

RADIO MUSIC COPYRIGHT LIABILITY - PRIVATE HOME
OR COMMERCIAL SOUND SYSTEM?

James C. Kozlowski, J.D., Ph.D.
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In response to a request by the NRPA leadership to use NRPA publications to educate the membership about liability and exemptions for the unlicensed use of copyrighted music, last month's column presented a federal court decision which applied the laws to live performances by amateur musicians. The federal court in this particular instance found that such public performances of copyrighted materials were not exempt from infringement liability under Section 110(4) of the federal copyright laws, 17 U.S.C. § 110(4). Section 110(4) exempts from liability public performances which do not seek a commercial advantage, and either (A) do not charge a direct or indirect admission charge; or (B) all proceeds after direct costs are used for charitable, educational, or religious purposes without private financial gain.

Section 110 also provides exemptions from copyright liability for other specified uses. This month's column describes the exemption available under section 110(5) when copyrighted music is received through a radio and transmitted to the public over a speaker system. To the best of my knowledge, no reported federal court decision to date has directly confronted the applicability of the section 110(5) exemption to the use of unlicensed copyrighted music by a public park and recreation agency or similar governmental entity.

Like the air we breath, most people assume that music played over the radio is to be enjoyed free of charge. However, as illustrated by the *Springsteen* decision described below, there are situations where the use of radio transmissions through multiple speakers for background music may be subject to copyright infringement liability, unless such use is exempt under Section 110(5) of the federal copyright laws, 17 U.S.C. § 110(5). Specifically, the *Springsteen* decision described below illustrates the judicial analysis applied by a federal court in considering a 110(5) exemption for a commercial recreation facility which transmitted radio music through six pole-mounted speakers on its miniature golf course.

The following description of the *Springsteen* decision appears 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.

No Static at All, Boss!

In the case of *Springsteen v. Plaza Roller Dome, Inc.*, 602 F.Supp. 1113 (M.D. N.C. 1985), plaintiff Bruce Springsteen and nine other copyright owners who were members of the American Society of Composers, Authors, and Publishers ("ASCAP"), brought copyright infringement actions against defendants Plaza Roller Dome, Inc., and Gerald Manuel ("Plaza") for the allegedly "unauthorized transmission via radio and speaker system" of copyrighted music at the Plaza Putt-Putt golf course in Laurinburg, North Carolina, a facility owned and controlled by Plaza. The facts of the case were as follows:

The complex owned and controlled by Defendant Plaza Roller Dome, Inc., consists of an indoor roller rink and an adjacent outdoor miniature golf course and is located at the College Plaza Shopping Center in Laurinburg, North Carolina. Defendant Gerald E. Manuel is the president and principal shareholder of Plaza Roller Dome, Inc. The genesis of the present dispute between the two parties was the October 15, 1980, initialing of a licensing agreement between Plaza and ASCAP whereby Plaza would be entitled to perform musical compositions by ASCAP's members. The agreement was the result of a long, arduous, and often bitter negotiating process; it provided for ASCAP to settle any and all claims of copyright infringement against the Plaza through October 14, 1980, for the payment of \$500.00, and Plaza agreed to pay \$300.00 per year for the privilege of performing musical compositions by ASCAP's members thereafter.

Shortly after the October 15, 1980, signing of the licensing agreement, ASCAP approached Plaza and insisted that the Plaza pay an additional fee in order to license the Putt-Putt course. Plaza claims that it understood and was led to believe by ASCAP that the settlement covered both the roller rink and the Putt-Putt course. ASCAP disagrees, claiming that the agreement does not cover the Putt-Putt course. Plaza contends that ASCAP was well aware of the scope of the initial agreement, and that ASCAP threatened suit and ultimately brought about the institution of this action in order to coerce the Plaza into paying for privileges to which they were already entitled under the 1980 agreement.

The specific infringements complained of by ASCAP are alleged to have arisen from the performance, via radio and speaker system, of copyrighted musical compositions at Plaza's Putt-Putt course on August 27, 1983. The radio and speaker system at the Putt-Putt course consisted of a radio receiver wired to six separate speakers mounted on light poles interspersed over the 7,500 square foot area of the course.

As noted by the federal district court, "Section 106(4) of Title 17 of the United States Code grants copyright owners the exclusive rights publicly to perform, or authorize the performance of, their copyrighted works." (Pursuant to this provision of the copyright law, ASCAP receives licensing fees from radio stations for the performance of their copyrighted works.) In this particular instance, ASCAP argued that "the 'further transmission or performance' of its members' copyrighted works via a radio receiving apparatus 'not of a kind commonly used in private homes' by the Plaza Roller Dome and Putt-Putt golf course constitutes copyright infringement." As characterized by the court, Plaza maintained that its use of copyrighted materials fell within the 17 U.S.C. § 110(5) exemption to the copyright laws.

Plaza contends that the speakers are very unsophisticated, do not project well, and can be heard without distortion only at a close proximity thereto. They argue that this lack

of sophistication, inferior to many home systems, and the limited revenue generated by the Putt-Putt course (\$24,308.00 over the six-year period ending July 31, 1983 or slightly over \$4,000.00 per year -- or less than 3% of the gross revenue of the Plaza Roller Dome) support their contention that the course is not of sufficient size to justify, as a practical matter, a subscription to a commercial background music system and thus is exempt under Section 110(5) [of the copyright laws].

Therefore, the specific issue before the federal district court was "whether Plaza' Putt-Putt course falls within the 17 U.S.C. § 110(5) exemption to the copyright laws." As described by the court, Section 110(5) exempts from liability for copyright infringement the following activities:

Communication of a transmission embodying a performance or display of a work by the public reception of a transmission on a single receiving apparatus of a kind commonly used in private homes, unless - (A) a direct charge is made to see or hear the transmission; or (B) the transmission thus received is further transmitted to the public.

According to the federal district court, "the meaning of this statutory language is far from clear, and its reach has scarcely been tested in the courts." As a result, the court acknowledged that any judicial interpretation of Section 110(5) would rely on "the legislative history in determining whether the exemption applies in a particular factual setting." Specifically, the court referred to the following relevant discussion for the House Judiciary Committee on the 1976 copyright act which enacted Section 110(5):

[T]he clause would exempt small commercial establishments whose proprietors merely bring onto their premises standard radio or television equipment and turn it on for their customers' enjoyment, but it would impose liability where the proprietor has a commercial "sound system" installed or converts a standard home receiving apparatus (by augmenting it with sophisticated or extensive amplification equipment) into the equivalent of a commercial sound system. Factors to consider in particular cases would include the size, physical arrangement, and noise level of the areas within the establishment where the transmissions are made audible or visible, and the extent to which the receiving apparatus is altered or augmented for the purpose of improving the oral or visual quality of the performance for individual members of the public using those areas.

Accordingly, the federal district court found that "a small commercial establishment which merely augmented a home-type receiver and which was not of sufficient size to justify, as a practical matter, a subscription to a commercial background music service, would be exempt." On the other hand, the court noted that "[t]he size of the allegedly offending facility and the number of speakers are not, however, standing alone, the sole or even predominant factors to consider in determining the applicability of the exemption."

According to the House Judiciary Committee Report, "size, physical arrangement, and noise level of the areas within the establishment where the transmissions are made audible or visible, and the extent to which the receiving apparatus is altered or augmented for the purpose of improving the oral or visual quality of the performance" are all factors to consider in determining whether the receiving apparatus has been converted into the equivalent of a "commercial sound system" so as to remove the establishment from the scope of the Section 110(5) exemption. Whether or not a system has been transformed into the equivalent of a commercial sound system is a

significant test in the legislative history because, inferentially, Congress apparently concluded that a receiving apparatus is "not of a kind commonly used in private homes" precisely when it has been transformed into the equivalent of a commercial sound system.

Applying these factors to Plaza's Putt-Putt course, the federal district court found "the argument against applying the Section 110(5) exemption becomes much less persuasive."

ASCAP's own field representative described the sound system at Plaza's Putt-Putt facility as follows: "Six speakers, attached to white posts that also provide lighting for evening Putt-Putt are equidistantly spread throughout the course. The speakers did not project very well and one needed to be in a close proximity to the speaker to hear without much distortion." Clearly, the noise level and audibility of songs transmitted over Plaza's loudspeakers, by ASCAP's own admission... does not rise to the level or minimum quality requisite for a commercial sound system....

[Unlike commercial systems where the infringing performances are audible throughout the stores and the speakers improve the quality of the performance] the allegedly infringing performances at Plaza' Putt-Putt course were scarcely audible without distortion even at very close proximity to the speakers. Under such circumstances, the speakers could scarcely be said to have "improved the quality of the performance." Indeed, the poor quality of speakers and the outdoor nature of the course guaranteed that the quality of sound performed for customers at Plaza's course would be lower than that which was performed for customers [in stores using commercial sound systems]. Moreover, with respect to audibility and lack of improvement in the quality of the performance via augmentation, the receiving apparatus and speakers at Plaza' Putt-Putt course are inferior [to such systems].

Accordingly, the federal district court concluded that "the Plaza Roller Dome Putt-Putt course is not of sufficient size to justify a subscription to a commercial background music service and therefore is within the scope of the Section 110(5) exemption."

Hence, when all relevant factors have been taken into account, including those set out in the House Judiciary Committee Report, Plaza's sound system does not exceed the outer limit of the exemption... and should therefore be entitled to the exemption to the copyright laws pursuant to Section 110(5). This conclusion is reinforced by the language of the Conference Committee Report, incorporated into the legislative history subsequent to the House Judiciary Committee Report, which stated that a small commercial establishment... [which is] not of sufficient size to justify, as a practical matter, a subscription to a commercial background service, would be exempt... [I]f any operation is "not of sufficient size to justify, as a practical matter, a subscription to a commercial background music service," it is Plaza's Putt-Putt course. [Over the six-year period from July 1977 through July 1983, Plaza' Putt-Putt course never generated revenues in excess of \$5,700.00 in any six-month period.]

The Putt-Putt course is, of course, only a part of a larger operation which may be of sufficient size to justify a subscription to a commercial music system, i.e., the Plaza Roller Dome complex which includes Plaza' licensed roller rink. However, since ASCAP seeks to treat the Putt-Putt course separately for purposes of licensing, this

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court will likewise treat the course as analytically separate for the purpose of applying the Section 110(5) exemption.

The federal district court, therefore, granted Plaza's motion for summary judgment dismissing ASCAP's claims for copyright infringement under the circumstances of this case.

Dr. Kozlowski is the author of *Legal Issues in Recreation Administration* and the *Recreation and Parks Law Reporter*. He is also the associate director of the Center for Recreation Resources Policy, George Mason University, Fairfax, Virginia.