spaeth v. Eddy Furn. Co., 386 N.W.2d 901 (N.D. 1986).

51-12-09. Representation as to worth or value. For the purpose of sections 51-12-08 through 51-12-14 the worth or value of any thing advertised is the prevailing market price, wholesale if the offer is at wholesale, retail if the offer is at retail, at the time of publication of the advertisement in the locality wherein the advertisement is published.

No price may be advertised as a former price of any advertised thing unless the alleged former price was the prevailing market price as above defined within three months next immediately preceding the publication of the advertisement or unless the date when the alleged former price did prevail is clearly, exactly, and conspicuously stated in the advertisement.

This section does not apply to any publisher, owner, or employee of a newspaper, magazine, broadcasting or cable station, advertising device, or other publication by any means of communication, who publishes an advertisement in good faith, without knowledge of its false, deceptive, or misleading character; nor to any owner, manager, or employee of an advertising agency or a printer that prepares, places, or prints an advertisement in good faith, without knowledge of its false, deceptive, or misleading character; nor to any employee of the person who offers the advertised thing if that employee in good faith relied on the statements of the person