

PUBLIC RECREATION LIABILITY  
UNDER 1976 COPYRIGHT LAW UNCERTAIN

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In recent months, more than a few public park and recreation administrators have expressed concern and bewilderment over proposed licensing agreements sent to them by the American Society of Composers, Authors and Publishers (ASCAP) and/or Broadcast Music Inc. (BMI). Essentially, these agreements indicate that public recreation agencies must pay copyright royalties for the right to play live or recorded music during their activities. Playing records for public roller skating sessions has been one example of such activities.

The U.S. Supreme Court in *Broadcast Music Inc. v. Columbia Broadcasting*, 441 US 1, described the formation of ASCAP and BMI to enforce the copyrights of affiliated authors and composers.

[A]s a practical matter it was impossible for the many individual copyright owners to negotiate with and license the users and to detect unauthorized uses. ASCAP was organized as a 'clearinghouse' for copyright owners and users to solve these problems associated with the licensing of music .... As ASCAP operates today, its 22,000 members grant it nonexclusive rights to license non-dramatic performances of their works, and ASCAP issues licenses and distributes royalties to copyright owners in accordance with a schedule reflecting the nature and amount of the use of their music and other factors.

BMI, a nonprofit corporation owned by members of the broadcasting industry, was organized in 1939, is affiliated with or represents some 10,000 publishing companies and 20,000 authors and composers, and operates in much the same manner as ASCAP. Almost every domestic copyrighted composition is in the repertory either of ASCAP, with a total of three million compositions, or of BMI, with one million.

Both organizations operate primarily through blanket licenses, which give the licensees the right to perform any and all of the compositions owned by the members or affiliates as often as the licensees desire for a stated term. Fees for blanket licenses are ordinarily a percentage of total revenues or a flat dollar amount, and do not directly depend on the amount or type of music used.

"FOR PROFIT" LIMITATION

On October 19, 1976, Congress passed Public Law 94-553. This law entirely revised the copyright statutes which had been in effect since 1909. These revisions became effective January 1, 1978. The federal copyright laws are compiled in Title 17 of the United States Code (17 U.S.C. Sec. 101 et seq.).

Section one of the 1909 Act provided exclusive rights to the copyright holder to allow others "to perform the copyrighted work publicly for profit if it be a musical composition, and for the purpose of public performance for profit. "As a result, public performances of copyrighted works by nonprofit organizations were impliedly exempt from infringement liability under this statute. Significantly, the analogous provision of the 1976 Act (17 U.S.C. Sec. 106(4)) deleted the "for profit" requirement. "[T]he owner of copyright under this title has exclusive rights to do and to authorize . . . in the case of literary, musical, dramatic, and choreographic works to perform the copyrighted work in public."

In its report on this legislation, the House Judiciary Committee indicated that this change was designed to remove the "for profit" limitation imposed by the 1909 Act on exclusive public performance rights. According to the committee, report, the legislative intent of this change was "first to state the public performance right in broad terms and then to provide specific exemptions for educational and other nonprofit uses." In other words, the rather nebulous, open-ended nonprofit exemption in the 1909 Act was replaced by a blanket public performance protection for copyright holders with specific exceptions in the 1976 Act. The House committee provided the following rationale for this change in emphasis:

This approach is more reasonable than the outright exemption of the 1909 statute. 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 public exploitation of copyrighted works by public broadcasters and other noncommercial organizations is likely to grow. In addition to these 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.

The presumption has, therefore, been shifted in the 1976 Act in favor of the copyright holder. As a result, an individual or agency playing ASCAP/BMI licensed music must show an applicable exemption from the broad scope of 17 U.S.C. § 106(4) to avoid liability for copyright infringement. Nonprofit performances in an educational setting are exempt. For non-educational activities however, the most likely exemption for public park and recreation programs is described in 17 U.S.C. § 110(4). In pertinent part, a performance of a musical work "without any purpose of direct or indirect commercial advantage" and without any compensation to any performers, promoters, or organizers will not constitute copyright infringement.

This noncommercial performance, however, must satisfy one of two additional conditions to qualify for the 110(4) exemption. There must be no direct or indirect admission charge. If there is an admission charge, the proceeds after deducting the reasonable costs of producing the performance must be used exclusively for educational, religious, or charitable purposes and not for private financial gain.

Given an admission charge, the copyright owner or his agents has the option under § 110(4) to object to the public performance of his works. Notice of objection must be in writing and signed by the copyright holder or his agent. Further, the notice of objection must be served on the person responsible for the performance seven days prior to the performance. Specific regulations regarding the form, content, and

notice requirements of such objections are contained in Title 37 of the Code of Federal Regulations, section 201.13 (37 CFR 201.13).

#### 110(4) LEGISLATIVE HISTORY

In objecting to a noncommercial performance involving an admission charge, the copyright holder or his agent is required to state the reason for his objecting to the public performance of the work(s). The opportunity to object to noncommercial public performances of musical works was included in the 1976 Act for a very specific purpose. This condition allows the copyright owner to determine whether and under what conditions the copyrighted work should be performed. Absent such discretion, the House committee report found copyright owners "could be compelled to make involuntary donations to fund-raising activities of causes to which they are opposed."

According to the House committee report, the scope of the exemption in 110(4) "expressly adopts the principle established by the court decisions construing the 'for profit' limitation." The "for profit" principle applied by the federal courts under the 1909 copyright law and described by the committee requires "public performances given or sponsored in connection with any commercial or profit-making enterprises [be] subject to the exclusive rights of the copyright owner even though the public is not charged for seeing or hearing the performance." Conversely, there would be no such rights conferred upon the copyright owner for public benefit performances which lacked any connection with commercial or profit-making enterprises. This reasoning is embodied by the phrase "without any purpose of direct or indirect commercial advantage" in § 110(4).

According to Professor Melville Nimmer in his law treatise, *Nimmer on Copyright*, federal court cases which have determined the nature of a "for profit" performance under the 1909 Act give some indication as to the meaning of "direct or indirect commercial advantage" under §110(4) of the 1976 copyright law.

If the purpose of a performance is a hoped for commercial advantage, this was sufficient under the 1909 Act to render the performance "for profit"; it is sufficient under the current Act to preclude application of the 110(4) exemption. (Nimmer on Copyright, §8.15E)

Nimmer, however, draws a distinction between the commercial advantage associated with a profit-making enterprise and the revenues generated by a nonprofit institution. According to Nimmer, nonprofit or public entities may derive financial benefits from performances of copyrighted works while remaining within the exemption of 17 U.S.C. 110(4).

[Further extension under the 1909 Act of the "for profit" concept to include performances by nonprofit institutions, if for the purpose of their pecuniary advantage, will not be followed under the current Act, so that such a performance may come within the Section 110(4) exemption. (Nimmer on Copyright, §8.15E)

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In other words, governmental entities should be exempt under § 110(4) if the funds generated directly or indirectly through the use of copyrighted music are used exclusively for public purposes. The pecuniary advantage provided by the performance of live or recorded music would, therefore, accrue to the public agency rather than any private individual or group, such as disc jockeys, musicians, and so forth.

To date, no federal court has determined the scope of the §110(4) exemption as it relates to governmental entities or nonprofit organizations. If the federal courts ultimately endorse Nimmer's view regarding the scope of this exemption, public park and recreation agencies need not be concerned with potential liability for copyright infringement when live or recorded music is used in their non-educational programs.