

56:3A-1

LEGISLATIVE HISTORY CHECKLIST
Compiled by the NJ State Law Library

"Music Licensing Practices Act"

NJSA: 56:3A-1

LAWS OF: 1996 CHAPTER: 122

BILL NO: A1698

SPONSOR(S): Bagger and others

DATE INTRODUCED: March 4, 1996

ASSEMBLY: Consumer Affairs

SENATE: ---

AMENDED DURING PASSAGE: Yes Amendments during passage
Second reprint enacted denoted by superscript numbers

DATE OF PASSAGE: ASSEMBLY: May 30, 1996

SENATE: September 26, 1996

DATE OF APPROVAL: November 1, 1996

FOLLOWING STATEMENTS ARE ATTACHED IF AVAILABLE:

SPONSOR STATEMENT: Yes

COMMITTEE STATEMENT: ASSEMBLY: Yes

SENATE: No

FISCAL NOTE: No

VETO MESSAGE: Yes

MESSAGE ON SIGNING: No

FOLLOWING WERE PRINTED:

REPORTS: No

HEARINGS: No

KBP:pp

[Second Reprint]
ASSEMBLY, No. 1698

STATE OF NEW JERSEY

INTRODUCED MARCH 4, 1996

By Assemblymen BAGGER, DORIA, Cohen, Bateman, Gregg,
Assemblywoman Wright, Assemblymen Bucco, Bodine,
Assemblywoman Bark, Assemblymen Garrett, Corodemus,
Green, Roma, Romano, Assemblywoman Allen, Assemblymen
Kavanaugh, DeCroce, Assemblywomen Murphy, Heck,
Assemblymen Kelly, Geist, Assemblywoman Farragher,
Assemblymen T. Smith, Blee, LeFevre, Moran, DiGaetano,
Assemblywoman J. Smith, Assemblyman Kramer,
Assemblywoman Turner, Assemblymen Azzolina, Rocco,
Impreduto, Pascrell, Garcia, Suliga, Steele, Holzapfel,
Asselta, Gibson, Connors, DeSopo, Zecker, Assemblywoman
Vandervalk, Assemblymen Gusciora and Greenwald

1 AN ACT concerning the enforcement of certain music licenses and
2 supplementing Title 56 of the Revised Statutes.

3

4 **BE IT ENACTED** by the Senate and General Assembly of the State
5 of New Jersey:

6

7 1. This act shall be known and may be cited as the "Music
8 Licensing Practices Act."

9

10 2. As used in this act:

11 ¹["Area" means a circular geographic region having a 25 mile
12 radius surrounding each business location of a proprietor;]¹

13 "Copyright owner" means the owner of a copyright of a
14 ¹["nondramatic"]¹ musical work, other than a motion picture or
15 audiovisual work;

16 "Performing rights society" means an association or corporation
17 that licenses the ²nondramatic² public performance of ¹["nondramatic"]¹
18 musical works on behalf of copyright owners, such as the American
19 Society of Composers, Authors and Publishers (ASCAP), Broadcast

EXPLANATION - Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and intended to be omitted in the law.

Matter underlined thus is new matter.

Matter enclosed in superscript numerals has been adopted as follows:

¹ Assembly ACP committee amendments adopted May 20, 1996.

² Assembly amendments adopted in accordance with Governor's recommendations September 16, 1996.

1 Music, Inc. (BMI) and SESAC, Inc.;

2 "Proprietor" means the owner of a retail establishment, restaurant,
3 inn, bar, tavern or any other similar place of business or professional
4 office located in this State in which the public may assemble and in
5 which ¹**[nondramatic]** musical works may be performed, broadcast,
6 or otherwise transmitted for the enjoyment of the members of the
7 public there assembled;

8 "Royalty" or "royalties" means the fees payable to a copyright
9 owner or performing rights society for the ²nondramatic² public
10 performance of a ¹**[nondramatic]** musical work.

11

12 3. a. Every performing rights society ¹**[doing business]** licensing
13 music¹ in this State shall ²**[file]** make available in electronic form on
14 the largest nonproprietary cooperative public computer network² a
15 current list of ¹not less than¹ the ²titles of the² ¹performed¹
16 copyrighted ¹**[nondramatic]** musical works for which the performing
17 rights society collects royalties on behalf of copyright owners ²**[with]**
18 and shall update the list at least weekly and shall provide the electronic
19 address to² the Secretary of State ²**[at least annually]**².

20 ²**[b.** The list required by this section may be relied upon by a
21 proprietor in making an informed decision before entering into a
22 contract with a performing rights society and shall be binding between
23 the parties for the period of any contract once executed pursuant to
24 this act.

25 c. The list required by this section shall be provided at a reasonable
26 cost to any person upon request.

27 ~~d.]~~ b. Upon request, any person may view the list in electronic
28 form through the Office of the Secretary of State.

29 c. The list in electronic form at the time that a proprietor enters
30 into a contract with a performing rights society, as supplemented by
31 subsequent additions to the list, shall be binding between the parties
32 for the period of the contract.

33 d. Every performing rights society shall provide a copy of its
34 current list at a reasonable cost to any person upon request.

35 e.² Every performing rights society ¹**[doing business]** licensing
36 music¹ in this State shall establish a toll free telephone number which
37 can be used to answer inquiries regarding specific ¹**[nondramatic]**¹
38 musical works licensed by that performing rights society.

39

40 4. A performing rights society shall not enter into or execute a
41 contract for the payment of royalties by a proprietor unless, no later
42 than 72 hours prior to the execution of the contract, the performing
43 rights society provides to the proprietor, in writing, the following:

44 a. a schedule of the rates and terms of royalties under the contract;

45 b. ¹notice that the performing rights society shall, upon request by

1 a proprietor, provide, before entering into a contract with that
2 proprietor.¹ a schedule of the rates and terms of royalties under
3 agreements executed by the performing rights society and proprietors
4 of comparable businesses in the ¹[area] same county¹;

5 ²[c. notice of its most recent filing with the Secretary of State
6 pursuant to section 3 of this act and the rights and responsibilities of
7 the performing rights society and the proprietor appurtenant thereto;

8 d. the toll free telephone number required by subsection d. of
9 section 3 of this act;]²

10 ²[e.] c.² in the case of a performing rights society which offers
11 discounts to proprietors in the ²[area] same county² on any basis, the
12 amounts and terms of those discounts;

13 ²d. notice of the provisions of section 3 of this act including the
14 electronic address and the toll free telephone number;² and

15 ²[f.] e.² notice that the proprietor is entitled to the information
16 required under this act and that the failure of the performing rights
17 society to provide that information is a violation of this act ¹[and may
18 render a contract unenforceable under this act]¹.

19

20 5. A contract between a performing rights society and a proprietor
21 for the payment of royalties shall be offered for a term of one year, but
22 the parties may agree to contract for a term other than one year. ¹The
23 provisions of this section shall not apply to ²[contracts which contain
24 terms] a contract for a term² negotiated between a performing rights
25 society and a bonafide national trade association representing a
26 substantial percentage of proprietors of the same type.¹

27

28 6. Every contract between a performing rights society and a
29 proprietor for the payment of royalties executed or renewed in this
30 State shall:

31 a. be in writing;

32 b. be signed by the parties to the contract; and

33 c. include at least the following information:

34 (1) the proprietors' name and business address and the name and
35 location of each place of business to which the contract applies;

36 (2) the name and business address of the performing rights society;

37 (3) the duration of the contract; and

38 (4) the schedule of rates and terms of royalties to be collected
39 under the contract, including any sliding scale, discount or schedule
40 for any increase or decrease of those rates for the duration of the
41 contract.

42

43 7. No performing rights society, or any agent or employee thereof
44 shall:

45 a. enter onto the premises of a proprietor's business for the purpose

1 of discussing a contract for the payment of royalties by that proprietor
2 without first identifying himself to the proprietor or his employees and
3 disclosing that he is acting on behalf of the performing rights society
4 and disclosing the purpose of the discussion;

5 b. collect or attempt to collect a royalty payment or any other fee
6 except as provided in a contract executed pursuant to the provisions
7 of this act on or after the effective date of this act;

8 c. use or attempt to use any ²unfair or deceptive² act or practice
9 in ²[negotiating] dealing² with a proprietor ²], or in retaliation for a
10 proprietor's failure or refusal to negotiate, with the intent of coercing
11 the proprietor to negotiate or enter into a contract for the payment of
12 royalties, including, but not limited to:

13 (1) any act or practice that ¹unduly¹ disrupts the proprietor's
14 business; or

15 (2) threatening to commence legal proceedings in connection with
16 an alleged copyright violation. **];**

17 d. use or attempt to use any act or practice that is substantially
18 disruptive to a proprietor's business; or

19 e. commence or threaten to commence legal proceedings in
20 connection with an alleged copyright violation unless that performing
21 rights society shall have advised the proprietor that the proprietor may
22 comply with the federal copyright law pursuant to Title 17 of the
23 United States Code with respect to copyrighted musical works in that
24 performing rights society's repertory by:

25 (1) obtaining a license from that performing rights society; or

26 (2) discontinuing all nondramatic public performances of music in
27 that performing rights society's repertory; or

28 (3) obtaining authorization for nondramatic public performances
29 directly from the copyright owners who are members of that
30 performing rights society.²

31

32 8. Nothing in this act shall be construed to prevent a performing
33 rights society from informing ²[the] a² proprietor of the proprietor's
34 obligations under the federal copyright law pursuant to Title 17 of the
35 United States Code.

36

37 ²[9. A person who ¹willfully ¹violates any provision of this act
38 shall be liable to pay a penalty of not more than \$2,500 for a first
39 violation and not more than \$10,000 for a second or subsequent
40 violation. The penalty shall be collected and enforced in the name of
41 the State by the Attorney General in a court of competent jurisdiction
42 in a summary proceeding pursuant to "the penalty enforcement law,"
43 N.J.S.2A:58-1 et seq.]²

44

45 ²[10.] 9.² a. A proprietor may bring an action in a court of
46 competent jurisdiction or assert a counterclaim against a performing

1 rights society to enjoy a violation of this act and to recover ¹[any]
2 actual¹ damages sustained as a result of that violation.

3 b. The prevailing party in an action brought under this act shall be
4 awarded reasonable attorney's fees and costs of suit.

5
6 ²[¹11.] ²10.² a. This act shall not apply to contracts between
7 performing rights societies and broadcasters licensed by the Federal
8 Communications Commission, except that if a performing rights
9 society is licensed by the Federal Communications Commission, this
10 act shall apply to contracts between that performing rights society and
11 a proprietor as otherwise provided herein.

12 b. This act shall not apply to any conduct by law enforcement
13 officers or other persons engaged in for the enforcement of section 1
14 of P.L. 1991, c. 125 (C. 2C:21-21).¹

15
16 ¹[11.]² [^{12.}1] ²11.² This act shall take effect ¹[immediately] on
17 the 90th day following enactment¹.

18
19
20 _____
21
22 Regulates certain music licensing practices.

1 10. a. A proprietor may bring an action in a court of competent
2 jurisdiction or assert a counterclaim against a performing rights society
3 to enjoin a violation of this act and to recover any damages sustained
4 as a result of that violation.

5 b. The prevailing party in an action brought under this act shall be
6 awarded reasonable attorney's fees and costs of suit.

7

8 11. This act shall take effect immediately.

9

10

11

STATEMENT

12

13 This bill establishes certain rights and responsibilities between the
14 parties to contracts for the payment of royalties for the performance
15 of nondramatic musical works on certain business premises. The
16 owners of copyrighted music are usually represented by "performing
17 rights societies," such as ASCAP (the American Society of
18 Composers, Authors and Publishers) and BMI (Broadcast Music,
19 Inc.). Among their other activities on behalf of the copyright owners
20 they represent, these societies negotiate "blanket" contracts with
21 individual small businesses, such as restaurants, bars and retail
22 establishments, for the performance, either live or recorded, or
23 broadcast on television or radio, of the copyrighted works in their
24 respective repertoires. Because of the powerful position these
25 performing rights societies have assumed, the average small business
26 owner is at a disadvantage in negotiating a fair contract. Often times,
27 the proprietor is left feeling he has no choice but to contract with
28 several performing rights societies, just to be certain that he doesn't
29 run afoul of the federal copyright laws and open himself up to
30 litigation.

31 This bill requires performing rights societies to make certain
32 information regarding the musical works represented available so that
33 the proprietor may make an informed decision; and provides certain
34 safeguards and remedies once the contract is executed. Specifically,
35 the bill requires performing rights societies doing business in the State
36 to file a current list of songs for which they collect royalties on behalf
37 of copyright owners with the Secretary of State annually. The list may
38 be used by the proprietor of a business in making an informed decision
39 before entering into a contract with a performing rights society to use
40 music in his place of business. The required list must be provided at
41 a reasonable cost to anyone requesting it. A performing rights society
42 must also establish and maintain a toll free telephone number through
43 which inquiries regarding specific musical works may be made. The
44 bill requires that certain information, including information regarding
45 the list and the toll free telephone number, be provided to a proprietor
46 at least 72 hours before a contract for the payment of royalties is

1 executed; and that certain information be included in the contract.
2 Contracts must be offered for a term of one year, but the parties may
3 agree to a contract of another duration.

4 Finally, the bill prohibits certain unfair or coercive practices by
5 performing rights societies in their dealings with proprietors and
6 establishes penalties for violations of its provisions. The maximum
7 penalty for a first violation is \$2,500, and for subsequent violations,
8 \$10,000. The bill also establishes a private cause of action for
9 violation of its provisions.

10

11

12

13

14 Regulates certain music licensing practices.

ASSEMBLY CONSUMER AFFAIRS AND REGULATED
PROFESSIONS COMMITTEE

STATEMENT TO
ASSEMBLY, No. 1698

with committee amendments

STATE OF NEW JERSEY

DATED: MAY 20, 1996

The Assembly Consumer Affairs and Regulated Professions Committee reports favorably and with committee amendments Assembly Bill No. 1698.

As amended, this bill establishes certain rights and responsibilities between the parties to contracts for the payment of royalties for the performance of musical works on certain business premises. The owners of copyrighted music are usually represented by "performing rights societies," such as ASCAP (the American Society of Composers, Authors and Publishers) and BMI (Broadcast Music, Inc.). Among their other activities on behalf of the copyright owners they represent, these societies negotiate "blanket" contracts with individual small businesses, such as restaurants, bars and retail establishments, for the performance, either live or recorded, or broadcast on television or radio, of the copyrighted works in their respective repertoires. Because of the powerful position these performing rights societies have assumed, the average small business owner may be at a disadvantage in negotiating a fair contract. Often times, the proprietor is left feeling he or she has no choice but to contract with several performing rights societies, just to be certain that he or she doesn't run afoul of the federal copyright laws and open himself or herself up to litigation.

This bill requires performing rights societies to make certain information regarding the musical works represented available so that the proprietor may make an informed decision; and provides certain safeguards and remedies once the contract is executed. Specifically, the bill requires performing rights societies licensing music in the State to file a current list of songs for which they collect royalties on behalf of copyright owners with the Secretary of State annually. The list may be used by the proprietor of a business in making an informed decision before entering into a contract with a performing rights society to use music in his or her place of business. The required list must be provided at a reasonable cost to anyone requesting it. A performing rights society must also establish and maintain a toll free telephone

number through which inquiries regarding specific musical works may be made. The bill requires that certain information, including information regarding the list and the toll free telephone number, be provided to a proprietor at least 72 hours before a contract for the payment of royalties is executed; and that certain information be included in the contract. Contracts must be offered for a term of one year, but the parties may agree to a contract of another duration.

Finally, the bill prohibits certain unfair or coercive practices by performing rights societies in their dealings with proprietors and establishes penalties for violations of its provisions. The maximum penalty for a first violation is \$2,500, and for subsequent violations, \$10,000. The bill also establishes a private cause of action for violation of its provisions.

Amendments to the bill include the following:

- removal of the definition of "area" from the bill, which was defined as a geographic region having a 25 mile radius surrounding each business location of a proprietor;
- provision that a performing rights society shall notify a proprietor, in writing, that upon request by the proprietor the performing rights society, before entering into a contract with that proprietor, will provide a schedule of the rates and terms of royalties under agreements executed by the performing rights society and proprietors of comparable businesses in the same county;
- removal of every reference of the term "nondramatic musical works" in the bill so that the bill's provisions relate to musical works in general;
- stipulation that the bill's provisions apply to performing rights societies licensing music in this State, rather than to performing rights societies doing business in the State, as originally stated in the bill;
- provision that every performing rights society licensing music in this State shall file a current list of not less than the performed copyrighted works, at least annually with the Secretary of State, rather than a current list of the copyrighted works, as originally provided in the bill, for which the performing rights society collects royalties on behalf of copyright owners;
- provision that a performing rights society, or any agent or employee of that society, is in violation of the bill's provisions when engaging in an act or practice that unduly disrupts a proprietor's business;
- provision that a proprietor, when bringing an action in a court of competent jurisdiction involving a performing rights society, may recover actual damages sustained as a result of a violation of a provision of this bill, instead of any damages so sustained, as stated in the original bill;
- stipulation that the provisions of the bill do not apply to contracts between performing rights societies and broadcasters licensed by the Federal Communications Commission or to any enforcement

conduct by law enforcement officers or other persons pursuant to the "New Jersey Anti-Piracy Act;" and

- exemption from the provision in the bill that all contracts must be offered for a term of one year unless the parties agree to a contract of another duration for contracts which contain terms negotiated between a performing rights society and a bonafide national trade association representing a substantial percentage of proprietors of the same type.

STATE OF NEW JERSEY
EXECUTIVE DEPARTMENT

September 16, 1996

ASSEMBLY BILL NO. 1698
(First Reprint)

To the General Assembly:

Pursuant to Article V, Section I, Paragraph 14 of the New Jersey Constitution, I am returning Assembly Bill No. 1698 (First Reprint) with my recommendations for reconsideration.

A. Summary of Bill

This bill regulates certain business practices between the parties to contracts for the payment of royalties for nondramatic public performances of copyrighted musical works on certain business premises. The contracts are between a performing rights society, such as the American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music, Inc. (BMI) or SESAC, Inc. and a proprietor of a retail establishment, restaurant, inn, bar, tavern or any other similar place of business or professional office.

The bill requires each performing rights society to file at least annually with the Secretary of State a list of the copyrighted works for which it collects royalties on behalf of the copyright owner and makes that list binding between the parties for the period of the contract. The bill establishes certain requirements for royalty payment contracts and mandates that a performing rights society provide certain specified information to a proprietor at least 72 hours prior to the execution of such a contract. Furthermore, the bill prohibits a performing rights society and its agents and employees from engaging in certain practices related to contract negotiations and attempts to collect royalty payments. Finally, the bill establishes penalties to be collected and enforced

by the Attorney General in the name of the State and also creates a private cause of action.

B. Recommended Action

I acknowledge the efforts of the sponsors to level the playing field between the powerful performing rights societies and small business owners in negotiating a fair contract for royalty payments on copyrighted musical works. Nevertheless, two provisions of this bill may be found to violate the Supremacy Clause of the United States Constitution if a court determines that they frustrate the full effectiveness of federal copyright law.

First, I am advised by my Chief Counsel and by the Attorney General that the bill's provision that prohibits a performing rights society from threatening to commence legal proceedings in connection with an alleged copyright violation may be federally preempted. Accordingly, I recommend a revision that would acknowledge the federally-established right of a performing rights society to threaten to commence such legal proceedings but would also impose upon the performing rights society the obligation to inform the proprietor of options for complying with the federal copyright law. This recommendation is in accord with the well-established practices of the performing rights societies and with the view of at least one federal court in its analysis of this issue.

I am further advised by my Chief Counsel and by the Attorney General that the bill's provision that makes the list filed by a performing rights society with the Secretary of State binding between that performing rights society and any proprietor for the period of any contract, regardless of how much time elapses between the preparation of the list for filing and the execution of a contract, may also be federally preempted. Accordingly, I recommend a revision

STATE OF NEW JERSEY
EXECUTIVE DEPARTMENT

3

that changes the filing requirement with the Secretary of State from a requirement to file a "hard copy" of the list at least annually to a requirement to make the list available in electronic form on the largest nonproprietary cooperative public computer network, as they already do, and to update the list in electronic form at least weekly. The list that is in electronic form at the time that a proprietor enters into a contract with a performing rights society will then be a current list when the contract is executed. That list, as supplemented by subsequent additions to the list, shall be binding between the parties for the period of the contract. The binding list requirement is, in my view, a reasonable state trade regulation that addresses the need for licensees to make informed choices. Similar state trade regulations have been upheld by the courts against federal preemption claims even where, unlike here, the regulation has imposed added costs. See, e.g., Allied Artists Picture Corp. v. Rhodes, 679 F.2d 656 (6th Cir. 1982); Associated Film Dist. Corp. v. Thornburgh, 614 F. Supp. 1100 (E.D. Pa. 1985), aff'd, 800 F. 2d 369 (3d Cir. 1986), cert. denied, 480 U.S. 933 (1987). I am informed that such a provision is consistent with current practice under federal law. Even though a member of a performing rights society may withdraw from membership during the term of that performing rights society's contract with a licensee, at least one federal court has acknowledged the propriety of making a member's withdrawal from a performing rights society subject to rights or obligations existing between that performing rights society and its licensees under then-existing licenses.

In addition, I am recommending deletion of the section of this bill that specifies penalties for willful violations of the act and requires the Attorney General to collect and enforce these penalties

STATE OF NEW JERSEY
EXECUTIVE DEPARTMENT

4

in the name of the State because placing that responsibility on the Attorney General is neither necessary nor appropriate. This bill creates a private cause of action to enjoin a violation of the act and to recover actual damages. Private disputes should be settled between private parties.

Therefore, I herewith return Assembly Bill No. 1698 (First Reprint) and recommend that it be amended as follows:

- Page 1, Section 2, Line 17: After "the" insert "nondramatic"
- Page 2, Section 2, Line 8: After "the" insert "nondramatic"
- Page 2, Section 3, Line 12: Delete "file" and insert "make available in electronic form on the largest nonproprietary cooperative public computer network"
- Page 2, Section 3, Line 13: Before "performed" insert "titles of the"
- Page 2, Section 3, Line 15: Delete "with" and insert "and shall update the list at least weekly and shall provide the electronic address to" and delete "at least annually"
- Page 2, Section 3, Lines 16-23 : Delete lines 16-22 in entirety. On line 23 delete "d." and insert:
- "b. Upon request, any person may view the list in electronic form through the Office of the Secretary of State.
- c. The list in electronic form at the time that a proprietor enters into a contract with a performing rights society, as supplemented by subsequent additions to the list, shall be binding between the parties for the period of the contract.
- d. Every performing rights society shall provide a copy of its current list at a reasonable cost to any person upon request.
- e. "
- Page 2, Section 4, Lines 38-42: Delete in entirety.

STATE OF NEW JERSEY
EXECUTIVE DEPARTMENT

5

- Page 2, Section 4, Line 43: Delete "e." and insert "c."
- Page 2, Section 4, Line 44: Delete "area" and insert "same county"
- Page 2, Section 4, Line 45: After ";" insert:

"d. notice of the provisions of section 3 of this act including the electronic address and the toll free telephone number;"
- Page 2, Section 4, Line 46: Delete "f." and insert "e."
- Page 3, Section 5, Lines 8-9: Delete "contracts which contain terms" and insert "a contract for a term"
- Page 3, Section 7, Lines 38-46: On line 38, after "any" insert "unfair or deceptive"; delete "negotiating" and insert "dealing". On line 39, after "proprietor", delete remainder of line 39 and lines 40-46 and insert "

d. use or attempt to use any act or practice that is substantially disruptive to a proprietor's business; or

e. commence or threaten to commence legal proceedings in connection with an alleged copyright violation unless that performing rights society shall have advised the proprietor that the proprietor may comply with the federal copyright law pursuant to Title 17 of the United States Code with respect to copyrighted musical works in that performing rights society's repertory by:

(1) obtaining a license from that performing rights society; or

(2) discontinuing all nondramatic public performances of music in that performing rights society's repertory; or

(3) obtaining authorization for nondramatic public performances directly from the copyright owners who are members of that performing rights society."

STATE OF NEW JERSEY
EXECUTIVE DEPARTMENT

6

Page 4, Section 8, Line 2: After "informing", delete "the"
and insert "a"

Page 4, Section 9, Lines 6-12: Delete in entirety

Page 4, Section 10, Line 14: Delete "10." and insert "9."

Page 4, Section 11, Line 21: Delete "11." and insert "10."

Page 4, Section 12, Line 31: Delete "12." and insert "11."

Respectfully,

/s/ Christine Todd Whitman
GOVERNOR

[seal]

Attest:

/s/ Michael P. Torpey
Chief Counsel to the Governor