

1-1-1979

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### Recommended Citation

Stein, Leslie Reicin (1979) "The Copyright Act of 1976: Its Effect on Higher Education's Use of Music," *Journal of Legislation*: Vol. 6: Iss. 1, Article 6.

Available at: <http://scholarship.law.nd.edu/jleg/vol6/iss1/6>

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# THE COPYRIGHT ACT OF 1976: ITS EFFECT ON HIGHER EDUCATION'S USE OF MUSIC

*Leslie Reicin Stein\**

On January 1, 1978, the Copyright Revision Act of 1976<sup>1</sup> became effective. This Act has had an adverse impact upon colleges, universities and other educational institutions as users of copyrighted materials. This Act eliminated Section 1(e) of the 1909 Act<sup>2</sup> which in general exempted nonprofit institutions from the payment of royalty fees when they publicly performed musical compositions. Unless educational institutions can assert a specific exemption, they are now required to pay royalties whenever they are responsible for a public performance of music. Although this change may have been apparent from a careful reading of this Act, it is one which did not receive the attention of most educators until the fall of 1977.<sup>3</sup> Since most educational institutions primarily focused their attention upon the extensive new photocopying and library provisions of this Act,<sup>4</sup> they were generally unprepared and unable to effectively deal with this change in the area of musical performance rights prior to the effective date of this Act. At present, many educational institutions are still uncertain about their rights and obligations in the musical performance area. As there appears to have been little if any discussion within the educational community on this subject prior to the elimination of the "for profit" exemption, many educators wonder whether Congress was aware of the far reaching change it made when it eliminated this exemption.

This article will attempt to examine the effect of the elimination of the "for profit" exemption upon colleges and universities in order to provide guidance to those who may be able to effect legislative change and assist those who are required to operate under the statute as presently written. To accomplish this task, the author will analyze Section 110 of the new Act, prior to discussing the efforts and accomplishments of a higher education task force which

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1. Copyright Act of 1976, 17 U.S.C. § 101 *et seq.* (1976) [hereinafter referred to as "1976 Act" or "the new Act"]. The legislative history of this Act is contained in S. Rep. No. 2, 94th Cong., 1st Sess. (1975); H.R. Rep. No. 1476, 94th Cong., 2d Sess. (1976) [hereinafter cited as "House Report"]; and H.R. Rep. No. 1733, 94th Cong., 2d Sess. (1976).
2. 17 U.S.C. § 1(e) (1970) (originally enacted as Act of March 4, 1909, ch. 320, § 1, 35 Stat. 1075) (repealed 1976).
3. Officials of the University of South Florida were first alerted to the change by a letter from J. W. Peltason (President of the American Council on Education) and D. F. Finn (Executive Vice President of the National Association of College and University Business Officers) to their colleagues (September 29, 1977).
4. The impact of the new Act in this area was quickly realized and thoroughly addressed. See Stedman, *The New Copyright Law: Photocopying for Educational Use*, 63 AAUP BULL. 5 (1977); Lieb, *An Overview of the New Copyright Law*, (Ass'n of Am. Pub., 1976); Cardozo, *To Copy or not to Copy for Teaching and Scholarship: What Shall I Tell My Client?*, 4 J. Coll. & U.L. 59 (1977); American Libraries Association, *Washington Newsletter*, Vol. 28, no. 13 (Nov. 15, 1976); Special Committee on Copyright Law, Practice, and Implementation, *Library Photocopying and the U.S. Copyright Law of 1976*, Special Libraries Association Report (December 29, 1977); NACUBO, *NACUBO Special Report*, 77-9 (December 16, 1977); United States Copyright Office, *Library of Congress, Reproduction of Copyrighted Works by Educators and Librarians*, Circular R-21 (April, 1978).

negotiated on behalf of institutions of higher education with the three largest performing rights societies. It is hoped that the reader will acquire some appreciation for the issues which have frustrated the educational community.

### BACKGROUND

Under Section 1(e) of the Copyright Act of 1909,<sup>5</sup> the unlicensed public performance of a musical composition did not infringe the rights of a copyright holder unless the performance was for profit. As educational institutions generally use any and all monies however derived for their tax exempt purpose, the "for profit" exemption embodied in the 1909 Act effectively removed them from the class of possible infringers with regard to the public performance of musical compositions. Rather than exempting all not-for-profit performances of music, the 1976 Act adopts the position that unless an exception is expressly stated or the use is within the defined purview of "fair use",<sup>6</sup> all public performances of copyrighted musical compositions need to be licensed. This change of position is explained in the comments of the Report of the Committee on the Judiciary of the United States House of Representatives as follows:

The line between commercial and 'nonprofit' organizations is increasingly difficult to draw. Many 'nonprofit' organizations are highly subsidized and capable of paying royalties, and the widespread public exploitation of copyrighted works by public broadcasters and other noncommercial organizations is likely to grow. In addition to these trends, it is worth noting that performances and displays are continuing to supplant markets for printed copies and that in the future a broad 'not for profit' exemption could not only hurt authors but could dry up their incentive to write.<sup>7</sup>

It has been argued that the elimination of the "for profit" exemption is in the country's best interest as some universities have been able to capture a major segment of the concert business thereby reducing the amount of royalties that writers of music normally would expect to receive for the performance of their works. If indeed there is a correlation between actual financial remuneration derived from performance of one's works and continued productivity and creativity, Congress may have been justified in enacting a statute which would have required the performer to pay royalties wherever he performs music provided that he is paid a significant fee for his services and the performance is for a commercial entertainment purpose.

### SCOPE OF THE EXEMPTION

Instead of the general "for profit" exemption, Section 110 of the new Act recites certain activities which are not violative of a copyright owner's license. In general, this section describes the following as exempt activities:

1. Performance or display of a work by instructors or pupils in the course of face-to-face teaching activities of a nonprofit educational institution, in a classroom or similar place devoted to instruction . . . .<sup>8</sup>

5. 17 U.S.C. § 1(e) (1970) (originally enacted as Act of March 4, 1909, ch. 320, § 1, 35 Stat. 1075) (repealed 1976).

6. The concept of "fair use" has been codified in section 107 of the new Act. 17 U.S.C. § 107 (1976).

7. House Report, *supra* note 1, at 62-63.

8. 17 U.S.C. § 110(1) (1976).

It should be noted that only performances by instructors or pupils made in the course of "systematic instruction"<sup>9</sup> will be considered to be within the classroom exemption. According to the House Report, regular instructional personnel may be supplemented by guest lecturers without losing this exemption.<sup>10</sup> It appears that the phrase "face-to-face teaching activities" was used to exclude from this exemption, broadcasting or other transmissions from an outside location into the classrooms.<sup>11</sup> It was not designed to preclude the "use of devices for amplifying or reproducing sound and for projecting visual images"<sup>12</sup> so long as the instructor and pupils are in the same general area.

2. Performance of a nondramatic literary or musical work or display of a work, by or in the course of a transmission, if —
  - (a) the performance or display is a regular part of the systematic instructional activities of a governmental body or a nonprofit educational institution; and
  - (b) the performance or display is directly related and of material assistance to the teaching content of the transmission; and
  - (c) the transmission is made primarily for
    - (i) reception in classrooms or similar places normally devoted to instruction, . . . .<sup>13</sup>

As this exemption for instructional broadcasting is limited to the performance of a "nondramatic literary or musical work or display of a work" it is necessary for a copyright owner's permission to be obtained for the performance of a dramatic or dramatico-musical work on educational television even if the intended recipients of the broadcast are primarily students seated in a classroom.<sup>14</sup>

3. 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.<sup>15</sup>

9. House Report, *supra* note 1, at 81.

10. *Id.* at 82.

11. *Id.* at 81.

12. *Id.*

13. 17 U.S.C. § 110(2) (1976).

14. House Report, *supra* note 1, at 83.

15. 17 U.S.C. § 110(4) (1976).

This exemption makes it clear that an educational institution need not pay royalties if it does not pay the performers and no direct or indirect admission fee is charged or, if an admission fee is charged, the net proceeds are used exclusively for educational purposes and no timely objection has been served by the copyright owner.

The exemption is to be interpreted as limited to public performances which are given directly in the presence of an audience whether they be by means of live performers, the playing of phonorecords, or the operation of receiving apparatus and does not include transmissions to the public. It is important to note that the performance must be given without payment of compensation to the performers, organizers or promoters of the event unless such payment can be construed as part of a salary for duties which include this performance. According to the House Report, the exemption was qualified 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."<sup>16</sup> The inclusion of this qualification will afford copyright owners the right to prevent public performances of their work for fund raising purposes. Had this right not been afforded, a copyright owner could have been forced to allow his works to be used to raise funds for a cause he opposes.<sup>17</sup> As Section 110(4) of the new Act does not require the user to notify the copyright owner that his work will be played for fund raising purposes, unless the copyright holder files a blanket prohibition with the Copyright Office, it is difficult to understand how this right can be effectively exercised.<sup>18</sup>

According to the House Report, the inclusion of the phrase "without any purpose of direct or indirect commercial advantage" is designed to adopt the judicial precedent established under the 1909 Act construing the term "for profit".<sup>19</sup>

In addition to the exemptions stated above, Section 107 of the new Act codifies the judicially created exemption of "fair use".<sup>20</sup> Section 107 recites the four factors which courts have traditionally considered in their determination as to whether a certain use is fair. These factors are as follows:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit 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.<sup>21</sup>

16. House Report, *supra* note 1, at 85.

17. *Id.* at 86.

18. Final Regulations from the Register of Copyrights relating to notice of objection to non-commercial performances of non-dramatic musical works have been published in 42 Fed. Reg. 64, 682-4 (1977). Notice of objection is discussed in Korman, *Performance Rights in Music Under Sections 110 and 118 of the 1976 Copyright Act*, reprinted in *Current Developments in Copyright Law 1979*, 199-234 (1979).

19. House Report, *supra* note 1, at 85. The leading case on this matter is *Herbert v. Stanley*, 242 U.S. 591 (1917), in which it was held that the performances of music at a restaurant were for profit even though the patrons paid no additional charge for the music as it was part of the total service for which the public paid.

20. The fair use doctrine has been a part of copyright law since at least 1841. See *Folson v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4,901); 3 *Nimmer on Copyright* § 13.05 at 13-48 (1978) contains an excellent discussion of this doctrine.

21. 17 U.S.C. § 107 (1976).

But note that these are not the only factors which may be considered. The manner in which this section is written would indicate to the reader that other factors may be significant. The "fair use" doctrine has been treated as a means of achieving a balance between the rights of creators and the needs of users.<sup>22</sup>

Thus, those performances of music on campus which do not fall within the exceptions of "systematic instruction" or "fair use" are protected under the new Act and must be paid for by the institutional user. As a consequence, in a period of financial exigency, colleges and universities have been required to further strain their budgets by expending thousands of dollars for an item which they had not anticipated.

### HIGHER EDUCATION TASK FORCE

To deal with the impact on colleges and universities of the new Act in the area of musical performance rights, a task force was organized in November, 1977. This task force was charged with the responsibility of negotiating with the American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music Incorporated (BMI), the Society of European Stage, Authors and Composers (SESAC), to develop a model licensing agreement. Representatives of the American Council on Education (ACE), the National Association of College and University Business Officers (NACUBO), the Association of College, University and Community Arts Administrators, Inc. (ACUCA), the Association of College Unions—International (ACU-I), the National Association of Schools of Music (NASM), and the National Entertainment and Campus Activities Association (NECAA) participated in the negotiations.<sup>23</sup> None of the educational groups who participated in the negotiations had the ability to bind any of the college or university members as they were not authorized to act as their agents. The negotiations were in fact initiated to draft model agreements to assist colleges and universities in their negotiations with each of the performing rights organizations. It was contemplated that each college and university would have the option of signing the model agreement or negotiating individually for different terms.

The task force saw as its goal the development of arrangements which would satisfy the diverse and unique needs of higher education. The task force hoped to develop one model agreement which would be used by all three performing rights organizations.<sup>24</sup> Unfortunately though, due to the diversity of programs among institutions, the uncertainty as to what activities actually required licenses, and the unique characteristics of each of the performing rights societies, it was not possible to draft one agreement which would be equitable and reasonable as well as adoptable by the majority of colleges and universities.

22. The principle has been reiterated in *Meeropol v. Nizer*, 417 F. Supp. 1201, 1206 (S.D.N.Y. 1976), which states: "[T]here are occasionally situations in which the copyright holder's interest in a maximum financial return must occasionally be subordinated to the greater public interest in the development of art, science and industry."

23. The author of this paper acted as an advisor to the Florida Department of Education and Mr. Sheldon Steinbach, Staff Counsel of the American Council on Education (ACE) and Chairman of the negotiating team.

24. ACE-NACUBO, ACE-NACUBO Report, Licensing and Royalties for Campus Performance of Music (March 22, 1978).

## THE PERFORMING RIGHTS SOCIETIES

The American Society of Composers, Authors and Publishers (ASCAP), was founded in 1914 to enable writers and publishers to effectively enforce their performance rights under the Copyright Statute of 1909. Unlike BMI and SESAC, ASCAP is a nonprofit organization owned by its approximately 23,000 members who are composers, authors and publishers. There are at least three million works in its repertoire.<sup>25</sup> As all members of ASCAP grant to the Society their non-dramatic performing rights on a non-exclusive basis for a specified period of time, the Society is able to engage in the business of licensing users of music and enforcing the performance rights of its members. Users of music have the option of contracting with ASCAP or, in accordance with a consent decree first entered in 1941,<sup>26</sup> contracting with the individual composer. ASCAP offers a blanket license which in general permits a licensee access to all of the music in its repertory for a flat fee or a percentage of gross receipts, and a per program license which assesses the fee based upon the type of performance involved. In the event that the licensee believes that the fee is unfair, the consent decree provides a mechanism by which it can be adjusted.<sup>27</sup> ASCAP interprets its consent decree to prohibit it from discriminating in license fees or terms between licensees who are "similarly situated".<sup>28</sup>

Broadcast Music Incorporated was founded in 1940 by members of the broadcasting industry in response to the need to increase their bargaining power with ASCAP. Except for operating expense reserves this society distributes the monies it collects to writers and publishers. As of February, 1979, more than 55,000 writers and publishers belonged to BMI. There are approximately 1,000,000 works in BMI's repertoire.<sup>29</sup> Like ASCAP, it operates under a consent decree however, it does not appear to interpret it to preclude administrative changes in contracts of entities which are similarly situated.

In addition to ASCAP and BMI there are several small privately owned licensing groups based in the United States. The largest of these is the Society of European Stage, Authors and Composers (SESAC) which was founded in 1931. As of February, 1979, SESAC had approximately 500 publishers and 1000 writers as members. There are approximately 150,000 works in its repertoire.<sup>30</sup>

25. Finkelstein, *Public Performance Rights in Music and Performances Rights Societies*, 12-13, reprinted from 7 *Copyright Problems Analyzed*; Telephone interview with I. Fred Koenigsberg, ASCAP Counsel (February 22, 1979). The number 3 million was derived by the United States District Court for the Southern District of New York in *United States v. ASCAP*, 32 C.O. Bull. 601 (S.D.N.Y. 1960), 37 C.O. Bull. 559 (S.D.N.Y. 1969).

26. 2 *Nimmer on Copyright* 8.19 at 8-238 (1978), citing *United States v. ASCAP*, 32 C.O. Bull. 601 (S.D.N.Y. 1960), 37 C.O. Bull. 55 (S.D.N.Y. 1969). The consent decree against BMI can be found in *United States v. BMI*, 35 C.O. Bull. 870 (S.D.N.Y. 1966).

27. Finkelstein, *supra* note 25, at 22. Under the consent decree, any user subjected to the license fee quoted by ASCAP can apply to the United States District Court for the Southern District of New York for fixation of the rate.

28. Interview with I. Fred Koenigsberg, ASCAP Counsel, in New York City (January 12, 1979).

29. Telephone interview with Alan Smith, ASCAP Vice President of Licensing (February 20, 1979).

30. Telephone interview with Barry Tuber, SESAC Assistant Director of Licensing (February 20, 1979).

Due to the extensive and varied uses of music on college and university campuses<sup>31</sup> and the uncertainty as to what uses need to be licensed, the task force opted for a blanket license which would be all-inclusive. As a consequence the three agreements are more appropriately used by a large university engaged in substantial musical activities than by a small community college which primarily serves commuter students.<sup>32</sup> To suit the needs of a small user of music, a minimal user option, which would allow an institution to separately license each of the activities which may be copyright infringement, is available from ASCAP and BMI.<sup>33</sup>

Both ASCAP and BMI have developed a non severable two-tier license which will provide general coverage for the payment of a fee based upon full-time equivalent enrollment and a per performance charge based upon the highest price of admission or the seating capacity when the performer or performers are paid a total of \$1000 or more. Under the ASCAP contract an educational institution is required to pay \$.06 per full time equivalent student enrollment or a minimum fee of \$50. Under the BMI contract an educational institution is required to pay \$.055 per full time equivalent student enrollment or a minimum fee of \$60. Full time student enrollment is computed by dividing the total number of course hours taken by the number of hours considered to be a full time class load under institutional regulations.<sup>34</sup> ASCAP computes its per performance charge based on both the highest price of admission and the seating capacity. For example, if the highest ticket price is \$6.00 and the seating capacity of the hall is 10,000 seats, a \$100 per performance charge would be assessed. BMI computes its per performance charge solely upon seating capacity.

In addition, both societies require monthly accountings in order to determine if additional fees are required. Due to the large number of groups on any campus who could possibly sponsor an activity which would give rise to the per performance charge, and the existence of two methods by which the charge must be calculated, administration of this part of the contract is most time-consuming and expensive.<sup>35</sup> Recognizing this fact, BMI has expressed a willingness to allow these report to be filed on a quarterly bases.<sup>36</sup>

31. On many campuses, both live and/or recorded music is played at concerts, coffee houses, dances, discos, sporting events, etc.
32. This complaint was aired in a letter from Dr. Frank Scaglione, President of Hillsborough Community College in Tampa, Florida, to Dr. Carl Kuttler, President of St. Petersburg Junior College, St. Petersburg, Florida (September 20, 1978).
33. ACE-NACUBO Report, *supra* note 24, at 6-9. BMI has formalized this option by allowing an institution to pay in accordance with the performance schedule for each activity it wishes to license regardless of whether \$1,000 has been paid to a performer or performers. ASCAP has agreed to receive requests for a minimal user option and appears to be offering other types of contracts to institutions based upon the type of entity the user of music most closely resembles.
34. Use of the total enrollment figure is most unfortunate as it does not accurately reflect the actual number of students who participate in campus life. This figure includes persons who take noncredit courses or community service courses as well as those who do not intend to earn a diploma.
35. At the University of South Florida, the Office of Student Programming is charged with the responsibility for completing the monthly reports. The Coordinator for this office is required to obtain information from the College of Fine Arts, the Florida Center for the Arts, the Student Government, the Interfraternity Council, Pan-Hellenic, the Office of Student Affairs, the Division of Housing and Food Service, the Department of Physical Education and others, prior to completing each report.
36. Letter from Dr. John Lott Brown, President of the University of South Florida, Tampa, Florida, to Alan H. Smith, BMI Vice President of Licensing (September 28, 1978) confirming the fact that monthly reports can be filed on a quarterly basis.

Colleges and universities have found especially troublesome the requirement that they must bear the burden of paying the per performance charge to both ASCAP and BMI even if neither societies' music is performed.<sup>37</sup>

SESAC has adopted a one-tier contract which covers all performances for a fee based upon total student enrollment. But the contract further provides that the institution agrees to furnish, upon request, copies of its programs and all other records relating to musical compositions performed under its auspices. Additionally, SESAC reserves the right to unilaterally withdraw up to 20% of the music granted for use at any time.

The inability of ASCAP, BMI, and SESAC to treat campus FM radio stations in a consistent manner is a further example of the burden which was placed upon institutions of higher learning in their attempt to negotiate musical performance rights agreements. By March of 1978, ASCAP was contending that its college and university license agreement completely excluded the use of music by campus radio stations. BMI was contending that its college and university license agreement provided blanket coverage for all noncommercial radio stations as well as for those commercial stations whose gross receipts did not exceed \$10,000. Commercial stations whose receipts exceed \$10,000 were required to pay the normal BMI commercial rate. SESAC was contending that its college and university license agreement provided coverage for all carrier-current radio stations and all "class D" radio stations up to 20 watts. A fee of one-half the usual SESAC commercial rate was to be paid by all college radio stations exceeding 20 watts. The resulting confusion caused the task force to petition the Copyright Royalty Tribunal, a newly formed body under the Act, to establish reasonable rates for noncommercial broadcasting college radio stations not covered by voluntary agreements.<sup>38</sup> On June 8, 1978, the Tribunal announced uniform royalty rates for these stations.

### SPECIAL SESSION

On June 20, 1978, attorneys representing many colleges and universities met at a special session of the annual meeting of the National Association of College and University Attorneys to discuss the proposed performing rights agreements.<sup>39</sup> After lengthy discussion no consensus was reached among the participants as to whether these agreements should be signed.

Prior to this meeting, some 500 or 600 institutions had already signed these agreements.<sup>40</sup> It appeared that some of these institutions had acted on the advice of counsel. Many of the attorneys present at this meeting stated that they had advised their clients to execute these agreements as they believed that the costs incident to execution would be far less than the costs which

37. BMI is willing to forgo payment if the licensee can prove by submission of a documented schedule that no BMI music has been performed. This would require the institution to know what music was being performed at all times and additionally, to know what music was in BMI's repertoire.

38. A full discussion of this matter can be found in, Statement of the American Council on Education and the Intercollegiate Broadcasting System, *Use of Certain Copyrighted Works by Non-Commercial College and University Broadcasting Stations*, before the Copyright Royalty Tribunal, March 15, 1978.

39. Approximately 760 institutions are members of NACUA. According to the Education Directory, Colleges and Universities, 1977-78 (National Center for Education Statistics), there are approximately 3130 institutions of higher learning in the United States. This figure only approximates the number of institutions which would be required to sign musical performance rights agreements as it includes seminaries, war colleges, and institutions which are so small that it would not be practicable for them to be engaged in musical activities.

40. Proposed agreements were sent by SESAC during the week of March 13, 1978, by BMI during the week of March 20, 1978, and by ASCAP during the month of April, 1978.

might be incurred if their institution was forced to defend an infringement action.<sup>41</sup> As it appeared unlikely that any of the national educational associations would be willing or able to devote the resources necessary to a major resistance effort, many institutional counsels were convinced that it was necessary for their clients to execute performing rights agreements. At this critical juncture, the inability of the institutions of higher education to act together greatly weakened their bargaining power.

Several of the attorneys present at this meeting were of the opinion that although the agreements were not binding upon their educational institution, the actions of the task force placed their institution in a precarious position as ostensibly the task force acted on their behalf. They stated that the task force should have directed its attention to developing an agreement which would have required paid performers to accept the responsibility for royalty payments as they are primarily liable for copyright infringements under the new Act. The task force's approach was one of shifting the burden for payment of royalties from the paid performers to the institution which housed the performance. This appeared to be especially unreasonable in light of the fact that many of the performers play their own music and, therefore, could not be copyright infringers. As a consequence, even though a copyright infringement could not possibly occur, an institution would be required by the contract to pay a royalty fee. Based upon this reasoning, the University of Tennessee and others adopted an indemnification provision in their entertainment contracts which clearly gave the universities a right of action against the performer in the event that they were sued for copyright infringement.<sup>42</sup> This position was subsequently abandoned by the University of Tennessee and others when it became apparent that institutions of higher education would not maintain a united front against the American Federation of Musicians and the American Guild of Musical Artists, who opposed the policy of requiring musicians to be responsible for the royalty payments. In addition, it was believed by some that secondary liability would prove to be real liability as the right over and against a defaulting performer could prove to be illusory due to the itinerant nature of many musicians.<sup>43</sup>

Several of the institutions opposed signing the agreements on the ground that the unilateral approach suggested by the blanket license agreements may constitute a restraint of trade as it attempted to set prices in violation of the Sherman Anti-trust Act in a manner not keyed to the use of music. This argument is questionable in light of a footnote in *Columbia Broadcasting System v. ASCAP*<sup>44</sup> which suggested that blanket licenses given by ASCAP to certain types of enterprises including restaurants, night clubs and radio stations are not necessarily unlawful as a restraint of trade.

41. A moratorium against the bringing of infringement actions was called for the period of January to March, 1978, to afford the higher education negotiating team the time required to develop the model agreements. To date, it appears that only one infringement action has been initiated against an institution of higher education. On March 19, 1979, *The Chronicle of Higher Education* reported that BMI filed suit in a United States District Court in Boston, Massachusetts against Harvard University for use of copyrighted music. Magarrell, *Harvard Universities Sued for Copyright Infringement*, *The Chronicle of Higher Education*, March 19, 1979, at 3, col. 1. Harvard had not signed licensing agreements with any of the three performing rights societies.

42. This opinion was expressed in a letter written by Dr. Edward J. Boling, President of the University of Tennessee, to Dr. J. W. Peltason, President of ACE (February 14, 1978).

43. It should be noted that ACE staff council was not supportive of the view that an owner of facilities incurs only vicarious liability in the event that a performer is an infringer. NACUA Special Report, 77-4 (December, 1977).

44. *Columbia Broadcasting System v. ASCAP*, 562 F.2d 130, 140, n. 26, (2nd Cir. 1977).

Several of the attorneys representing public institutions of higher education questioned whether they had any real liability under the copyright statute as their states had not waived sovereign immunity in tort. Although a tort action might not be an effective remedy against a state agency, this argument was not pursued, as it was reasoned that injunctive relief could effectively ban musical performances on college campuses.

It was further argued at this meeting that the blanket license approach could result in the payment of public monies when services had not been rendered, thereby violating some states' laws. This argument was rejected by several of the Florida institutions on the ground that there is no extension of the credit of the state of Florida by payment of either the blanket license fee or the per performance fee as no prepayment is required and music of any of the licensing societies could have been played at any nonexempt performance. Elimination of conflict of laws provisions, arbitration clauses and the inclusion of anti-discrimination clauses and clauses making payment contingent upon legislative appropriations were topics which appear to be open to discussion by each of the societies when the contracts are renegotiated for 1980.

As of February, 1979, approximately 1500 contracts covering 2500 campuses have been executed by colleges and universities with ASCAP.<sup>45</sup> Over two-thirds of the colleges and universities have executed contracts with BMI.<sup>46</sup> Over 1300 educational institutions have executed contracts with SESAC.<sup>47</sup>

### CONCLUSION

It has become apparent that the issue as to whether educational institutions are required by the change in the law to sign these agreements in order to avoid copyright infringement will not be effectively addressed. Unless a change in the law is effected, millions of public and private dollars will be expended each year in the payment of royalties. It appears that Congress did not comprehend the adverse effects of dropping the non-profit exemption for institutions of higher learning. Nothing in the legislative history shows that the potential problem for these institutions was clearly brought to the attention of legislators before the new Act became law. As meaningful negotiation was hindered by institutional fear of costly litigation, colleges and universities have been placed in the unfortunate position of being forced to execute contracts which contain terms and conditions which are inappropriate and unfavorable to many schools.

The foregoing suggests that a legislative reevaluation is in order. Congress should reconsider its action of placing such a burden on our nation's already financially overstrained institutions of learning. In the meantime, those institutions who have not yet signed the proposed agreements should continue to negotiate in good faith for provisions of benefit to their specific institutions. It is hoped that all of the institutions impacted by the removal of the "for profit" exemption will cooperate so that they may carefully plan their approach to the re-negotiations of 1980.

45. Telephone interview with I. Fred Koenigsberg, ASCAP Counsel, (February 22, 1979).

46. Telephone interview with Alan H. Smith, BMI Vice President for Licensing (February 20, 1979).

47. Telephone interview with Barry Tuber, SESAC Assistant Director of Licensing (February 20, 1979).