NEW FEDERAL LAW ENLIVENS COPYRIGHT CONTROVERSY

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Public Law 97-366, enacted October 25, 1982, in part amended federal law to provide a specific exemption for nonprofit veterans' groups and nonprofit fraternal organizations who play live or recorded music without a license. This legislation was offered as an amendment to H.R. 441 on the floor of the Senate by Edward Zorinsky (D-NE). As a result, potential copyright infringement liability is no longer an issue for groups like the American Legion and Moose Lodge, who use live or recorded music at their functions. Unfortunately, this is not the case for public park and recreation agencies.

Under existing law, reasonable minds may differ regarding the scope of copyright liability and the applicability of certain exemptions for public park and recreation agencies. However, the uncertainty of the law regarding copyright liability exemption for public recreation functions is not apparent in notices from licensing groups to local administrators.

Two major organizations license the use of copyrighted music: The American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music Inc. (BMI). The following excerpts from a typical licensing notice illustrate the very broad interpretation applied to the copyright law by licensing groups:

> We understand that music is performed in your establishment. Practically all music generally performed is protected by copyright under the Federal Copyright Law.
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> As you have not applied for a BMI license, you apparently are unaware that copyrighted music may not be publicly performed without the prior permission of the copyright holder. The enclosed pamphlet... explains those provisions in the Federal Copyright Law regarding your liability for statutory damages for unauthorized performances... BMI is a major performing rights organization which licenses a considerable portion of all copyrighted music generally performed. Since you are using music, you are certainly using BMI controlled music. A BMI license is necessary for the performance of this music ....

The BMI schedule of license fees cited in this particular notice was based upon gross annual receipts for a commercial skating rink. Fees ranged from $40 for receipts under $20,000 annually up to $120 for receipts over $100,000. Similar fee schedules are used by ASCAP and smaller licensing groups.

Rates may be higher depending upon the nature of the activity. For example, ASCAP license fees for bars and restaurants vary from $90 to over $3,000 per year depending upon the seating capacity of the establishment, the type of music (live or recorded), and the days per week provided.

The former copyright law, enacted in 1909, was interpreted to exempt nonprofit organizations and public entities from infringement liability. The Copyright Act of 1976 (P.L. 94-553) effective January, 1978, however, abolished this broad interpretation in favor of specific exemptions. Section 110 of the present law (17 U.S.C. Sec. 110) originally contained nine exemptions for certain performances. The Zorinsky amendment adds a tenth exempt category for veterans' groups and fraternal organizations.

Paragraph 4 of section 110 (17 U.S.C. 110(4)) was included in the 1976 law to exempt certain nonprofit performances from copyright liability. Section 110(4), in part states that it is not copyright infringements to provide the following:

> (4) performance of a nondramatic literary or musical work otherwise than in a transmission to the public, without any purpose of direct or indirect commercial advantare and without payment of any fee or other compensation for the performance to any of its performers, promoters or organizers, if-
>
> > (A) there is OR direct or indirect admission charge; OR
> >
> > (B) the proceeds, after deducting the reasonable costs of producing the performance, are used exclusively for educational, religious, or charitable purposes and not for private financial gain, except where the copyright owner has served [timely written] notice of objection to the performance...

HOUSE SUBCOMMITTEE HEARING

The scope and legislative intent of the section 110(4) nonprofit exemption provision was the focus of attention during a congressional hearing on the use of copyrighted music by nonprofit organizations. This hearing was held May 28, 1981, by the House Subcommittee on Courts, Civil Liberties, and the Administration of Justice. In the words of subcommittee chairman Robert W. Kastenmeier (D-WI), the specific purpose of the hearing was to receive testimony "from proponents and opponents of legislation to exempt nonprofit veterans' organizations and nonprofit fraternal organizations from copyright liability for the public performance of music." An examination of the hearing record, however, illustrates arguments which are equally applicable to the issue of nonprofit use of copyrighted music by public park and recreation agen

Testifying on behalf of the Veterans of Foreign Wars, legislative service director Donald Schwab provided a rationale for the requested copyright exemption. "[T]he performance of live music at our VFW post homes is [provided] to enhance their fundraising activities which are not for personal gain but, rather, for the good of the order to support our rather extensive youth activities pro~ grams and community service programs." In proposing his amendment to the copyright laws, Senator Zorinsky reiterated this public benefit rationale

for exempting nonprofit community service groups from infringement ,liability. "This legislation will allow the outstanding contribution these groups are making to their communities to continue and, in addition, allow them to do even more of this fine work by providing additional dollars for charitable services." Charitable services cited by the VFW and American Legion in their House testimony included "VFW teen-er baseball" and the American Legion baseball teams.

Arguably, the public benefit rationale warranting exemptions for these nonprofit groups applies with greater force to public park and recreation agencies. While community service may be an important function of veterans and fraternal organizations, these groups primarily serve their membership rather than the general public. On the other hand, the sole purpose of the public park and recreation agency is to provide services to the community and general public.

Witnesses for the VFW and American Legion were particularly disturbed that ASCAP/BMI license fees for nonprofit groups were identical to that "charged commercial enterprises, such as restaurants, taverns, nightclubs, and similar establishments operated solely for personal financial gain of the owner or owners." Similarly, licensing agreements and fee schedules sent to public park and recreation agencies are usually identical to that offered private businesses providing such services. While the fees themselves may not appear particularly onerous, public agendes are understandably loathe to pay royalties for musical performances which may, in fact, be exempt. On the other hand, potential liability under the copyright act far exceeds the licensing fee rates being charged by ASCAP, BMI, and other licensing groups. According to the VFW testimony, "under the provision of 17 U.S.C. 504(c), the judgment will ordinarily not be less than $250 for each copyrighted musical composition performed without a license plus court costs and attorneys' fees."

According to subcommittee chairman Robert Kastenmeier the blanket exemption for nonprofit use of copyrighted music was abolished by the 1976 copyright law in response to perceived abuses by certain groups including institutions of higher education.

> The fact is that a case in point had been educational institutions' use of mass audiences presumably for profit which appeared to be in abuse; the great rock groups that appear at the great universities for thousands of people and then the question is asked, is that really what the law intended at the outset to exempt that sort of activity? The committee answered no.

Witnesses for ASCAP and BMI indicated that this change in the law was necessary to allow songwriters and composers to receive remuneration whenever anyone else was paid for their services, such as performers, promoters, or musicians. In the opinion of BMI president Edward Cramer, the exemption for certain nonprofit performances (17 U.S.C. 110(4)) was adequate.

> It is important to recognize that the new Copyright Act already provides an exemption for nonprofit organizations--including the fraternal orders

> and veterans posts--from paying royalties on copyrighted music, These organizations can play all the music they wish for free, so long as no admission is charged and so long as no compensation is paid to the musicians, or to the producers, or the promoters of the affair. However, if the musicians are paid, if the promoters or producers are paid, then says the Copyright Act, the song writers must also be paid royalty for their music surely this is fair to all concerned.

Similarly, Bernard Korman, ASCAP general counsel, testified that the exemption for certain nonprofit performances contained in 17 U.S.C. 110(4) of the 1976 law was sufficient, although "more limited than the 1909 law's exemption."

> In deciding what the specific exemptions were to be, Congress concluded that no general exemption for fraternal, veterans', or indeed, for any charitable group, was warranted. Instead, Congress decided generally that if no payment of any sort were being made by noncommercial groups, then nondramatic performances of copyrighted music should also go unpaid.

Korman and Cramer were asked by chairman Kastenmeier if under present law "a lodge, post or chapter did not charge admission, had donated musical services, but advertised to the public, would that subject them to liability?" Both agreed such activity would be exempt. According to Korman: "No admission charge. No payment to anybody."

Witnesses on both sides of the issues acknowledged that the federal courts have yet to construe the breadth of the nonprofit exemption under 17 U.S.C. 110(4). As a result, ASCAP and BMI expressed their willingness to negotiate lower uniform rates than that charged commercial entities for nonprofit groups. The following statement by BMI President Cramer illustrates this position:

> We proposed--again this doesn't mean it would be forever, but whatever figure it is, there certainly isn't going to be tremendous fluctuation, but we proposed to the people... [VFW, American Legion] a deal which would cost them $35 a post or a club provided it was done on some kind of bulk basis, state-by-state basis, so we wouldn't have to be involved in chasing down different posts...

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.

Obviously, the veterans' and fraternal organizations were unwilling to play the copyright music game. Rather than test the narrow ASCAP/BMI interpretation of 110(4) in court, these groups had the political clout to effect a legislative solution to their potential liability.

Eventually, a federal court can be expected to decide this issue. Undoubtedly, the plaintiff licensing group will choose its defendant and forum very carefully to maximize the probability of a favorable decision. Therefore, a likely test case for 17 U.S.C. 110(4) will involve a public agency function which embodies that high degree of commercialism and revenues characteristic of those "nonprofit" rock concerts cited by Kastenmeier. Conversely, more modest public recreation functions which clearly provide direct public benefits are less likely candidates for copyright infringement lawsuit to clarify the scope of potential nonprofit exemption under 17 U.S.C. 110(4).