

Exemption for performance of a nondramatic literary or musical work 17 USC § 110(4)

(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 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 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 notice of objection to the performance under the following conditions:

(i) the notice shall be in writing and signed by the copyright owner or such owner's duly authorized agent; and

(ii) the notice shall be served on the person responsible for the performance at least seven days before the date of the performance, and shall state the reasons for the objection; and

(iii) the notice shall comply, in form, content, and manner of service, with requirements that the Register of Copyrights shall prescribe by regulation;

Legislative History

U.S. Congress. House. Committee on the Judiciary. *Copyright Law Revision*;
House Report 94-1476 to accompany S. 22. September 3, 1976, pp. 85 – 86

Certain other nonprofit performances.

In 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."

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.

Important Definitions from 17 USC § 101

To "**perform**" a work means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible.

To **perform or display a work "publicly"** means— (1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or (2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.

Note: Dramatic and non-dramatic works are not defined in copyright law.

The **U.S. Copyright Office** provides this description:

Generally, dramatic works such as plays and radio or television scripts are works intended to be performed. Dramatic works usually include spoken text, plot, and directions for action. U.S. Copyright Office. "Dramatic Works: Scripts, Pantomimes, and Choreography", FL-119, Revised June 2008 <http://www.copyright.gov/fls/fl119.html>

The North Carolina State University Libraries TEACH Toolkit Glossary provides additional assistance in understanding the distinction:

Nondramatic vs. Dramatic

According to Nimmer and the U.S. Copyright Office, a dramatic work is "'a written or literary work invented and set in order' in which the narrative is not related but is represented by dialogue and action." It is "a work in which the narrative is told by dialogue and action, and the characters go through a series of events which tell a connected story..." Fundamentally there seem to be but two essential elements for a dramatic composition: (1) that it relate a story, and (2) that it provide directions whereby a substantial portion of the story may be visually or audibly represented to an audience as actually occurring, rather than merely being narrated or described." Thus, performances of a nondramatic literary work would include readings from textbooks, novels, and poetry. Dramatic works would be exemplified by stage plays.

<http://www.lib.ncsu.edu/dspc/legislative/teachkit/glossary.html>

For a discussion of 17 USC § 110(4) see: James c. Kozlowski, "Federal Counsel Responds to NRPA, Clarifies Copyright Music Public Park Exemption," Law Review, February 1992

<http://classweb.gmu.edu/jkozlows/lawarts/02FEB92.pdf>

Also see:

"When in Doubt, Do Without: Licensing Public Performances by Nonprofit Camping or Volunteer Service Organizations under Federal Copyright Law" *Washington University Law Quarterly*, Vol. 75, no. 3 (Fall 1997), 1277

<http://lawreview.wustl.edu/inprint/75-3/753-5.html>

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