

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 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 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:

<u>Page 1, Section 2, Line 17:</u>	After "the" insert "nondramatic"
<u>Page 2, Section 2, Line 8:</u>	After "the" insert "nondramatic"
<u>Page 2, Section 3, Line 12:</u>	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.
- 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."

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