BLANKET AGREEMENTS LICENSE GOVERNMENT MUSIC

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In determining federal copyright liability for the public performance of unlicensed music by public parks and recreation agencies, under the Copyright Act of 1976, the most critical issue is whether or not performing groups or promoters are paid for their services. Since the early 80's, public park and recreation agencies have had a number of questions and concerns regarding "licensing rights" for the "public playing of copyrighted music" by parks and recreation departments. One state society director recently wrote: What is the deal with ASCAP and BMI? Are local governments still exempt or do you know? They are starting to hound our members again." Similarly, one director reported that ASCAP had demanded the county sign "a blanket license agreement with respect to musical events conducted in our County Parks." In another instance, a parks and recreation director in a small town wanted to know if her department needed to purchase a license from ASCAP and/or any other music licensing company.

> ASCAP feels it necessary to call me once a week, write me occasional letters, and send e-mails stating I am infringing copyrights and violating federal laws and will continue to do so unless I purchase a license from ASCAP. We have three festivals throughout the year and typically host a concert at each one. At each concert we have contracts with each of the bands playing. Other than these festivals our use of music is limited to playing CDs in the recreation centers during programs, at ballfields before little league games, and the occasion power point presentation shown at city council meetings. Our use of music is not very extensive nor does it reach many people.

In response to similar licensing demands by ASCAP and BMI, some public park and recreation agencies have claimed an exemption from copyright liability and refused to pay licensing fees while other have paid the fees for some or all of their activities. In one instance, a town attorney acknowledged that "they may have activities that call for them to pay," i.e., events where performers and/or organizers are paid.

ASCAP (The American Society of Composers, Authors and Publishers) and BMI (Broadcast Music Inc.) are the two major Performing Rights Organizations (PROs) in the United States, each controlling 47-50% of the commercial music market. Federal copyright law defines a PRO as "an association, corporation, or other entity that licenses the public performance of nondramatic musical works on behalf of copyright owners of such works." A PRO acts as a "clearinghouse" to negotiate and issue public performance licenses to users of copyright music and distribute royalties to copyright owners from license proceeds according to a fixed schedule.

In the past, ASCAP and BMI have both expressed their willingness to negotiate lower uniform rates than that charged commercial entities for nonprofit groups. The apparent willingness to negotiate with nonprofits, rather than sue them in federal court, makes good business sense for ASCAP and BMI. The music licensing groups have everything to lose and very little to gain by suing a nonprofit group, particularly a public park and recreation agency, for copyright infringement. If a federal court should find in favor of a public park and recreation agency, the

precedent established could ultimately deprive licensing groups of existing fees received from some public agencies previously unwilling to challenge ASCAP/BMI claims to royalty payments. Thus, it makes more sense to seek fees through negotiation and/or intimidating references in correspondence to "liability for statutory damages for unauthorized performances," rather than actual court confrontations. See: "New Federal Law Enlivens Copyright Controversy" *Parks & Recreation*. March 1983. Vol. 17, Iss . 3; p. 20
http://classweb.gmu.edu/jkozlows/lawarts/03MAR83b.pdf

CHARITABLE PURPOSE EXEMPTION

Based on correspondence from the General Counsel of the U.S. Copyright Office in 1991, federal law provides an exemption from liability for unlicensed public performance of copyrighted music by nonprofits under certain circumstances. See: "Federal Counsel Responds to NRPA, Clarifies Copyright Music Public Park Exemption," *Parks & Recreation*. February 1992. Vol. 27, Iss . 2; p. 14
http://classweb.gmu.edu/jkozlows/lawarts/02FEB92.pdf

In pertinent part, Section 110(4), 17 U.S.C. § 110(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...

(In addition, given an admission charge, the copyright owner has the option under §110(4) to object in writing seven days prior to the public performance of his works. This formal objection provision is unlikely to be raised against any public parks and recreation fund raising activities.)

As a result, the Section 110(4) exemption for unlicensed public performances of copyrighted music would apply to most public park and recreation events which do not involve paid performers. For those limited situations involving "payment of any fee or other compensation for the performance to any of its performers, promoters, or organizers," according to Copyright Counsel, the copyright owners should also be paid for the use of their music.

Where an admission fee is charged, nonprofits would still be exempt under Section 110(4) if it can be shown that any revenues generated by an event or activity are used exclusively for educational-charitable purposes. Presumably, the public purpose for most park and recreation programs and activities is inherently educational or charitable and "not for private financial gain." Accordingly, while not providing a blanket nonprofit exemption (which has existed under the old Copyright Act of 1909), most public park and recreation programs should be exempt under Section 110(4) from liability for unlicensed use of copyrighted music.

In fact, on its website, ASCAP acknowledges that "United States Copyright Law provides a limited exemption for certain performances by non-profit organizations" under Section 110(4). However, as characterized by ASCAP, "that exemption is very narrow." According to ASCAP, non-profit organizations should "contact your attorney or ASCAP to find out whether your particular performances qualify for exemption" because "application of any statutory exemption always depends on the particular facts of the musical performance."

To date, a search of reported court decisions would indicate that the federal courts have yet to construe the breadth of the nonprofit exemption under 17 U.S.C. 110(4) as it would apply to public parks and recreation departments and activities. As a result, reasonable minds can certainly differ as to whether the Section 110(4) exemption is "very narrow" or rather broad, particularly when the public performance of copyrighted music involves public park and recreation agencies. The applicability of Section 110(4) exemption, however, becomes less clear and more problematic when "the particular facts of the musical performance" may involve direct or indirect commercial advantage or private financial gain for private performers, promoters, or organizers at public park and recreation activities and events.

Increasingly, public parks and recreation departments are partnering with the private sector and independent contractors to provide programs and activities, some of which may include live or recorded music. In a given situation, such public/private partnerships may place the applicability of the Section 110(4) exemption in doubt. Moreover, federal copyright law requires both the performers and the owner/operators of an establishment to have separate licenses for the public performance of copyrighted music.

ASCA/BMI BLANKET AGREEMENT

Recognizing the fact that "the U.S. Copyright Act does not provide explicit language that would exempt several uses of music engaged by local governments" (as was the case before the Copyright Act of 1976, which became effective in January 1978), the International Municipal Lawyers Association (IMLA) has negotiated several blanket music licensing agreements with ASCAP and BMI for use of music by local governments. On its website, IMLA describes itself as "a non-profit, professional organization that has been an advocate and resource for local government attorneys since 1935." http://www.imla.org/about/History.htm

According to IMLA, these "simple, comprehensive and cost-effective blanket license agreements with ASCAP and with BMI" will provide local governments with licenses to use "nearly 98% of all music commercially available in the United States." As described by IMLA, these blanket licenses "will provide coverage for almost all non-dramatic performances presented on both government owned property and at functions and events hosted by the government," including government use of music in "festivals, concerts, arts & craft fairs, parades, First Night and New Year's Celebrations, fireworks, carnivals, swimming pools, community center dances, aerobic classes ... and the list goes on and on.." http://www.imla.org/music_licensing/index.html

The "Local Governmental Entities Agreement" negotiated by IMLA with ASCAP and BMI includes not only named governmental entity as "LICENSEE", but also "any of its constituent bodies, departments, agencies or leagues." As a result, a blanket license executed by a city,

town, or county would also extend to the local parks and recreation department, assuming parks and recreation is not a totally separate governmental entity, like a park district. On the other hand, the Agreement does not authorize LICENSEE to grant to others any right to perform publicly in any manner any of the musical compositions.

The Agreement provides a license for "mechanical music" which includes audio records and discs, DVDs, videotape, and TV/radio transmissions, but not jukeboxes. In addition, the Agreement provides a license for "live entertainment," i.e., "music that is performed at the premises by musicians, singers or other performers." The Agreement, however, does not authorize the broadcasting, telecasting or transmission or retransmission by wire, Internet, website or otherwise renditions of musical compositions.

The Local Governmental Entities Agreement defines "Premises" as "buildings, hospitals, airports, zoos, museums, athletic facilities, and recreational facilities, including, but not limited to, community centers, parks, swimming pools, and skating rinks owned or operated by LICENSEE and any site which has been engaged by LICENSEE for use by LICENSEE.

As defined in the Agreement, "Events" and "Functions" includes any activity conducted, sponsored, or presented by or under the auspices of LICENSEE, including, but not limited to, aerobics and exercise classes, athletic events, dances and other social events, concerts, festivals, arts and crafts fairs, and parades held under the auspices of or sponsored or promoted by LICENSEE on the Premises. Such events and functions, however, do not include "Special Events" which the Agreement defines as "musical events, concerts, shows, pageants, sporting events, festivals, competitions, and other events of limited duration presented by LICENSEE for which the 'Gross Revenue' of such Special Event exceeds $25,000.

Special Events are subject to separate "Special Events License Fees" over and above the "Base License Fee" covered by the Agreement, i.e. .01 percent of Gross Revenue. Gross Revenue is defined as "all monies received by LICENSEE or on LICENSEE'S behalf from the sale of tickets for each Special Event." If there are no monies from the sale of tickets, "Gross Revenue" means "contributions from sponsors or other payments received by LICENSEE for each Special Event." A Report of Gross Revenues and Payment is due 90 days after the conclusion of each Special Event.

The license in the Agreement is limited to non-dramatic performances and does not authorize any dramatic performances, i.e., music accompanied by dialogue, pantomime, dance, stage action, or visual representation of the work in a comedy, opera, play with music, revue, or ballet.

The Agreement does not extend to "any convention, exposition, trade show, conference, congress, industrial show or similar activity presented by LICENSEE or on the Premises, unless it is presented or sponsored solely by and under the auspices of LICENSEE, is presented entirely on LICENSEE'S Premises, and is not open to the general public." Further, the Agreement does not authorize performances by or at colleges and universities; at any professional sports event or game played on the Premises; at any permanently situated theme or amusement park owned or operated by LICENSEE; by any symphony or community orchestra, and by any coin operated

jukebox. Performance of music in these excluded areas is subject to separate licensing requirements and fee agreements. http://www.imla.org/music_licensing/index.html#ascap

FEE SCHEDULE

Under the Agreement, the annual license fee is based on the Licensee's population as established in the most recent published U.S. Census data. This fee does not include any additional fees due for "Special Events." (The fee schedules for ASCAP and BMI are virtually identical.) The 2007 Annual Basic Rate Schedule for Local Governmental Entities was as follows:

POPULATION			ANNUAL FEE
1	to	50,000	$284.00
50,001	to	75,000	$567.00
75,001	to	100,000	$681.00
100,001	to	125,000	$909.00
125,001	to	150,000	$1,136.00
150,001	to	200,000	$1,476.00
200,001	to	250,000	$1,816.00
250,001	to	300,000	$2,158.00
300,001	to	350,000	$2,499.00
350,001	to	400,000	$2,840.00
400,001	to	450,000	$3,180.00
450,001	to	500,000	$3,521.00
500,001		And Over	*** $4,315.00

*** $4,315 plus $500 for each 100,000 of population above 500,000 to a maximum fee of $56,781

Except the $500 add-on for populations of 500,001 or more, the annual license fee for the preceding calendar year, is adjusted in accordance with the increase in the Consumer Price Index – All Urban Consumers (CPI-U)) between the preceding October and the next preceding October, rounded to the nearest dollar.

SESAC EXCEPTION

In addition to ASCAP and BMI, another PRO (SESAC) controls a significantly smaller percentage of the commercial music market at 2 to 5 percent. On its website (www.sesac.com), SESAC describes itself as "the second oldest performing rights organization in the United States," founded in 1930. According to SESEC, its repertory "once limited to European and gospel music, has diversified to include today's most popular music, including R&B/hip-hop, dance, rock classics, country hits, the best of Latina music, Contemporary Christian, the coolest jazz, and the television and film music of Hollywood's hottest composers." Included in the SESAC repertory are songs performed by the following rock artists: Bob Dylan, Eric Clapton, ZZ Top, U2, The Rolling Stones, Led Zeppelin, and Jimi Hendrix.

On the SESAC website, one of the "Frequently Asked Questions" regarding General Licensing was as follows: "If I have licenses with ASCAP and/or BMI, why do I need a license with SESAC? According to SESAC, licenses with SESAC, ASCAP and BMI ensure proper copyright clearance for virtually all of the copyrighted music in the world.

> SESAC, ASCAP, and BMI are three separate and distinct Performing Rights Organizations (PROs). Each organization represents different songwriters, composers, publishers and copyright holders, and each organization licenses only the copyrighted works of its own respective affiliated copyright holders. Licenses with ASCAP and BMI do NOT grant you authorization for the right to use the copyrighted music of SESAC represented songwriters, composers, publishers or copyright holders.
>
> Since a license with ASCAP and/or BMI does not grant authorization to play songs in the SESAC repertory, most businesses obtain licenses with SESAC, ASCAP and BMI to obtain proper copyright clearance for virtually all of the copyrighted music in the world.

In 2004, IMLA had attempted to negotiate a blanket licensing agreement for local governmental entities similar to that negotiated with ASCAP and BMI. While SESAC was willing to negotiate the terms of the license, it was unwilling to negotiate their current rate schedule. These rates were equal or significantly higher than those offered by ASCAP and BMI, even though SESAC controlled a significantly smaller percentage of the commercial music market (2-5% in comparison to 47-50% controlled by BMI or ASCAP).

In the opinion of IMLA, SESAC's rates should have reflected its smaller market share "in order to ensure that local governments are receiving a fair and equitable agreement." As a result, IMLA refused to endorse "the SESAC licensing agreement and the rate schedule currently offered by SESAC." In the absence of an IMLA negotiated blanket licensing agreement with SESAC, IMLA advised local governments to "not use music requiring a license from SESAC," or "negotiate a fair and equitable licensing agreement directly with SESAC" to play SESAC music. http://www.imla.org/music_licensing/ML_RepRes.htm

To illustrate the difference in rates, for 2008, SESAC's licensing fee for a Virginia municipality with population between 50 and 100 thousand is $831. In comparison, the IMLA Agreement for a local government with a population between 75 and 100 thousand assesses a licensing fee of $681. As a result, a local government with a population between 75 and 100 thousand would pay $1362 to execute blanket licensing agreements with both ASCAP and BMI. In so doing, the local government would secure a license for 95-98% of the commercial music market. In order to secure the additional 2 to 5 percent of the commercial music market controlled by SESAC, a municipality would have to pay an additional $831, i.e., 61% of the ASCAP/BMI fees.

As a result, to ensure "proper copyright clearance for virtually all of the copyrighted music in the world" by securing licenses with ASCAP, BMI, and SESAC, this municipality with a population of 75 to 100 thousand in 2007 would have to pay approximately $2193 per year. In the alternative, the municipality could pay $1321 for an ASCAP/BMI blanket agreement and take the advice of IMLA and "not use music requiring a license from SESAC." This less costly alternative, however, would involve the added burden of determining the Performing Rights Organization associated with each piece of music being played in a particular park and recreation activity or program. Moreover, the decision whether to "pay for play" must be tempered by the

continued, albeit debatable, availability of the "charitable purpose" Section 110(4) exemption which would allow for unlicensed public performances of copyrighted music in most park and recreation activities which do not involve admission fees and/or paid private performers.

SECURITY BLANKET?

In a December 22, 2005 article, entitled "Oklahoma City Council plays it safe regarding music," the *Legal Ledger* reported that the Oklahoma City Council was expected to approve an IMLA blanket "music performance agreement" with BMI "in an amount not to exceed $4,582." According to the article, with such an agreement, Oklahoma City government officials would no longer have to fear a lawsuit every time a song is played in a government facility.

According to the facility manager for the City's civic center music hall, "we need that coverage… [given] the volume of music potentially being played at any time, whether it be at our community centers, the Civic Center Music Hall, the Myriad Gardens — anywhere music is played, in leased or non-leased space." Further, according to BMI's executive director of media relations, "[w]henever there is a public performance of music, we're entitled to collect a fee and forward that money to the songwriters… under our general licensing area."

Conspicuously absent, however, in this statement by the BMI official is any mention of the charitable exemption under Section 110(4). Similarly, the facility manager assumes that BMI and similar organizations representing intellectual copyrights, like ASCAP and SESAC, are automatically entitled to fees "whenever there is a public performance of music. Clearly, this is not the case, particularly where there are no paid performers or organizers in a public performance of music by a government agency under the Section 110(4) exemption.

Despite the availability of the Section 110(4) exemption, is the "peace of mind" provided by a IMLA blanket licensing agreement worth the price? At least in the opinion of IMLA (and presumably Oklahoma City and other governmental entities), the availability of blanket licensing agreements with ASCAP and BMI provides a fair and equitable solution to some of the uncertainly surrounding the scope and applicability of Section 110(4), given the myriad of uses of music by local governments in general and public parks and recreation in particular. For the individual parks and recreation agency, the decision whether to "pay for play" through a blanket licensing agreement with ASCAP, BMI, and perhaps SESAC will depend on the nature of musical performance in various programs and activities and the advice of local counsel regarding the applicability of any statutory exemption, including Section 110(4), to those uses of copyright music.