FEDERAL COUNSEL RESPONDS TO NRPA, CLARIFIES COPYRIGHT MUSIC PUBLIC PARK EXEMPTION

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In response to continued expressions of concern and frustration by its members, NRPA Executive Director R. Dean Tice called on the Chairman of the Senate Subcommittee on Patents, Copyrights, and Tradmarks, Dennis DeConcini (D. Ariz.), to clarify the responsibilities and scope of exemptions available to public park and recreation agencies under the existing federal copyright laws. As decribed below, NRPA's request to Congress was prompted by an ongoing controversy between public agencies and the major licensing organizations regarding federal copyrighted liability for the use of unlicensed music in park and recreation programs and activities. In pertinent part, NRPA's letter to DeConcini dated October 9, 1991 provided as follows:

> The uncertainty surrounding the applicability of copyright law exemptions, particularly Section 110(4), (17 U.S.C. § 110(4)) to public park and recreation agencies has caused widespread confusion and consternation. The members of our organization which provide the public with recreation opportunities are expressing deep concern and dismay over perceived distortions and abuses of the copyright laws by the major organizations which license the use of copyrighted music. Local agency executives who administer public park and recreation programs regularly receive correspondence from licensing groups threatening copyright liability if their demands for licensing contracts are not met.
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> In many instances, these licensing agreements are contracts of adhesion offered on "a take it or leave it basis." The payment schedule contained in these licensing agreements is typically identical to that offered commercial establishments such as bars and restaurants using live or recorded background music. Further, these licensing agreements tend to treat each facility within a public park and recreation agency which uses music in any manner as a separate entity. The proposed agreements also fail to take into account the use of music within these facilities which may be exempt pursuant to Section 110 regarding educational and non-fee functions. These practices tend to drive up the cost of these agreements beyond that which would apply if a blanket agreement for the entire public agency were clearly available for use of music not exempt under Section 110.
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> In claiming their right to payment under the federal copyright laws, these licensing groups cite a number of federal court decisions which have found copyright infringement for the use of unlicensed music in clearly commercial for profit entities. To the best of our knowledge, no federal court to date has reported a decision which has imposed infringement liability on a public park and recreation agency or similar governmental entity. Nor, has any reported federal court decision addressed the applicability of the Section 110(4) exemption to use of music by public park and recreation agencies. This fact is conspicuously absent

from the correspondence circulated by the major music licensing groups to apprise agencies of "their responsibilities under federal law."

In practice, licensing groups are unilaterally interpreting federal copyright law and presenting a "black and white" situation to public park and recreation administrators (i.e., pay our non-negotiable predetermined licensing fees for each facility or be liable for thousands of dollars plus attorney fees in federal court). In our judgment, the applicability of existing federal copyright law to the use of unlicensed music in public park and recreation settings is a grey area in need of clarification by the Congress.

Inpertinent part, Section 110, subsection 4 provides an exemption for public performances whose purposes are not intended for commercial advantage or private financial gain.

> Performance of a non-dramatic literary or musical work otherwise than in a transmission to the public, without any purpose of direct or indirect commercial advantage and without payment of any fee or other compensation for the performance to any of its performers, promoters, or organizers, if - (A) There is no direct or indirect admission charge; or (B) The proceeds, after deducting the reasonable cost of producing the performance, are used exclusively for educational, religious, or charitable purposes and not for private financial gain,...

The legislative history of Section 110(4) indicates that the Congress intended to exempt public performances of copyrighted works which involve no profit motive and no payment to performers. Further, no direct or indirect admission charge must be made for the performance. Alternatively, Congress also intended to allow an exemption under Section 110(4) for performances wherein the proceeds generated by any admission charges are used solely for bonafide educational, charitable or religious purposes after the deduction of reasonable costs for producing the performance.

In the absence of a reported federal court decision on point, we believe the Congress should clarify the applicability of the section 110(4) exemption to the use of unlicensed copyrighted music by a public park and recreation agency. At present, it is unclear under what circumstances this particular section may provide a public park and recreation agency with an exemption from infringement liability for certain uses of copyrighted music. Under a broad construction of terms like "commercial advantage," "educational/charitable purposes," and "not for private financial gain," one could reasonably argue that the most uses of particularly recorded music in public park and recreation program would be exempt under 110(4).

For example, a local park and recreation agency operates a public skating facility which plays recorded background music. The children and adults pay a small fee to go skating. However, any proceeds from the activity either do not cover the operational costs and overhead (which is the case for most public park and recreation programs charging user fees), or any revenues derived from such fee activities are used to subsidize that or other recreation programs within the agency. Similarly, a youth or seniors dance sponsored by public park and recreation agencies which use recorded music and charge participants a minimal fee are another prime example of a presumably exempt activity under Section 110(4). In addition to a possible exemption as an educational activity, aerobics and fitness classes in which the participants work out to prerecorded music would also present the type of activity which Congress intended to exempt from copyright liability under 110(4). In each of these public examples, there is no commercial advantage or private gain and any revenues produced would certainly benefit educational or charitable purposes exempt under Section 110(4).

The situations described above (skating parties, dances, aerobic classes) are characteristic of the vast majority of activities for which the music licensing groups are demanding fees from public park and recreation agencies. The licensing groups make no attempt to distinguish the type of music used or its purpose and their correspondence typically states flatly that all music must be licensed and fees paid to avoid liability for damages in the thousands of dollars. As a result, many park and recreation agencies have either paid fees at the predetermined commercial rate, discontinued the use of recorded music in their programs altogether, or continued to operate their programs under the threat of federal copyright liability by the major licensing groups.

In our opinion, the Congress did not intend to create such a situation when it enacted the 1976 changes to federal copyright law and abolished the traditional non-profit exemption from infringement liability afforded to public agencies. On the contrary, Section 110(4) was drawn to address the perceived abuses by public non-profit state universities in conducting large and perhaps very lucrative "rock concerts" featuring paid live performers which were then exempt from licensing fees under the non-profit exemption. In our view, the Congress did not intend the course now pursued by the major music licensing groups which seeks commercial rate fees for each and every public park and recreation facility using recorded background music in any manner and for any activity.

Specified exemptions are provided under Section 110 for annual agricultural or horticultural fairs. In 1982, fraternal organizations also received an exemption in so far as they also provide a community service. This community service rationale would arguably apply with even greater force to support a more specific exemption for public park and recreation programs under Section 110. Further, an argument could be made that the exemption extended to governmental entities for annual agricultural and horticultural fairs should be extended to similar community services programs, in particular public park and recreation programs.

> Otherwise, what is the legislative rationale for limiting non-educational governmental exemptions to fairs?
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> We believe the Congress must address the perceived ambiguity and abuses under existing federal copyright law, particularly the scope and applicability of Section 110(4). Thus, we call on your Subcommittee to conduct hearings to review this situation, and to determine whether remedial legislation is warranted to restore the public exemption contained in the earlier copyright law for programs like parks and recreation which clearly provide community services without private gain. As a minimum, Congress should clarify the scope of exemptions presently available to public park and recreation agencies under Section 110(4) by defining such unclear and ambiguous terms in the existing statute as applied to governmental entities, i.e., "commercial advantage", "not for private gain", "educational/charitable purposes."..

In response to NRPA's request, Senator DeConcini solicited the opinion of the Copyright Office of the Library of Congress on this issue of unlicensed music liability/exemption for public parks under existing federal law. In pertinent part, the November 6, 1991 analysis from Dorothy Schrader, General Counsel of the U.S. Copyright Office, provided as follows:

> Under appropriate circumstances, the public parks would have no copyright liability under existing law. It is possible, however, that sometimes either the performers, or organizers of musical events in public parks may be compensated for their efforts.
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> Under the 1976 Copyright Act, the fact that performing groups or promoters are paid for their services is critical to determining copyright liability.
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> Many nonprofit performances of nondramatic music, are exempt under the current Act, but the exemption fails if the performers/promoters are paid. Before 1978, all nonprofit performances of nondramatic music were exempt from copyright liability. As part of the general revision, authors and copyright owners made strong (and eventually convincing) arguments that the line between "for-profit" and "not-for-profit" activities was increasingly blurred and could not in any case be drawn fairly by exempting all nonprofit performances. After careful consideration, Congress decided to eliminate the general exemption for nonprofit performance of music, and substituted several more specific exemptions. The 1976 House Report to Congress gave this explanation of the change.
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> > The line between commercial and "nonprofit" organizations is increasingly difficult to draw. Many "nonprofit" organizations are highly subsidized and capable of paying royalties, and the widespread exploitation of copyrighted works by public broadcasters and other noncommercial organizations is likely to grow. In addition to the trends, it is worth noting that performances and displays are continuing to supplant markets for printed copies

> and that in the future a broad "not for profit" exemption could not only hurt authors but could dry up their incentive to write. (H.R. Rep. 1476, 94 Cong., 2d Sess. 62-63 (1976).)

Under section 110(4) of the current Act, "nonprofit" performances of nondramatic music are exempt if the performers, promoters, or organizers of the event are not paid and if there is no direct or indirect admission charge. (Even if admission is charged, the performance can be exempt if the proceeds are used exclusively for charity.) The thought behind this compromise is that creators of music would not be paid if performers are not paid, but if performers are paid, then creators should be paid for the use of their music, even in an otherwise nonprofit context...

Mr. Tice has written a very thoughtful letter. He urges restoration of the pre-1978 general exemption for nonprofit performance of music, or at least requests legislative clarification of key phrases such as "commercial advantage," "not for profit gain," and "educational/charitable purposes." The phrase "commercial advantage" means there is a for-profit motivation; the public parks described by Mr. Tice would not be operated for purposes of commercial advantage. The other phrases he cites become more important only if there is an admission charge. Perhaps the practice is developing of charging admission to the public parks. Basically, if the proceeds are devoted to public educational purposes, the exemption applies unless the author files an objection. I assume the proceeds from events at public parks would be devoted to educational-charitable purposes. The objection procedure is virtually a "dead-letter" provision, and, in any case, I doubt that any author would object to the activities of public parks.

In summary, the present law embodies a carefully crafted compromise. The exemption for nonprofit performances of music is available unless the performers/promotion are paid or an admission fee is charged. Even in the latter case, the exemption is available generally to charitable organizations like public parks.

COMMENTARY

Most significantly, Counsel states that "[u]nder appropriate circumstances, the public parks would have no copyright liability under existing law." In so doing, Counsel appears to cautiously endorse NRPA's ongoing contention that public park and recreation functions are, or should be, exempt from copyright liability under 17 U.S.C. § 110(4). According to Counsel's analysis, the law would rarely require the payment of licensing fees for the use of copyrighted music from public park and recreation events and activities which charge admission fees. Specifically, such events would be exempt under section 110(4) where it can be shown that any revenues generated are used exclusively for the educational-charitable purposes inherent in the vast majority of public park and recreation programs. On the other hand, Counsel acknowledged this section 110(4) exemption may not apply to public parks under rather limited circumstances where "performers are paid, then creators should be paid for the use of their music, even in an otherwise nonprofit context." While not providing a blanket exemption, Counsel concludes that most

public park and recreation programs should be exempt under section 110(4) from licensing fees and copyright liability.

Although Counsel's opinion regarding the applicability of the section 110(4) exemption to public park and recreation functions does not have the force of law, it certainly reflects an unbiased, reasonable and authoritative interpretation of copyright law by a federal official and attorney responsible for such matters. Consequently, public park and recreation agencies should be able justifiably rely on this opinion in the absence of judicial interpretations or legislative action to the contrary.

In a worse case scenario involving an infringement lawsuit by a music licensing organization, a defendant public park and recreation agency could certainly offer this opinion by the General Counsel of the U.S. Copyright Office to support its defense claim to a section 110(4) exemption. Further, in the unlikely event of a judgment imposing copyright liability, this opinion could be offered to establish an innocent infringement of the law and, thus, substantially mitigate the amount of statutory damages for copyright liability.

Statutory damages for innocent infringement of copyright are $250 per infringement (i.e., each public performance of an individual work). In contrast, the statutory maximum for damages associated with willful copyright infringement is $50,000. As a result, damages associated with innocent infringement of copyright tend to be much more modest than those willful violations demonstrating an utter disregard for the law.

More importantly, however, this worse case scenario assumes that a federal court reaches a conclusion which is diametrically opposed to the opinion expressed by the General Counsel of the U.S. Copyright Office. In the event of such an adverse ruling from a federal court, a better case could be made for legislative relief from the U.S. Congress.