

MUSIC THEATER DENIED NOT-FOR-PROFIT, FAIR USE COPYRIGHT EXEMPTIONS

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In March 1983, the "NRPA Law Review" column addressed the issue of potential federal copyright infringement liability for the unlicensed use of recorded or live music by public park and recreation agencies in an article entitled "Public Recreation Liability Under 1976 Copyright Law Uncertain." A companion article also appeared in the March 1983 issue of *Parks & Recreation* entitled "New Federal Law Enlivens Copyright Controversy." As described in these articles, the 1976 changes to federal copyright law abolished the traditional non-profit exemption from infringement liability afforded to public agencies. Rather than providing blanket immunity for public agencies, the new law, effective in 1978, raised the presumption in Section 106 that all unlicensed performances of copyrighted music in public are subject to infringement liability, unless the defendant can prove an applicable exemption. Exemptions enumerated in Section 110 include use of copyrighted works for certain educational and other specified purposes.

The 1983 law review column focused on Section 110, subsection 4 which, in part, provides an exemption for public performances whose purposes are not intended for commercial advantage or private financial gain. The column expressed the opinion that this particular section may provide a public park and recreation agency with a defense to charges of infringement liability for certain uses of copyrighted music. Specifically, the legislative history of Section 110(4) indicates that Congress intended to exempt public performances of copyrighted works which involve no profit motive and no one responsible for it gets paid. 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.

Today, more than eight years after the 1983 article, the uncertainty and controversy surrounding the applicability of copyright law exemptions, particularly Section 110(4), to public park and recreation agencies continues to rage. Recently, the NRPA Great Lakes Regional Council passed a resolution expressing its concern and displeasure with perceived distortions and abuses of the copyright laws by the major organizations which license the use of copyrighted music. Specifically, a number of public park and recreation agencies have received correspondence from these licensing groups threatening copyright liability if their demands for licensing contracts are not met. The Council, therefore, called upon NRPA and other groups to seek legislative relief from the U.S. Congress to restore the blanket public exemption contained in the old copyright law, or, at least, to clarify the scope of exemptions presently available to public park and recreation agencies under Section 110.

In addition, the Council recommended that NRPA utilize its publications to educate the membership regarding liability under the copyright law. In response to the Council's suggestion, this month's law column provides a case report describing a rather recent federal court decision which addressed the issue of liability for the unlicensed use of copyrighted music.

To the best of my knowledge, no reported federal court decision to date has directly confronted the applicability of the section 110(4) exemption to the use of unlicensed copyrighted music by a public park and recreation agency or similar governmental entity. The *Bourne* decision described below,

however, illustrates the judicial analysis applied by a federal court in denying a 110(4) and fair use exemption to the private owner of a music theater which featured live performances of copyrighted works by amateur musicians.

The following description of the *Bourne* decision appeared in Volume I, number 4 of *Legal Issues in Recreation Administration* (LIRA). LIRA is a quarterly publication of the George Mason University Center for Recreation Resources Policy. LIRA is co-sponsored by the National Recreation and Park Association. Each edition of LIRA provides a series of case reports on a specific law-related topic in recreation and park administration. This particular edition of LIRA contains a series of case reports on the topic of copyright infringement liability for public music and video performances.

LIRA is available at the rate of \$100/yr. (\$50/yr. for NRPA members) payable to "George Mason University." Forward subscription requests to: Legal Issues in Recreation Administration, George Mason University, Center for Recreation Resources Policy, 4400 University Drive, Fairfax, Virginia 22030-4444. For further information, contact: Dr. Brett Wright, Director, GMU Center for Recreation Resources Policy (703) 323-2826. Suggestions for future topics to be addressed in LIRA are encouraged and should be forwarded to myself or Dr. Wright at the above address.

Sing Me Those Copyright Music Blues

In the case of *Bourne Company v. Speeks*, 670 F.Supp. 777 (E.D. Tenn. 1987), defendant Verlin Speeks was sued for copyright infringement resulting from the public performance of two musical compositions owned by plaintiff Bourne Company and several other plaintiffs represented by the American Society of Composers, Authors and Publishers (hereinafter referred to as ASCAP). The facts of the case were as follows:

At all times pertinent hereto, Speeks was the owner and operator of the Country Music Theater located in Clinton, Tennessee. Speeks produced weekly country music shows at the said theater. The shows were largely comprised of amateur performances. There was an admissions charge for such performances. Speeks was contacted on several occasions over a three-year period by representatives of the American Society of Composers, Authors and Publishers [ASCAP] concerning the unauthorized performance of copyrighted musical compositions during the shows at the Country Music Theater. However, Speeks failed or refused to purchase the appropriate license to permit the performance of material covered by ASCAP copyrights. On October 19, 1985, responding to audience requests, different performers sang in their entirety the songs "San Antonio Rose" and "Highway 40 Blues". ASCAP owns the copyrights to these musical compositions and did not in any way authorize the said performances of their compositions.

Speeks argued that "under the circumstances, the use of the songs in question did not constitute an infringement of copyright under the exemption set forth in Title 17, U.S.C. § 110(4)." As noted by the federal district court, "Section 110(4) provides that the following is not an infringement of copyright":

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,...

As characterized by the court, Speeks maintained that "the use of the material in question falls within this [Section 110(4)] exemption because Speeks' Theater operated without purpose of commercial advantage and its limited proceeds served to further charitable aims."

In support of these allegations, Speeks has filed his affidavit that "the Theater has never been a commercial success", that the Country Music Theater has never been a financially lucrative venture, and that "the Theater has been used as a refuge for the needy and homeless on a number of occasions as well as a central location for dispensing charity during the holidays."

For the following reasons, the federal district court found that "Speeks is not entitled to the exemption claimed under § 110(4)":

Whether the use of copyrighted material is in fact a financial success is not the deciding factor in determining the exemption under § 110(4). The language of § 110(4) requires that to be exempt the performance must be "without any purpose of direct or indirect commercial advantage." Clearly, the Country Music Theater was operated in the hope of realizing a profit... [W]hether it pays or not the purpose of employing it is profit and that is enough. There was an admission charge to the Country Music Theater. The band members were paid a nominal fee. The occasional charitable use of the Country Music Theater does not meet the mandate of § 110(4)(B) that the proceeds are to be used exclusively for educational, religious, or charitable purposes and not for private financial gain.

Speeks had also argued that "the use of the copyrighted material in question comes within the fair use doctrine and does not constitute a copyright infringement." As described by the federal district court, the fair use doctrine codified in Title 17, U.S.C. § 107, provided in pertinent part as follows:

[T]he fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use); scholarship, or research, is not an infringement of copyright.

As noted by the court, the fair use doctrine "offers a means of balancing the exclusive right of a copyright holder with the public's interest in dissemination of information affecting areas of universal concern, such as art, science, history, or industry." Accordingly, the court would apply the following factors to determine "whether the use made of a work in any particular case is a fair use":

- (1) The purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;
- (2) The nature of the copyrighted work;
- (3) The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) The effect of the use upon the potential market for or value of the copyrighted work.

Applying these factors to the circumstances of this particular case, the federal district court found that "the use of the copyrighted material in question was of a commercial nature rather than for non-profit

educational purposes or any purpose of universal concern." In addition, the court found that "the musical compositions in question were performed in their entirety." As noted by the court, in most instances, "the fair use doctrine does not apply where copyrighted material is used as a whole." Accordingly, the court concluded that "Speeks is, therefore, not entitled to the benefit of the fair use doctrine." The federal district court, therefore, granted ASCAP's motion for summary judgment on their claims for copyright infringement under the circumstances of this case.

The federal district court then addressed the issue of damages. The court noted that ASCAP had not shown that "the value of the musical compositions in question was diminished by Speeks's unauthorized use." On the other hand, the court acknowledged that ASCAP had exercised its prerogative under the law to elect "to recover statutory damages under Title 17, U.S.C. § 504, for all infringements involved in this action instead of actual damages and the profits of the infringer."

Section 504(c)(1) provides for an award of statutory damages of not less than \$ 250 or more than \$ 10,000 as the court considers just for all infringements involved in the action with respect to any one work. If the court finds that the infringement was committed willfully, the court in its discretion may increase the award of damages to a sum of not more than \$ 50,000. 17 U.S.C. § 504(c)(2). Statutory damages may be elected whether or not there is adequate evidence of the actual damages suffered by plaintiff or of the profits reaped by defendant. It is not essential to a recovery of the statutory damages that the giving of an infringing performance shall be a willful violation of the copyright.

In this particular instance, ASCAP requested "statutory damages in the amount of \$ 3,000 per infringement." Speeks objected to the requested damages as exorbitant and excessive under the circumstances. The federal district court, however, noted that it had "wide discretion in determining the amount of statutory damages to be awarded, constrained only by the specified maxima and minima."

In addition, ASCAP requested the court to award "attorney fees under the authority of Title 17, U.S.C. § 505." According to the court, this section provides that "the court may also award a reasonable attorneys' fee to the prevailing party as part of the costs." As described by the court, Speeks may be required to pay ASCAP's attorneys' fees under the following circumstances:

[Defendants may] be required to pay the plaintiffs an allowance for attorneys' fees where liability was unquestionable on both the law and the facts and where the defendants were not innocent infringers in that they repeatedly rebuffed offers to resolve the dispute prior to the commencement of litigation, their defense efforts were sparse and they made no attempt whatsoever to avoid the infringement although they were well aware of the law's requirements.

In this particular instance, the court found that it was "undisputed that Speeks was contacted on numerous occasions by ASCAP representatives concerning a license authorizing the performance of ASCAP works and, as a music publisher, Speeks understood the licensing requirements."

Nevertheless, the only steps which Speeks took to avoid infringement was to request a list of songs covered by ASCAP copyrights. The licensor of musical compositions on behalf of copyright owners has no duty to provide a list of copyrighted songs assigned to it.

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Accordingly, the court concluded that "this is an appropriate case for an award of attorney fees." The court, therefore, ordered a separate hearing "to determine the amount of damages and attorney fees."

ASCAP's attorney has submitted an itemized schedule of hours and legal services performed. Speeks objects to the requested attorney's fees as unreasonable. In view of Speeks' objection to the requested damages and attorney's fees, the court finds it appropriate to set this matter for hearing upon the amount of damages and attorney fees.

The federal district court, further ordered that Speeks be "permanently restrained and enjoined from the unauthorized performance of musical compositions the copyrights of which are held by ASCAP and from aiding and abetting in the performance of such musical compositions."

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