



---

## State Legislation Restricting the Sale of Prerecorded Music

S. Williams Grimes

Follow this and additional works at: <https://via.library.depaul.edu/jatip>

---

### Recommended Citation

S. W. Grimes, *State Legislation Restricting the Sale of Prerecorded Music*, 2 DePaul J. Art, Tech. & Intell. Prop. L. 44 (1992)

Available at: <https://via.library.depaul.edu/jatip/vol2/iss2/3>

This Legislative Updates is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Journal of Art, Technology & Intellectual Property Law by an authorized editor of Via Sapientiae. For more information, please contact [digitalservices@depaul.edu](mailto:digitalservices@depaul.edu).

17. *Id.* at 7.
18. *Id.*
19. *Id.* at 7-8.
20. *Id.* For example, a patient who has lost his or her eyesight can develop exceptional hearing skills to compensate for the loss of vision.
21. *Id.*
22. *Id.* at 31.
23. *Id.* at 28-29.
24. *Id.* at 30-31, 77-105.
25. *Id.* at 77-105.
26. *Id.* at 52-55.
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. S. 1723, 102nd Cong., 1st Sess., 137 Cong. Rec. 13,235-13,239 (1991) (statement of Dr. Oliver Sacks).
32. Older Americans Act of 1965, 42 U.S.C. § § 3001 *et seq.* (1986).
33. S. 1723, 102nd Cong., 1st Sess., 137 Cong. Rec. 13,235-13,239 (1991).
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. 42 U.S.C. at § § 3030o (1)-(7).
40. *Id.* at § 3030m(b).
41. *Id.* at § § 3011, 3016.
42. *Id.* at § 3027.
43. *Id.* at § 3030m(a).
44. S. 1723, 102nd Cong., 1st Sess., 137 Cong. Rec. 13,235-13,239 (1991).
45. 42 U.S.C. at § 3035a(b). *See also* H. 2967, 102nd Cong., Sess., 137 Cong. Rec. H6466-04 (1991). House Bill 2967 also proposes, among other things, the addition of music therapy as a *discretionary* project or program. Apparently, S. 1723, with its placement of music therapy under services to receive “special consideration,” would require less discretion on the Commissioner’s part in considering music therapy as a viable program. S. 1723, 102nd Cong., 1st Sess., 137 Cong. Rec. 13,235-13,239 (1991).
46. S. 1723, 102nd Cong., 1st Sess., 137 Cong. Rec. 13,235-13,239 (1991).
47. *Id.*
48. *Id.*

---

## State Legislation Restricting the Sale of Pre-recorded Music

### Introduction

During the 1950’s the music regulation era began with the inception of rock and roll. Over the years, as rock and roll and the music industry grew, parents became concerned with the possible negative influences of modern music.<sup>1</sup> This concern erupted as a national issue in 1985 when the Parent Music Resource Center (PMRC), a Washington D.C. based lobby, called for the music industry to put warning labels on records considered unsuitable for children.<sup>2</sup> The PMRC’s target was music that encourages violence, drug use, and sexual promiscuity.<sup>3</sup>

Lobbyists are also concerned with the alleged references to satanic worship in heavy metal music.<sup>4</sup> Opponents promptly accused PMRC of music censorship. PMRC responded to the allegations by insisting that the group was asking for voluntary compliance.<sup>5</sup> In November of 1985, under pressure from PMRC, the members of the Recording Industry Association of America (RIAA) agreed to independently label their more controversial releases with the following warning: “Parental Guidance: Explicit Lyrics.”<sup>6</sup>

In 1989 the issue of warning labels resurfaced with the introduction of labeling bills in approximately twelve state legislatures.<sup>7</sup> By 1990 these bills and this new music censorship movement once again lost momentum. According to the Legislative Counsel for the National Association of Record Merchandisers (NARM) — the organization that represents most of the nation’s major record retail chains - the “tide was turning” in the fight against music censorship.<sup>8</sup> One factor leading to this conclusion was that no action was taken on the proposed bills. In four states the record labeling bills were rejected.<sup>9</sup> In the other eight states either the bills never made it out of committee or they were never seconded.<sup>10</sup> Another factor which led NARM to believe that the issue of warning labels was fading was the positive reaction it received upon informing state legislators of the danger of music censorship and why it is inappropriate to label records.<sup>11</sup>

In 1991 and 1992 record warning label legislation began to reappear. The new bills do more than target record labeling; they focus on protecting minors from obscenity in pre-recorded music.<sup>12</sup> This proposed legislation forges a new path in obscenity laws. Previously, federal and state obscenity laws involved books, periodicals, films, and videos.<sup>13</sup> This new wave of bills is now focused on restricting the sale of pre-recorded music by way of state obscenity law.<sup>14</sup> The state legislatures are amending obscenity statutes to include “unsuitable” music and “redefining it as obscenity.”<sup>15</sup> These bills restrict pre-recorded music in two ways: first, the bills define unsuitable music as obscene; second, they institute a policy for protecting minors. As of April 1992, the state of Washington<sup>16</sup> is the first state to enact such legislation and there are currently twelve other states with music censorship bills under consideration.<sup>17</sup> These bills are broader, more sophisticated, and potentially more dangerous to the recording industry than their predecessors.<sup>18</sup> They present a whole new set of legal obstacles dealing with the problems associated with obscenity laws.

This update will investigate these bills and their impact on first amendment freedoms. It will consist of a general overview of each of the proposed regulations and a discussion of the resulting concerns of the music industry.

## Overview of the Music Censorship Laws and Bills

On March 20, 1992 the state of Washington passed the first state law limiting the sale of prerecorded music.<sup>19</sup> Music industry observers have named the law the “erotic music law” because it is one of the first bills to specifically send violators to jail for selling minors music deemed erotic.<sup>20</sup> Under Washington’s statutory scheme the labeling process begins when a complaint is filed with States Attorney’s office.<sup>21</sup> A complaint may be brought by individuals who wish to have particular lyrics labeled as “adults only.”<sup>22</sup> Prior to labeling specific lyrics for “adults only,” the prosecutor investigates and determines whether a court hearing is appropriate for resolution of the complaint.<sup>23</sup> If a hearing is warranted, a court will hear arguments on whether the music is erotic.<sup>24</sup> If the music is deemed erotic, the court will order the music to be labeled for “adults only.”<sup>25</sup> The court will deem lyrics to be erotic using community standards similar to those used in other obscenity cases.<sup>26</sup> Thus, the “adults only” label would require dealers and distributors to restrict the record’s sale and display.<sup>27</sup>

The Washington law also provides that any person found to have sold erotic music to a minor would face up to six months in jail and a \$500 dollar fine.<sup>28</sup> Repeat offenders face up to one year in jail and a \$1,000 dollar fine. A third offense is regarded as a felony with a maximum \$5,000 dollar fine and a minimum one year sentence.<sup>29</sup>

Twelve other states either have pending labeling bills or are considering such measures. In South Carolina, a labeling bill was introduced on January 24, 1991 and the bill is in the House Committee on the Judiciary.<sup>30</sup> The bill prohibits the sale, lease, distribution, or rental of records, audiotapes, compact discs, music videotapes, and other recordings that contain sexually explicit lyrics, lyrics that advocate violence or criminal conduct, or lyrics containing swear or curse words to persons under the age of eighteen years.<sup>31</sup> The Texas legislature is also considering a bill which would make it an offense to sale, distribute, or exhibit lyrics harmful to minors.<sup>32</sup> The proposed legislation also requires that certain recordings be labeled as containing explicit lyrics. Violators would be fined \$3,000 per violation.<sup>33</sup>

Massachusetts legislators are pondering an obscenity measure introduced on February 8, 1991.<sup>34</sup> This bill would prevent the sale or rental to minors of pornographic books, records, or videos and subject retailers to a \$250-per-day fine for displaying such material.<sup>35</sup> Similarly, the Oregon legislature is considering a bill which would allow parents or guardians of a minor to file a civil action against the party who furnished obscene sound recordings, videos, or books to their minor children.<sup>36</sup> The bill requires the payment of punitive damages of not less than \$200 and not more than \$2,500 in addition to actual damages, if any, and it authorizes the awarding of attorney fees.<sup>37</sup> The bill was introduced on February 15, 1991.<sup>38</sup> and has been passed in the Oregon House of Representatives and is pending in the Senate Committee on the Judiciary.<sup>39</sup>

In Nebraska, a proposed bill would prohibit minors from attending obscene motion pictures, shows, and presentations, and prohibit the sale of obscene material to minors.<sup>40</sup> It was introduced on January 10, 1991 and is pending in the House Committee on the Judiciary.<sup>41</sup> This bill, like the others, is an obscenity based measure. However, it is not clear if prerecorded music is included in the statute’s use of “obscene materials.”<sup>42</sup>

New Jersey has three obscenity or harm-to-minors bills pending. These bills are carryovers from last year, and currently are not scheduled for hearing.<sup>43</sup> Nevertheless, the New Jersey bills still pose a minimal threat to the music industry because they are obscenity based bills. Additionally, New York has a bill under consideration that would mandate labeling of recordings that contain sexually explicit or violent lyrics and prohibit the sale to minors.<sup>44</sup> This bill is now pending in the Assembly Committee on Consumer Affairs and Protection<sup>45</sup> and is very similar to the South Carolina and Massachusetts bills discussed *infra*.

The Florida legislature is currently considering a bill which would prohibit the sale of recordings that contain lyrics that describe, advocate, or glamorize suicide, sodomy, incest, bestiality, sado-masochism, adultery, violent sexual activity, and recordings that advocate or encourage murder, violent racism, religious violence, morbid violence, or the illegal use of drugs or alcohol to minors.<sup>46</sup> The proposed legislation would also require such recordings to bear a warning label, provide for injunctions and confiscation, and require retailers to make written copies of certain lyrics available for examination.<sup>47</sup>

In summary, Arizona, Michigan, Illinois, and Missouri are also considering regulating obscene mu-

sic.<sup>48</sup> However, since no significant action has been taken on any of these bills, discussion of this proposed legislation is beyond the scope of this update.

### Music Industry Concerns

The Washington law and the twelve proposed regulations impose a greater threat to first amendment freedoms than previously considered censorship bills.<sup>49</sup> These new bills are broader, more sophisticated, and potentially more destructive.<sup>50</sup> Record industry observers and first amendment scholars believe one of the problems that the bills impose is the new legal obstacles associated with including music in obscenity. "By casting the debate in terms of whether you are pro-obscenity or anti-obscenity, it might be easier for legislators to avoid the constitutional censorship debate," said Art Kropp, president of People For The American Way, a non-profit Washington based free speech group founded in 1980.<sup>51</sup> "It's not like you're arguing against music when once you can categorize something as pornographic, it's easier to strip it of free-speech protection."<sup>52</sup>

Observers and scholars also believe the bills impose problems because they have the potential of eliciting greater public support. NARM theorizes that the new legislation will have greater public support than past bills because they appear less radical.<sup>53</sup> The new bills are limited in scope to protection of minors and it is difficult to publicly argue against the protection of children. Previously considered bills were radically written and produced a negative reaction by the general public and legislators.<sup>54</sup> According to NARM, "the appeal of this new round [of bills] is that it appears to be cloaked in an air of rationality."<sup>55</sup>

The new wrinkles used in the bills have greatly improved the chances of the legislation being enacted. These laws would affect important rights; most significantly, the right to free speech. The proposed legislation would cause a chilling effect on the first amendment rights of the musicians involved as well as on the general public. Despite the fact that most of the new bills are directed at protecting minors, minors are the main consumers of music. As a result of the reduced amount of consumers, a musician may not choose to produce music because the greatest portion of his or her intended audience will not even have the chance to purchase the music. The resulting impact is that there is no incentive to produce a record if the target market is effectively eliminated. Veron Reid, the guitarist from the rock group Living Colour, best expressed this concern among artists:

"One of the most important things about American Society is the free flow of ideas, even ideas that the good parents inside of us may find reprehensible. In protecting the right of certain ideas to be viewed, abhorrent though they may be, we are protecting our right to respond and attack those ideas in the public forum."<sup>56</sup>

### Conclusion

In conclusion, the new Washington law and the bills in the other twelve states pose a threat to first amendment rights. These regulations bear a heavy constitutional burden and, given the current conservative trend of the U.S. Supreme Court and Federal Circuit, it is not clear whether these regulations will be upheld. Hopefully, the state legislatures and the U.S. Supreme Court will listen to the general public and legal scholars, and consider Supreme Court precedent in determining whether or not to discard these proposed regulations of music. Ω

S. William Grimes

1. Chuck Philips, *The Target Is Rock; Censorship-vs.-Responsibility Debate Gains New Momentum as More States Examine Laws Requiring The Labeling of 'Offensive' Recordings*, LA TIMES, Feb. 11, 1990, at C69.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. Jeffrey Jolson-Colburn, *Music Rating Tide Turning; 4 States Reject Labeling Bills*, HOLLYWOOD REP., March 23, 1990.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. Paul Verna, *Record Censorship Bills Resurface*, BPI ENT. NEWS WIRE, March 14, 1991.

13. *Id.*

14. *Id.*

15. *Id.*

16. The law passed in the state of Washington is not a true obscenity statute. It does not define "offensive" music as being obscene. Instead, it defines "offensive" music as being "erotic material." It is not clear what the difference is between obscene material and "erotic material."

17. *Washington State Bans Sale of Erotic Music*, REUTER LIB. REP., March 20, 1992; Verna, *supra* note 12.

18. Verna, *supra* note 12.

19. REUTER LIB. REP., *supra* note 17.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. Tom Duffy & Ken Terry, *Solons In Washington State OK 'Erotic Music' Legislation*, BILLBOARD, March 14, 1992, at 4; A record deemed erotic must carry an "adults only" label in 40 point bold type on its face. *Id.*

26. *Id.*
27. *Id.*
28. REUTER LIB. REP., *supra* note 17.
29. *Id.*
30. H.B. 3311, 1991 SC H.B. 3311, 1991 South Carolina Law.
31. *Id.*
32. H.B. 1017, 1991 Texas Law; Chuck Phillips, *Pop Music; A War That Isn't Over; A Year After Agreeing To Warning Labels, The Recording Industry Is Under Fire Again As Bills To Curb Explicit Lyrics Are Pushed In 8 States*, LA TIMES, April 21, 1991, at C8.
33. *Id.*
34. H.B. 2684, 177th Gen. Cert., 1991 Reg. Sess., 1991 Massachusetts Law; Phillips, *supra* note 32, at C8.
35. *Id.*
36. H.B. 2669, 1991 Oregon Law.
37. *Id.*
38. *Id.*
39. *Id.*
40. L.B. 110, 1991 Nebraska Law.
41. *Id.*
42. *Id.*
43. Verna, *supra* note 12.
44. A.B. 6332, 1991 New York Law; Verna, *supra* note 12.
45. *Id.*
46. S.B. 986, 1990 Florida law.
47. *Id.*
48. REUTER LIB. REP., *supra* note 17.
49. Verna, *supra* note 12.
50. *Id.*
51. Phillips, *supra* note 32, at C8.
52. *Id.*
53. *Id.*
54. *Id.*
55. Verna, *supra* note 12.
56. Philips, *supra* note 1.

The editorial staff of the *DePaul—LCA Journal of Art and Entertainment Law* is currently accepting submissions for lead articles. Interested individuals should contact Gina Calabro, *DePaul—LCA Journal of Art and Entertainment Law*, DePaul University, College of Law, 25 East Jackson Boulevard, Chicago, IL 60604, (312) 362-5475. The deadline for consideration of publication in the Fall 1992 issue is September 15, 1992.