User Name: Daan Erikson
Date and Time: Tuesday, November 10, 2020 11:42:00 AM EST
Job Number: 129704828

Document (1)

1. *8 Nimmer on Copyright [81] Section 110*
Client/Matter: HBlexElib20
Search Terms: religious
Search Type: Natural Language
Narrowed by:

Content Type	Narrowed by
Secondary Materials	custom: custom; Sources: Nimmer on Copyright; Content Type: Treatises

8 Nimmer on Copyright [81] Section 110

[81] SECTION 110. EXEMPTIONS OF CERTAIN PERFORMANCES AND DISPLAYS[1]

Clauses (1) through (4) of section 110 deal with performances and exhibitions that are now generally exempt under the "for profit" limitation or other provisions of the copyright law, and that are specifically exempted from copyright liability under this legislation. Clauses (1) and (2) between them are intended to cover all of the various methods by which performances or displays in the course of systematic instruction take place.

Face-to-face teaching activitiesClause (1) of section 110 is generally intended to set out the conditions under which performances or displays, in the course of instructional activities other than educational broadcasting, are to be exempted from copyright control. The clause covers all types of copyrighted works, and exempts their performance or display "by instructors or pupils in the course of face-to-face teaching activities of a nonprofit educational institution," where the activities take place "in a classroom or similar place devoted to instruction."

There appears to be no need for a statutory definition of "face-to-face" teaching activities to clarify the scope of the provision. "Face-to-face teaching activities" under clause (1) embrace instructional performances and displays that are not "transmitted." The concept does not require that the teacher and students be able to see each other, although it does require their simultaneous presence in the same general place. Use of the phrase "in the course of face-to-face teaching activities" is intended to exclude broadcasting or other transmissions from an outside location into classrooms, whether radio or television and whether open or closed circuit. However, as long as the instructor and pupils are in the same building or general area, the exemption would extend to the use of devices for amplifying or reproducing sound and for projecting visual images. The "teaching activities" exempted by the clause encompass systematic instruction of a very wide variety of subjects, but they do not include performances or displays, whatever their cultural value or intellectual appeal, that are given for the recreation or entertainment of any part of their audience.

Works affected. —Since there is no limitation on the types of works covered by the exemption, teachers or students would be free to perform or display anything in class as long as the other conditions of **[82]** the clause are met. They could read aloud from copyrighted text material, act out a drama, play or sing a musical work, perform a motion picture or filmstrip, or display text or pictorial material to the class by means of a projector. However, nothing in this provision is intended to sanction the unauthorized reproduction of copies or phonorecords for the purpose of classroom performance or display, and the clause contains a special exception dealing with performances from unlawfully made copies of motion pictures and other audiovisual works, to be discussed below.

1

Editor's note:

As corrected in 122 Cong. Rec. H 10727-8 (daily ed. Sept. 21, 1976). Original pagination is indicated in brackets[ ].

Instructors or pupils. —To come within clause (1), the performance or display must be "by instructors or pupils," thus ruling out performances by actors, singers, or instrumentalists brought in from outside the school to put on a program. However, the term "instructors" would be broad enough to include guest lecturers if their instructional activities remain confined to classroom situations. In general, the term "pupils" refers to the enrolled members of a class.

Nonprofit educational institution.—Clause (1) makes clear that it applies only to the teaching activities "of a nonprofit educational institution," thus excluding from the exemption performances or displays in profit-making institutions such as dance studios and language schools.

Classroom or similar place. —The teaching activities exempted by the clause must take place "in a classroom or similar place devoted to instruction." For example, performances in an auditorium or stadium during a school assembly, graduation ceremony, class play, or sporting event, where the audience is not confined to the members of a particular class, would fall outside the scope of clause (1), although in some cases they might be exempted by clause (4) of section 110. The "similar place" referred to in clause (1) is a place which is "devoted to instruction" referred to in clause (1) is a place which is "devoted to instruction" in the same way a classroom is; common examples would include a studio, a workshop, a gymnasium, a training field, a library, the stage of an auditorium, or the auditorium itself, if it is actually used as a classroom for systematic instructional activities.

Motion pictures and other audiovisual works.—The final provision of clause (1) deals with the special problem of performances from unlawfully-made copies of motion pictures and other audiovisual works. The exemption is lost where the copy being used for a classroom performance was "not lawfully made under this title" and the person responsible for the performance knew or had reason to suspect as much. This special exception to the exemption would not apply to performances from lawfully-made copies, even if the copies were acquired from someone who had stolen or converted them, or if the performances were in violation of an agreement. However, though the performance would be exempt under section 110(1) in such cases, the copyright owner might have a cause of action against the unauthorized distributor under section 106(3), or against the person responsible for the performance, for breach of contract.

Projection devices. — As long as there is no transmission beyond the place where the copy is located, both section 109(b) and section 110(1) would permit the classroom display of a work by means of any sort of projection device or process.

Instructional broadcasting *Works affected*.—The exemption for instructional broadcasting provided by section 110(2) would apply only to "performance of a non-**[83]**dramatic literary or musical work or display of a work." Thus, the copyright owner's permission would be required for the performance on educational television or radio of a dramatic work, of a dramatico-musical work such as an opera or musical comedy, or of a motion picture. Since, as already explained, audiovisual works such as filmstrips are equated with motion pictures, their sequential showing would be regarded as a performance rather than a display and would not be exempt under section 110(2). The clause is not intended to limit in any way the copyright owner's exclusive right to make dramatizations, adaptations, or other derivative works under section 106(2). Thus, for example, a performer could read a nondramatic literary work aloud under section 110(2), but the copyright owner's permission would be required for him to act it out in dramatic form.

Systematic instructional activities.—Under section 110(2) a transmission must meet three specified conditions in order to be exempted from copyright liability. The first of these, as provided by subclause (A), is that the performance or display must be "a regular part of the systematic instructional activities of a governmental body or a nonprofit educational institution." The concept of "systematic instructional activities" is intended as the general equivalent of "curriculums," but it could be broader in a case such as that of an institution using systematic teaching methods not related to specific course work. A transmission would be a regular part of these activities if it is in accordance with the pattern of teaching established by the governmental body or institution. The use of commercial facilities, such as those of

a cable service, to transmit the performance or display, would not affect the exemption as long as the actual performance or display was for nonprofit purposes.

Content of transmission. —Subclause (B) requires that the performance or display be directly related and of material assistance to the teaching content of the transmission.

Intended recipients. —Subclause (C) requires that the transmission is made primarily for:

(i) Reception in classrooms or similar places normally devoted to instruction, or

(ii) Reception by persons to whom the transmission is directed because their disabilities or other special circumstances prevent their attendance in classrooms or similar places normally devoted to instruction, or

(iii) Reception by officers or employees of governmental bodies as a part of their official duties or employment.

In all three cases, the instructional transmission need only be made "primarily" rather than "solely" to the specified recipients to be exempt. Thus, the transmission could still be exempt even though it is capable of reception by the public at large. Conversely, it would not be regarded as made "primarily" for one of the required groups of recipients if the principal purpose behind the transmission is reception by the public at large, even if it is cast in the form of instruction and is also received in classrooms. Factors to consider in determining the "primary" purpose of a program would include its subject matter, content, and the time of its transmission.

Paragraph (i) of subclause (C) generally covers what are known as "in-school" broadcasts, whether open- or closed-circuit. The reference to "classrooms or similar places" here is intended to have the same meaning as that of the phrase as used in section 110(1). The **[84]** exemption in paragraph (ii) is intended to exempt transmissions providing systematic instuction [sic] to individuals who cannot be reached in classrooms because of "their disabilities or other special circumstances." Accordingly, the exemption is confined to instructional broadcasting that is an adjunct to the actual classwork of nonprofit schools or is primarily for people who cannot be brought together in classrooms such as preschool children, displaced workers, illiterates, and shut-ins.

There has been some question as to whether or not the language in this section of the bill is intended to include instructional television college credit courses. These telecourses are aimed at undergraduate and graduate students in earnest pursuit of higher educational degrees who are unable to attend daytime classes because of daytime employment, distance from campus, or some other intervening reason. So long as these broadcasts are aimed at regularly enrolled students and conducted by recognized higher educational institutions, the committee believes that they are clearly within the language of section 110(2)(C)(ii). Like night school and correspondence courses before them, these telecourses are fast becoming a valuable adjunct of the normal college curriculum.

The third exemption in subclause (C) is intended to permit the use of copyrighted material, in accordance with the other conditions of section 110(2), in the course of instructional transmissions for Government personnel who are receiving training "as a part of their official duties or employment."

Religious services The exemption in clause (3) of section 110 covers performances of a nondramatic literary or musical work, and also performances "of dramatico-musical works of a ***religious*** nature"; in addition, it extends to displays of works of all kinds. The exemption applies where the performance or display is "in the course of services at a place of worship or other ***religious*** assembly." The scope of the clause does not cover the sequential showing of motion pictures and other audiovisual works.

The exemption, which to some extent has its counterpart in sections 1 and 104 of the present law, applies to dramatico-musical works "of a ***religious*** nature." The purpose here is to exempt certain performances of sacred music that might be regarded as "dramatic" in nature, such as oratorios, cantatas, musical settings of the mass, choral services, and the like. The exemption is not intended to cover performances of secular operas, musical plays, motion pictures, and the like, even if they have an underlying ***religious*** or philosophical theme and take place "in the course of [***religious***] services."

To be exempted under section 110(3) a performance or display must be "in the course of services," thus excluding activities at a place of worship that are for social, educational, fund raising, or entertainment purposes. Some performances of these kinds could be covered by the exemption in section 110(4), discussed next. Since the performance or display must also occur "at a place of worship or other ***religious*** assembly," the exemption would not extend to ***religious*** broadcasts or other transmissions to the public at large, even where the transmissions were sent from the place of worship. On the other hand, as long as services are being conducted before a ***religious*** gathering, the exemption would apply if they were conducted in places such as auditoriums, outdoor theaters, and the like.

[85] Certain other nonprofit performancesIn addition to the educational and ***religious*** exemptions provided by clauses (1) through (3) of section 110, clause (4) contains a general exception to the exclusive right of public performance that would cover some, though not all, of the same ground as the present "for profit" limitation.

Scope of exemption. —The exemption in clause (4) applies to the same general activities and subject matter as those covered by the "for profit" limitation today: public performances of nondramatic literary and musical works. However, the exemption would be limited to public performances given directly in the presence of an audience whether by means of living performers, the playing of phonorecords, or the operation of a receiving apparatus, and would not include a "transmission to the public." Unlike the clauses (1) through (3) and (5) of section 110, but like clauses (6) through (8), clause (4) applies only to performing rights in certain works, and does not affect the exclusive right to display a work in public.

No profit motive. —In addition to the other conditions specified by the clause, the performance must be "without any purpose of direct or indirect commercial advantage." This provision expressly adopts the principle established by the court decisions construing the "for profit" limitation: that public performances given or sponsored in connection with any commercial or profit-making enterprises are subject to the exclusive rights of the copyright owner even though the public is not charged for seeing or hearing the performance.

No payment for performance. —An important condition for this exemption is that the performance be given "without payment of any fee or other compensation for the performance to any of its performers, promoters, or organizers." The basic purpose of this requirement is to prevent the free use of copyrighted material under the guise of charity where fees or percentages are paid to performers, promoters, producers, and the like. However, the exemption would not be lost if the performers, directors, or producers of the performance, instead of being paid directly "for the performance," are paid a salary for duties encompassing the performance. Examples are performances by a school orchestra conducted by a music teacher who receives an annual salary, or by a service band whose members and conductors perform as part of their assigned duties and who receive military pay. The committee believes that performances of this type should be exempt, assuming the other conditions in clause (4) are met, and has not adopted the suggestion that the word "salary" be added to the phrase referring to the "payment of any fee or other compensation."

Admission charge. —Assuming that the performance involves no profit motive and no one responsible for it gets paid a fee, it must still meet one of two alternative conditions to be exempt. As specified in subclauses (A) and (B) of section 110(4), these conditions are: (1) that no direct or indirect admission charge is made, or (2) that the net proceeds are "used exclusively for educational, ***religious***, or charitable purposes and not for private financial gain."

[86] Under the second of these conditions, a performance meeting the other conditions of clause (4) would be exempt even if an admission fee is charged, provided any amounts left "after deducting the reasonable costs of producing the performance" are used solely for bona fide educational, ***religious***, or charitable purposes. In cases arising under this second condition and as provided in subclause (B), where there is an admission charge, the copyright owner is given an opportunity to decide whether and under what conditions the copyrighted work should be performed; otherwise, owners could be compelled to make involuntary donations to the fund-raising activities of causes to which they are

opposed. The subclause would thus permit copyright owners to prevent public performances of their works under section 110(4)(B) by serving notice of objection, with the reasons therefor, at least seven days in advance.

Mere reception in public Unlike the first four clauses of section 110, clause (5) is not to any extent a counterpart of the "for profit" limitation of the present statute. It applies to performances and displays of all types of works, and its purpose is to exempt from copyright liability anyone who merely turns on, in a public place, an ordinary radio or television receiving apparatus of a kind commonly sold to members of the public for private use.

The basic rationale of this clause is that the secondary use of the transmission by turning on an ordinary receiver in public is so remote and minimal that no further liability should be imposed. In the vast majority of these cases no royalties are collected today, and the exemption should be made explicit in the statute. This clause has nothing to do with cable television systems and the exemptions would be denied in any case where the audience is charged directly to see or hear the transmission.

On June 17, 1975, the Supreme Court handed down a decision in *Twentieth Century Music Corp. v. Aiken*, 95 S.Ct. 2040, that raised fundamental questions about the proper interpretation of section 110(5). The defendant, owner and operator of a fast-service food shop in downtown Pittsburgh, had "a radio with outlets to four speakers in the ceiling," which he apparently turned on and left on throughout the business day. Lacking any performing license, he was sued for copyright infringement by two ASCAP members. He lost in the District Court, won a reversal in the Third Circuit Court of Appeals, and finally prevailed, by a margin of 7-2, in the Supreme Court.

The *Aiken* decision is based squarely on the two Supreme Court decisions dealing with cable television. In *Fortnightly Corp. v. United Artists*, 392 U.S. 390, and again in *Teleprompter Corp. v. CBS*, 415 U.S. 394, the Supreme Court has held that a CATV operator was not "performing" within the meaning of the 1909 statute, when it picked up broadcast signals off the air and retransmitted them to subscribers by cable. The *Aiken* decision extends this interpretation of the scope of the 1909 statute's right of "public performance for profit" to a situation outside the CATV context and, without expressly overruling the decision in *Buck v. Jewell-LaSalle Realty Co.*, 283 U.S. 191 (1931), effectively deprives it of much meaning under the present law. For more than forty years the *Jewell-LaSalle* rule was thought to require a business establishment to obtain copyright licenses before it could legally pick up any broadcasts off the air and retransmit them to its **[87]** guests and patrons. AS reinterpreted by the *Aiken* decision, the rule of *Jewell-LaSalle* applies only if the broadcast being retransmitted was itself unlicensed.

The majority of the Supreme Court in the *Aiken* case based its decision on a narrow construction of the word "perform" in the 1909 statute. This basis for the decision is completely overturned by the present bill and its broad definition of "perform" in section 101. The Committee has adopted the language of section 110(5), with an amendment expressly denying the exemption in situations where "the performance or display is further transmitted beyond the place where the receiving apparatus is located"; in doing so, it accepts the traditional, pre-*Aiken*, interpretation of the *Jewell-LaSalle* decision, under which public communication by means other than a home receiving set or further transmission of a broadcast to the public, is considered an infringing act.

Under the particular fact situation in the *Aiken* case, assuming a small commercial establishment and the use of a home receiver with four ordinary loudspeakers grouped within a relatively narrow circumference from the set, it is intended that the performances would be exempt under clause (5). However, the Committee considers this fact situation to represent the outer limit of the exemption, and believes that the line should be drawn at that point. Thus, the 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 aural or visual quality of the performance for individual members of the public using those areas.

Agricultural fairs The Committee also amended clause (6) of section 110 of S. 22 as adopted by the Senate. As amended, the provision would exempt "performance of a nondramatic musical work by a governmental body or a nonprofit agricultural or horticultural organization, in the course of an annual agricultural or horticultural fair or exhibition conducted by such body or organization." The exemption extends only to the governmental body or nonprofit organization sponsoring the fair; the amendment makes clear that, while such a body or organization cannot itself be held vicariously liable for infringements by concessionaires at the fair, the concessionaires themselves enjoy no exemption under the clause.

Retail sale of phonorecords Clause (7) provides that the performance of a nondramatic musical work or of a sound recording by a vending establishment open to the public at large without any direct or indirect admission charge, where the sole purpose of the performance is to promote the retail sale of copies or phonorecords of the work, is not an infringement of copy**[88]**right. This exemption applies only if the performance is not transmitted beyond the place where the establishment is located and is within the immediate area where the sale is occurring.

Transmission to handicapped audiencesThe new clause (8) of subsection 110, which had been added to S. 22 by the Senate Judiciary Committee when it reported the bill on November 20, 1975, and had been adopted by the Senate on February 19, 1976, was substantially amended by the Committee. Under the amendment, the exemption would apply only to performances of "non-dramatic literary works" by means of "a transmission specifically designed for and primarily directed to" one or the other of two defined classes of handicapped persons: (1) "blind or other handicapped persons who are unable to read normal printed material as a result of their handicap" or (2) "deaf or other handicapped persons who are unable to hear the aural signals accompanying a transmission." Moreover, the exemption would be applicable only if the performance is "without any purpose of direct or indirect commercial advantage," and if the transmission takes place through government facilities or through the facilities of a noncommercial educational broadcast station a radio subcarrier authorization (SCA), or a cable system.