THE NECESSITY OF BLANKET LICENSE AGREEMENTS IN LIGHT OF 17 U.S.C. 110(4) UNVEILED

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Abstract

For decades universities and other educational institutions have contracted with performance rights organizations in order to be able to publicly perform and use their respective musical catalogues freely without the fear of litigation. For educational institutions, this is a significant drain on their financial resources, which otherwise could be used for the support of students through scholarships, new equipment or higher quality instructors. This Article proposes a method for determining whether such blanket license agreements are actually necessary for an individual institution, or whether such an annual budget item is legitimately justified.

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Introduction

For decades universities and other educational institutions have contracted with performance rights organizations (PRO) in order to be able to publicly perform and use their respective musical catalogues freely without the fear of litigation. For educational institutions, this is a significant drain on their financial resources, which could otherwise be used for the support of students through scholarships, new equipment or higher quality instructors. This Article proposes a method for determining whether such blanket license agreements are actually necessary for an individual institution, or whether an annual budget item is legitimately justified.

Blanket licenses are issued to universities and other educational institutions in order to obtain the right to publicly perform a specific copyrighted work.[1] Such a license focuses on the nondramatic use or performance of such a work and requires payment whenever a copyrighted work that is nondramatic is publicly performed.[2] In general, "nondramatic" in the context of entertainment encompasses any work that is not a drama.[3] Reversely, "dramatic" in the same context encompasses dramas or other productions that include a significant amount of theatrical performance.[4] The blanket aspect of the license allows universities to contract to publicly perform the entire repertoire of a given organization in a nondramatic setting. Another option, which seems to have never gained traction because universities and other educational institutions were too afraid of litigation, is making use of an exception allowed under the Copyright Act of 1976 (the "Act," or the "Copyright Act"). The Section 110(4) exception allows for the performance of nondramatic works in mostly not-for-profit settings.[5]

Special notice must be taken of the variance in wording between the Act and the standard blanket license agreements. While standard blanket license fee agreements specifically contract for the nondramatic use of a work,[6] the Copyright Act exempts the performance of a nondramatic work.[7] This exemption leads to four different scenarios—noted in the table below—that must

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1. *Common Licensing Terms Defined: Blanket License*, ASCAP, https://www.ascap.com/help/ascap-licensing#2BA890AD-EA7F-414E-BB11-0CC82DDBCC87 [https://perma.cc/XV55-UKXS].
2. *Colleges and Universities License Agreement (Two Tier)*, ASCAP, https://www.ascap.com/~/media/files/pdf/licensing/classes/2018-licensing-rates-reports/college-and-university-tier-two-2.pdf [https://perma.cc/K2TB-W65D].
3. U.S. Copyright Office, Compendium of U.S. Copyright Office Practices § 804.1 (3d ed. 2017).
4. *Id.*
5. 17 U.S.C. § 110(4) (2005).
6. *Colleges and Universities License Agreement (Two Tier)*, *supra* note 2. *See also College/University: One Tier*, BMI, https://www.bmi.com/forms/licensing/gl/58.pdf [https://perma.cc/3S5U-69YF].
7. 17 U.S.C. § 110(4).

be analyzed to determine what kind of license is required under the Act. The first scenario is when a performance is dramatic, and the underlying work is dramatic. In this case, neither the Act nor the blanket license cover the public performance, which means that the right to do so must be directly received from the copyright holder. The second scenario is when a work is nondramatic, and its performance is nondramatic as well. This scenario clearly falls within the exception of the Act, as long as all other requirements are met which will be detailed below, allowing for the performance of such work without a license. To determine whether a specific production falls within this exception of Section 110(4), it must only be determined where the line between nondramatic and dramatic musical works lies. The third scenario is when a work is nondramatic, and its performance is dramatic. The Copyright Act seems to allow such performances of a nondramatic work, provided its other requirements are satisfied, but blanket license agreements seem to encompass and charge for such use. Thus, there is an evident conflict between the license agreements, which requires critical analysis in determining when a work is considered nondramatic. The fourth scenario is when a work is dramatic, and its performance is nondramatic. Particular attention must be given here, since it must be determined when a work is deemed dramatic versus nondramatic and whether to ultimately license for a nondramatic performance of the work or to receive permission directly from the copyright holder of the dramatic work. If a work is dramatic, the exception of the Copyright Act does not apply because it only pertains to nondramatic musical works. Thus, for dramatic works a university should acquire permission directly through the copyright holder as a grand right[8] (a right individually negotiated with and granted by the copyright holder). However, if the work is of nondramatic character, a blanket license should be retained through one of the performance rights organizations in order to perform the work in a nondramatic setting. In either scenario, universities and other educational institutions will need to pay for licenses in such an

8. *Grand Rights*, Canadian League of Composers, https://www.composition.org/commissioning/grand-rights [https://perma.cc/A6QY-S6NV] ("A 'grand right' is a dramatic performing right which can encompass several copyrights, i.e. in the libretto, the music, the choreography, etc., and no one of these copyrights has greater rights than any other. Grand rights cover performances of musical theatre works, operas, operettas, ballets, and renditions of independent musical compositions in a dramatic setting where there is narration, a plot, and/or costumes and scenery."). *See also Common Licensing Terms Defined*, ASCAP, https://www.ascap.com/help/ascap-licensing/licensing-terms-defined [https://perma.cc/NFM2-2KCU] ("'Dramatic' (often referred to as 'grand') rights in musical works are licensed by the composer or publisher, or other licensing agent for the work. Traditionally, in dramatic works, the main motivation is the telling of a story and the music serves to enhance the plot. This was thought to increase the economic value of the music, leading the rightsholders of the music to conclude that they could derive greater benefit if they controlled the licensing of the works themselves.").

instance, regardless of the option they choose. In determining which license to acquire, an economic analysis needs to be conducted to establish whether individually negotiated grand rights are more financially viable than paying for blanket licenses with the performance rights organizations (PROs). These will be the two points of inquiry of this Article.

The first Part will discuss the concept of licensing and examine performance rights organizations, who license music to educational institutions. This will be followed by a short history of the current Copyright Act and the relevant provisions for determining whether licensing is required. Lastly, there will be a legal discussion of the Section 110(4) exemption for nonprofit performances and an evaluation of such uses under a fair use analysis, as another way to avoid license fees.

Table 1: The Four Scenarios of Licensing

Type of Work	Use of Work	License Required
Dramatic	Dramatic	Grand Rights
Nondramatic	Nondramatic	Exempt under Section 110(4)[9]
Nondramatic	Dramatic	Exempt under Section 110(4)[10]
Dramatic	Nondramatic	Grand Rights or Blanket License

Performance rights organizations serve as a support and relief mechanism for courts and to simplify the process of retaining permission to publicly perform certain copyrighted works. Their inherent purpose is to protect the very rights granted to copyright owners through the Copyright Act by providing them with reasonable remuneration for the use of their work through licensing.[11] The three most established performance rights organizations in the United States are the American Society of Composers, Authors, and Publishers (ASCAP), Broadcast Music, Inc. (BMI) and SESAC (originally the "Society of European Stage Authors and Composers").[12] Each performance rights organization compiles an individual catalogue of musical works by artists, writers and/or publishers who have authorized the PRO to license out their works. This catalogue of individual songs can then be licensed to individuals, performance venues, restaurants, hotels, large corporations, radio stations, schools and universities for use in accordance with the relevant agreement. PROs license out

9. Provided all the other requirements of Section 110(4) are fulfilled.
10. Provided all the other requirements of Section 110(4) are fulfilled.
11. *ASCAP Statement on Development with Music Modernization Act*, ASCAP (Aug. 2, 2018), https://www.ascap.com/press/2018/08/08-02-statement-on-mma [https://perma.cc/CH9A-NHZJ].
12. *What Performance Rights Organizations Do: How a PRO Can Maximize Your Royalties*, Soundcharts Blog (Jan. 28, 2020), https://soundcharts.com/blog/performance-rights-organizations#what-is-a-performing-rights-organization [https://perma.cc/89WY-Q55U].

the public performance right to works within their catalogue which allows the individual receiving the license to publicly perform the copyrighted work without fear of infringement. Such licenses allow the user to publicly perform a musical composition in a nondramatic setting, or use the license for a "nondramatic use."[13] Dramatic performances are excluded from the license agreement, leaving such performances subject to individual negotiation with the copyright holder and the granting of "grand rights."[14] For institutions of higher education, a standard license has been negotiated by the American Council on Education and the National Association of College and University Business Officers (NACUBO), which can be entered into by each educational institution as needed.[15] This license allows for performances of any musical work within the catalogue of the PRO by any constituent bodies, agencies, or organizations affiliated with the university, including "fraternit[ies], sororit[ies], social club[s] or other organizations affiliated with" the educational institution.[16] The performance by these organizations must be on campus or an outreach program encompassed within the institution's charitable and educational purpose to fall within the exception discussed below. The aforementioned licenses for use of the PRO's catalogue are called "blanket licenses." Because the catalog of any given PRO is generally somewhat limited, educational institutions often have to contract with all three of the principal PROs to cover their bases, which in turn leads to great expenses on a yearly basis.[17]

These blanket license fee agreements often ignore the provisions of the Copyright Act, which grants exceptions to universities and other educational institutions allowing them to publicly perform certain works in certain instances without remuneration to the copyright holder. In order to appreciate and understand the difference between blanket agreements and the Copyright Act, a brief summary of the Copyright Act and its exceptions are provided below.

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13. *See Colleges and Universities License Agreement (Two Tier)*, *supra* note 2. *See also Common Licensing Terms Defined*, supra note 8.
14. *Colleges and Universities License Agreement (Two Tier)*, *supra* note 2. *See also Common Licensing Terms Defined*, supra note 8.
15. *Use of Copyrighted Music on College and University Campuses*, Am. Council on Educ. (Sept. 2013), https://www.nacubo.org/-/media/Nacubo/Documents/BusinessPolicyAreas/Music_Use_of_Copyright_FINAL.ashx?la=en&hash=2CD85C621F08B10288A98CE1AED6B2CC5CA3A8CA&hash=2CD85C621F08B10288A98CE1AED6B2CC5CA3A8CA [https://perma.cc/2FWA-7PBY].
16. *Colleges and Universities License Agreement (Two Tier)*, *supra* note 2. *See also College/University: One Tier*, *supra* note 6.
17. Heather McDonald, *How a Blanket License Is Used in the Music Industry*, Balanced Careers (Jan. 21, 2019), https://www.thebalancecareers.com/blanket-license-in-the-music-industry-2460916 [https://perma.cc/VJ67-3QY5].

I. Overview of the Copyright Act of 1976 and its Exceptions Under Section 107 and 110

Copyright law evolved in an effort to protect authors' rights to reproduce, use and profit from their works.[18] However, society as a whole also recognized that there is a need for such protected works to be used freely by the community in certain instances, such as educational use.[19] The Copyright Act came into effect at a time when technology was advancing faster than ever before. With the first programmable microprocessor and the first Walkman on the market, the emergence of email and the Apple II paving the way for Apple's trajectory as a computer company, the 1970s and 80s were an exciting time to experience the rapid advance of the tech and entertainment industries.[20] The Act also allowed for easy access to copyrighted material on an international scale, thus threatening to corrupt the balance between exclusive rights granted to authors and exceptions thereof.[21] It was unimaginable in the preceding century to have such vast capacities of innovation and creativity. In light of these new developments, many parts of The Act's predecessor of 1909[22] became obsolete almost immediately after its passing due to rapid technological changes,[23] making the new Act an eagerly anticipated piece of legislation. Over the years, Congress continued to revise the old law into a more detailed statute, extending the rights granted in the Act of 1909 on several occasions.[24] An example of these extensions of rights can be illustrated through Section 106(4) and (5) the Copyright Act of 1976. These sections vest exclusive rights in the owner of a copyright to publicly perform and display his musical, literary or dramatic work, completely leaving aside the for-profit motive inherent in the 1909 Act, which provided for a general exemption from the requirements of the Copyright Act to universities and colleges.[25] Notwithstanding the provisions of Section 106 granting such exclusive rights, the broad definitions of an author's rights are limited by a series of exemptions, compulsory licenses and user privileges enumerated in Sections 107 through 120.[26] These limitations on the exclusive rights of the owner of copyright give exceptions for specific groups, such as colleges, libraries and archives,

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18. Robert J. Congleton & Sharon Q. Yang, *A Comparative Study of Education Exemptions to Copyright in the United States and Europe*, 3 Athens J.L. 47, 47 (2017).
19. *Id.*
20. David Gewirtz, *Technology that Changed Us: The 1970s, from Pong to Apollo*, ZDNet (June 28, 2019, 11:27 AM), https://www.zdnet.com/article/technology-that-changed-us-the-1970s [https://perma.cc/G9Y2-KG78].
21. Congleton & Yang, *supra* note 18, at 47.
22. Copyright Act of Mar. 4, 1909, 35 Stat. 1075, 1075 (repealed 1976).
23. Bernard Korman, *Performance Rights in Music Under Sections 110 and 118 of the 1976 Copyright Act, 22* N.Y. L. Sch. L. Rev. 521, 524 (1977).
24. Library of Cong., General Guide to the Copyright Act of 1976, at 112–22 (1977).
25. *Use of Copyrighted Music on College and University Campuses*, *supra* note 15.
26. Francis M. Nevins, *Copyright, Cassettes and Classrooms: The Performance Puzzle*, 43 J. Copyright Soc'y U.S.A. 1, 6 (1995).

but also define the scope of the rights depicted in Section 106. The inherent purpose of this, specifically in relation to universities and schools as a general matter, is to foster an information society by communicating knowledge freely[27] and to provide students with the tools necessary to participate in society politically, economically, culturally and intellectually.[28] Section 110 allows for certain public performances of nondramatic musical works without the necessity of acquiring permission from the copyright holder. In order to qualify for the exception, the performance of a nondramatic musical work must be a live performance without compensation to organizers or performers, and either have no admission charge or use its proceeds for charitable, religious or educational purposes after the deduction of reasonable costs. Section 110 provides as follows:

> Notwithstanding the provisions of section 106, the following are not infringements of copyright . . .
>
> (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 . . . [29]

Thus, Section 110 limits an author's exclusive right of public performances of his work. Section 106 of the Act grants authors the exclusive right to perform their works. However, due to the exceptions in Section 110, this right is limited to for-profit settings and some not-for-profit performances which exceed the boundaries of the Section 110 exceptions. Because of this limitation imposed on Section 106 by Section 110, the for-profit limitation inherent in the Act's predecessor is effectively reinstated.[30] Concordantly, Section 110 provides an example of Congress's intention to promote reasonable public interests and pro mote progress and knowledge in society,[31] by granting

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27. Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, 2001 O.J. (L 167) 10.
28. *Purpose of School*, Wesleyan Univ., http://www.purposeofschool.com/philosophical [https://perma.cc/QME9-7MHU].
29. 17 U.S.C. § 110 (2005).
30. Korman, *supra* note 23, at 521. *See also* H.R. Rep. No. 94-1476 (1976).
31. Jon M. Garon, *Normative Copyright: A Conceptual Framework for Copyright Philosophy and Ethics*, 88 Cornell L. Rev. 1278, 1307 (2003); William Patry, *Limitations and Exceptions in the Digital Era*, 7 Indian J.L. & Tech. 1, 2 (2011) ("Laws exist only to further the public interest. . . . [T]here is no such thing as copyright rights privately created and privately enforced.").

rights to universities and other charitable organizations that override the private rights of authors vested in Section 106.[32] It was Congress's objective to relieve charitable organizations, including many schools and universities, from the burden of purchasing the rights to copyrighted works used within the scope of their charitable purpose.[33] The exception of Section 110 is an integral part of the Copyright Act of 1976 as it grants public access to copyrighted work in an effort to promote creativity and innovation, and to assure that nonprofit organizations do not have to bear the financial burden of licensing their usage for activities within their charitable purpose.[34]

The Copyright Act provides further tools designed to reduce the burden put on ordinary citizens as well as nonprofit institutions, to license every copyrighted work they desire to use. One method in which this is accomplished, is through the rather vague standard of fair use. If a certain usage of a copyrighted work qualifies under a fair use analysis, a person is free to use such work without the permission of the copyright holder and without the need to remunerate the author. The preamble to the statute lists six fair use purposes, which provide courts with a guideline of what types of uses might fall within the fair use analysis.[35] In order to qualify for fair use, a court must also weigh four factors of the fair use analysis and decide whether the benefit of allowing unremunerated use outweighs the burden on the copyright holder.[36] These four factors are: a consideration of the purpose and character of the use, an examination of the type of copyrighted work used, the substantiality of the amount of the copyrighted work used, and the effects of the use on the potential market or value of the copyrighted work.[37]

The last and simplest tool, which provides educational institutions and other nonprofit organizations with a mode of financial relief, is placing works in the public domain.[38] Congress has tried to provide authors with adequate remuneration and profitmaking options for their copyrighted work but has limited the duration of such protection. Even though the duration for copyright protection is rather long compared to other intellectual property rights, this protection does not indefinitely carry over to the heirs of the author.[39] Once

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32. Patry, *supra* note 31, at 1.
33. H.R. Rep. No. 94-1476; Garon, *supra* note 31.
34. Patry, *supra* note 31, at 4.
35. 17 U.S.C. § 107 (1976).
36. *Id.*
37. 17 U.S.C. § 107 (1976).
38. Rich Stim, *Welcome to the Public Domain*, Stanford Copyright and Fair Use Center https://fairuse.stanford.edu/overview/public-domain/welcome [https://perma.cc/AAP7-6D4H].
39. The term of copyright for a particular work depends on several factors, including whether it has been published, and, if so, the date of first publication. As a general rule, for works created after January 1, 1978, copyright protection lasts for the life of the author plus an additional seventy years. For an anonymous work, a pseudonymous work, or a

copyright protection runs out, the creative work passes into the public domain where it is free to be used by everyone without permission and remuneration.[40] This provides for a large catalogue of creative works available to the general public, including also universities and other educational institutions.

However, since most musical works performed by the constituents of universities and other educational institutions do not fall within the public domain, licenses must generally be acquired, unless a specific exception applies. The following sections of this Article will go into greater detail of the Section 110(4) exception and delve deeper into the question of how to determine whether a musical composition is to be considered nondramatic or dramatic in nature, and what other exceptions or defenses might apply to public performances of copyrighted musical compositions in an educational or nonprofit context.

A. *How Should 17 U.S.C. Section 110(4) Be Interpreted: An Internal Analysis*

This Subpart will first consider how the term "nondramatic" is generally interpreted in the context of musical compositions. Following this, a differentiation will be made between musical use and musical work. This comparison will emphasize the distinguishing factor between blanket licenses and the Section 110(4) exception, and draw inferences on the interpretation of nondramatic musical work in context of Section 110(4). Next, it will be necessary to interpret what a "transmission to the public" is and how this is defined in the Copyright Act, followed by an economic analysis of what commercial advantage is in context of the Section 110 exception. This Subpart will close with an evaluation of the language within Section 1010 that no payment of fees or compensation should flow to performers, promoters and organizers.

1. What Does "Nondramatic" Mean?

It is crucial for determining whether a certain nondramatic work or use requires licensing of such underlying work or whether it falls within the exception of Section 110(4). If a musical composition is deemed to be nondramatic, it falls within the exception of Section 110(4) as long as the other requirements mentioned below are met. If a musical composition is deemed to be dramatic, however, the user of such a work must acquire a license in one form or another.

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work made for hire, the copyright endures for a term of 95 years from the year of its first publication or a term of 120 years from the year of its creation, whichever expires first. *How Long Does Copyright Protection Last?*, Copyright.gov, https://www.copyright.gov/help/faq/faq-duration.html [https://perma.cc/F3Z5-YRSG]. In comparison, utility patents are protected for twenty years from the date of filing the regular patent application, design patents are protected for fourteen years, and trademarks are protected as long as the business continuously uses the trademark in connection with its goods or services. *Duration of Patent Protection*, Justia (May 2019), https://www.justia.com/intellectual-property/patents/duration-of-patent-protection [https://perma.cc/6V75-7FWE].

40. Stim, *supra* note 38.

The Copyright Act of 1976 includes some definitions of key terms listed in Section 101, but fails to include the crucial definition of "nondramatic" works. In the House and Senate Report, Congress stated that the definitions of musical works and dramatic works were unnecessary to be included into the definitions of Section 101 simply because they have "fairly settled meanings" in the mind of an ordinary people.[41] This has led to contradicting interpretations of the terms dramatic and nondramatic musical works as well as conflicting opinions over the determination of when such classifications are to be made. Additionally, in considering the analysis of blanket licenses, PROs generally include nondramatic uses of copyrighted musical compositions within their licensing agreement.[42] In turn, the Copyright Act includes copyrighted works of a nondramatic nature.[43] These varying definitions and usages make a more in-depth analysis pertinent.

2. "Nondramatic" Musical Compositions

Musical works can be categorized into either dramatic or nondramatic works. In general, "nondramatic" in the context of entertainment encompasses any work that is not a drama. A drama is considered to be a composition that conveys a story or plot, and the music has a specific function in enhancing the plot. Nondramatic music, therefore, refers to music, such as popular songs, not incorporated and performed in an opera or theatrical production.

The U.S. Copyright Office broadly defines what dramatic musical works consist of in Section 802.2(A): "A dramatic musical work is a musical work created for use in a motion picture or a dramatic work, including musical plays and operas,"[44] that has "[c]haracteristic elements of dramatic works," such as "characters, dialog, and directions for performance."[45] A nondramatic musical work, therefore, is a musical work not created for use in a motion picture, or as a musical play or opera, but rather for "distribution solely on an album or . . . performance on the radio," including advertising jingles, even though they seem to bear vast similarities to motion pictures in many instances.[46] This definition aligns with the common conception of pop songs being nondramatic musical works, but operas and musicals being dramatic musical works, despite pop songs often conveying a story without the accompanying dramatic setting.

Generally, a musical work is considered dramatic when there is a clear storyline and the work is intended to be performed in front of an audience.[47]

41. H.R. Rep. No. 94-1476, at 53.
42. *Common Licensing Terms Defined*, *supra* note 8.
43. 17 U.S.C. § 110(4) uses the term "performance of a nondramatic . . . musical work," suggesting that it is the nature of the work that is considered rather than the performance of the work.
44. Compendium (Third) § 802.2(A).
45. *Id.* § 804.3.
46. *Id.* § 802.2(A).
47. *Id.* § 804.1.

This definition includes any creative work with a plot and characters and is presented in the form of a musical composition, such as an opera, musical, or a play. A dramatic musical work generally "represents the action as it occurs rather than simply narrating or describing the action,"[48] which is precisely what distinguishes a dramatic musical work from a nondramatic musical work that does not convey a story.[49] This applies to most operas, operettas, and musicals. If, however, there is no storyline or plot, a musical work can only be classified as a dramatic work if it is performed with dialogue, scenery, or costumes.[50] This principle has also been confirmed by the courts. In *Robert Stigwood Group v. Sperber*, the Second Circuit deemed a musical work dramatic even though it lacked the elements of costumes, scenery, and dialogue.[51] It did, however, portray a storyline thus confirming it as a dramatic work.

Other experts have also considered the debate between dramatic and nondramatic musical works and have come up with a slightly narrower definition. According to expert Professor Nimmer, the use of dialogue to establish a mere program format or the use of any nondramatic device merely to introduce a performance of a composition, should not be enough to classify such performance as dramatic.[52] This aligns with the proposition above that a dramatic musical work should represent the action, rather than simply narrate or describe it. Absent any dramatic elements, such as costumes, dialogue, scenery, or lightning, a musical work can still be deemed to be dramatic by simply portraying a storyline to an audience, as was suggested by the U.S. Copyright Office above. Nimmer also suggested that absent the elements of plot and the aforementioned dramatic elements, a musical work can never be deemed dramatic because it lacks all dramatic elements that would render it dramatic, thus making it nondramatic. The storyline becomes the primary focus in the determination of whether a musical work is deemed dramatic or nondramatic according to its original performance, and reduces the accompanying elements of costumes, scenery, and the like to a secondary priority.[53]

This analysis, however, leaves open the question of whether a musical work should ever be considered dramatic absent any storyline if it contains other dramatic elements. The U.S. Copyright Office put great weight on the importance of storyline when considering the characteristics of dramatic musical works.[54] This would suggest that a performance without a storyline but with

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48. *Id.*
49. *Id.* § 804.2(B).
50. Gershwin v. Whole Thing Co., 208 U.S.P.Q. 557 (C.D. Cal. 1980); Marilee Bradford, *From Tin Pan Alley to Title 17: Distinguishing Dramatic from Nondramatic Musical Performance Rights*, 7 Loy. L.A. Ent. L. Rev. 45, 63 (1987).
51. Robert Stigwood Grp., Ltd. v. Sperber, 457 F.2d 50 (2d Cir. 1972).
52. Bradford, *supra* note 50, at 64 (citing 3 Nimmer on Copyright § 10.10[E]).
53. *Id.* at 66.
54. Compendium (Third) §§ 802.2(A), 804.2(B).

other dramatic elements, such as costumes or scenery, would be considered nondramatic, because the quintessential aspect of a plot is missing. Further, this would also support the conclusion that storyline is the primary factor in the determination between nondramatic and dramatic musical work. There is a dramatic or narrative performance aspect to any song, which is generally classified as nondramatic,[55] mainly because without some elements of a story there is no show. Most contemporary pop concerts present their audience with some sort of scenery, lighting, and costumes, especially for dancers, which does not automatically render the performance a dramatic one. The same is true for any major combined concert between bands, combos, and choirs at universities. However, if combined with the dramatic element of a storyline or plot, a nondramatic performance can quickly turn into a dramatic performance, as is the case in operas and musicals. Therefore, a performance without a storyline or plot but with other dramatic elements is generally to be considered a nondramatic one. This is the secondary element in the distinction between dramatic and nondramatic musical works.

Another consideration in distinguishing nondramatic musical works from dramatic musical works is whether the musical work is incidental to or advances the storyline.[56] A musical work that is merely incidental to the storyline does not advance the plot; it only accompanies the dramatic work. This is mostly true for symphonies accompanying a ballet, background music to a scene during a Broadway show, or suspenseful music during a movie. R. Monta of Metro-Goldwyn-Mayer has said that if you "[d]elete the proposed musical performance from the production . . . [and] the continuity or story line of the production is in no way impeded or obscured, then the proposed [musical work] is nondramatic—otherwise it is dramatic."[57] Thus, if the music is an integral part of the dramatic work, it shall be considered a dramatic musical work. A transmission of a preexisting song, which is played in the background of a particular scene,[58] would consequently be an adjunct part to the performance, which renders it structurally dispensable, according to R. Monta, because it does not advance the storyline. In such a case, the musical work would be considered a nondramatic musical composition for purposes of Section 110(4) of the Copyright Act.

A second suggestion has been made about the importance of the location of a performance being a factor in determining whether a work is dramatic or nondramatic. It has been noted that more production values are generally acceptable under a nondramatic blanket license when the performance takes place in a nightclub or showroom, but the line is still quite blurry.[59] Marilee

55. Bradford, *supra* note 50, at 65.
56. Compendium (Third) § 804.4(B).
57. Bradford, *supra* note 50, at 61.
58. Compendium (Third) § 804.3(E).
59. Bradford, *supra* note 50, at 70.

Bradford has noted that if it is merely a concert performance, such as a pop or symphony concert, the musical work and its performance are considered nondramatic; if it is a theatre performance with some or all the dramatic elements present and it is not a concert, the musical performance and its containing works are considered dramatic.[60] However, the difficulties arise whenever the musical work is performed in a nightclub, cabaret or showroom. If an identical performance of that particular musical work would be considered a dramatic one when performed in a theatre, it is considered dramatic.[61] Otherwise, it is nondramatic. To visualize this test of nondramatic versus dramatic work, consider the following prongs established by Marilee Bradford. Note that Bradford incorporated some additional steps in her analysis, which are not necessarily relevant to our analysis:

> [F]our-pronged test:
> (1) Does the music performance involve, surround or conjure up any definite plot or storyline? If yes, it is dramatic. If no,
> (2) does the musical performance utilize costumes, scenery, dialogue, staging, or other visual production values? If no, it is nondramatic. If yes,
> (3) is the musical performance presented within a musical revue based predominantly on one composer's and/or lyricist's works? If yes, it is dramatic. If no,
> (4) where does the musical performance take place?
> (a) If it is a concert performance (in any location), it is nondramatic.
> (b) If it is a theatre performance (other than a concert), it is dramatic.
> (c) If it is a nightclub, cabaret, showroom, or music video performance, the performance is dramatic if an identical performance would be considered dramatic when performed in a theatre (and may thus fit into this author's suggested 'dramatic exempt' category for licensing purposes). Otherwise, it is nondramatic.[62]

This analysis can relate back to the premiere of a specific musical work and assist in determining when a musical work is considered dramatic or nondramatic. However, it must be noted that music videos should generally be considered nondramatic works due to the underlying song being previously released on an album or single rather than as a short movie, as is standard in the entertainment industry.

Under such an analysis it can be determined whether a specific copyrighted work is nondramatic or dramatic, which is crucial in applying the exception of Section 110(4). As long as a musical work is considered nondramatic, and all the other requirements of the exceptions are met, which will be discussed below, any public performance by the constituents of a university

60. *Id.* at 75.
61. *Id.* at 76.
62. *Id.* at 75–76 (emphasis omitted).

or other educational institution are exempt and no licenses must be acquired, thus eliminating any remuneration owed to the copyright holder.

The following Subpart will go into greater detail of the underlying differences between the section 110(4) exception and the language of standard blanket license fee agreements. As noted previously, the exception exempts public performances of nondramatic musical works, whereas blanket fees allow for the nondramatic use or performance of any type of work. This differentiation is negligible in most instances (see Table above) but becomes relevant whenever a work is deemed dramatic because it can influence a university's decision on how to procure licenses. The question becomes one of linguistic differentiation. It must be ascertained where the line between nondramatic musical work and nondramatic musical use lies, and at what point in time the nondramatic nature of a musical work is determined. This inquiry will be discussed in the subsequent Subpart.

3. Nondramatic Musical "Work" vs. "Use"

Section 110(4) of the Copyright Act specifically addresses the "performance of a nondramatic literary or musical work,"[63] as opposed to the language in generic licensing agreements, which exclude the performance of musical works in a dramatic setting from use under the agreement.[64] This suggests that when drafting the Copyright Act, Congress was referring to a musical work's classification measured by the nature of its original performance, and therefore the type of the work, rather than by the particular performance it is licensed for, or the nature of its use. This approach guarantees a musical work to be characterized as either dramatic or nondramatic at the initial outset of the performance, rather than have its classification change over time dependent on its usage. It serves for a clear, bright-line approach to music licensing. However, this approach is contrary to the definition commonly accepted by the major PROs, including ASCAP, BMI and SESAC, leagues of composers, and the music industry in general, whom license music according to the intended performance. The categorization of musical works as dramatic or nondramatic based solely on the type of the work as intended by the author instead of the performer, most certainly seems to undermine the benefits, purposes and underlying business model of PRO's blanket licenses. These blanket licenses allow for the licensing of individual works or the author's entire catalogues for performances in a nondramatic setting regardless of whether the underlying musical work is dramatic or nondramatic.[65] Even though performance-rights organizations built their licenses around the use of a specific work and therefore, the type of performance in a specific instance, a musical work itself can nonetheless be considered dramatic or nondramatic under the Copyright Act

63. 17 U.S.C. § 110(4) (2005).
64. *College/University: One Tier*, *supra* note 6, at 2.
65. *Common Licensing Terms Defined*, *supra* note 8.

of 1976. Regardless of the PRO's definition of a license, the Copyright Act's definition allows for a work to be either exempt from licensing altogether or qualify for grand rights. Grand rights allow for a license that is specifically geared at performance rights for dramatic performances, which must be acquired directly through the copyright holder.

The common stance adopted by the entertainment industry to license musical compositions based on their usage, rests on the presumption that the Copyright Act concerns itself with the nature of the use of a specific musical work rather than the type of the work itself.[66] As the late Justice Scalia noted in his *American Broadcasting Companies, Inc. v. Aereo, Inc.* dissent, "the proper course is not to bend and twist the Act's terms in an effort to produce a just outcome, but to apply the law as it stands and leave to Congress the task of deciding whether the Copyright Act needs an upgrade."[67] The Act is clear in its wording and usage of the word "work" rather than "performance" or "use" indicates that Congress intended to make the classification of musical works dependent on the nature and type of the work as intended by the author, which can be evidenced by its original performance, rather than the nature of the use in the publication or performance licensed for. Such intent by the author must necessarily be an objective standard, in order to make clear the definition of each musical work from the beginning. The easiest and generally most applicable way of determining such objective intent is by the author's actions. If the musical work was first published on a CD as an album, or as a single on iTunes, the author most likely intended for the work to be a nondramatic work. If, in contrast, the musical work is first published as the main title of a musical or opera or specifically composed for a movie, the author—considering the style of the musical work, the creative choices made to incorporate the plot into the work—is presumed to have intended such original usage as a dramatic musical work. This deep connection to the original premiere of a work can be seen in several court opinions throughout the years. In *Frank Music Corporation v. Metro-Goldwyn-Mayer, Inc.*, the Ninth Circuit classified musical compositions as dramatic because the performance was accompanied by costumes and scenery that represented the original work from which the songs were taken.[68] Similarly, in *April Productions, Inc. v. Strand Enterprises*, the Second Circuit in interpreting a license held that a musical work shall be considered dramatic whenever it is performed in the context of the dramatic story from which it originated, or if it is performed with the dramatic elements of such dramatic work.[69] Even though these court cases do not directly tie the classification of nondramatic versus dramatic work to the original performance, it can be seen that the original performance takes great importance in defining

66. *Id.*
67. Am. Broad. Cos., Inc. v. Aereo, Inc., 573 U.S. 431, 462 (2014) (Scalia, J., dissenting).
68. Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc., 772 F.2d 505, 511–12 (9th Cir. 1985).
69. April Prods., Inc. v. Strand Enters., 221 F.2d 292, 295 (2d Cir. 1955).

a musical work as dramatic or nondramatic for the purposes of the exception under Section 110(4).

It must be determined, therefore, whether a specific musical work was intended by the author to be dramatic or nondramatic as evidenced by its original performance. It must be determined whether such musical work was performed in a dramatic or nondramatic setting in its original performance and where to draw the line between dramatic and nondramatic performances. In making such a determination, the analysis of what makes a nondramatic composition described above is applied to the original performance of a copyrighted work.

In conclusion, in determining which kinds of musical works fall within the exemption of Section 110(4) and fulfill the requirement of performing "a . . . nondramatic musical work,"[70] a consideration must be made about the dramatic or nondramatic nature of the musical work according to the intent of the author, which is best represented by its original performance. In looking at the original performance, the question is if there was a storyline or plot, which would render the musical work dramatic, or, in absence of any storyline, whether there were any other dramatic elements present, which would render the musical work nondramatic. A look at whether the musical composition is incidental to the storyline or advances the plot in any way can also be helpful. If the musical work advances the storyline, the musical work will be considered to be a dramatic and a university must consider whether grand rights or a blanket license of a dramatic work's nondramatic performance are financially more viable. If the work and the performance are dramatic, grand rights are always necessary.

As soon as a determination as to the nature of the work has been made, it is necessary to look at the other statutory requirements of Section 110(4) to see if a specific performance of a nondramatic work meets those standards. If it does, the performance is exempt, and no license is needed. We will discuss the conditions in turn.

B. *Transmission to the Public*

It is rather astonishing that nowhere in the Copyright Act is "transmission to the public" defined. However, it does define "transmission" and when a performance is considered a "public performance." Section 101 states that "to 'transmit' a performance or display is to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent."[71] This means, that in order to qualify as a transmission to the public,

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70. 17 U.S.C. § 110(4).

71. 17 U.S.C. § 101 (2010) ("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

the audience cannot be in the same place in which the performance takes place. In order to be considered a public performance, the performance must be conducted outside the circle of a family or friends, must be in a place open to the public, or transmitted or otherwise communicated to a place being publicly accessible or consisting of a wider circle than merely family and friends.[72] This also includes transmissions to any individual set of people, which are not within a circle of friends or family, and therefore considered to be the public.[73] Transmission over the internet illustrates a particular example. It is targeted at a public audience, but the audience does not all have to be in the same place but can consist of individual people in their homes receiving the performance.[74] This definition makes clear that "the exemption [is] 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."[75]

For universities and other educational institutions, this generally means that any broadcasting or on-hold music is considered to be a transmission to the public, since the recipient of the musical work is located in a different place from the performer or the work. This also means that most performances conducted on campus or as part of an outreach program in front of a live audience are not considered to be a transmission to the public and fulfill this requirement of Section 110(4) and are exempt as long as all the other elements of the provision are met.

1. No Direct or Indirect Commercial Advantage

In Section 110(4) it specifically states that performances of nondramatic musical works must be made "without any purpose of direct or indirect commercial advantage and without payment of any fee or other compensation . . . to any of its performers, promoters, or organizers."[76] This Subpart will discuss what "fees or other compensation" and "commercial advantage" refers to, and how this affects the requirement of blanket license fees for universities and other educational institutions.

"Commercial advantage" is generally recognized as the financial or competitive benefit related directly to who you are and what you do. It can be interpreted as equating the definition of "competitive advantage" used in economics. In economic law, a competitive advantage exists if a business or

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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.").

72. *Id.*
73. *Id.*
74. *Id.*
75. H.R. Rep. No. 94-1476, at 85 (1976).
76. 17 U.S.C. § 110(4).

person can produce a product more efficiently than its competitors.[77] This in turn results in more profit for the business, ergo financial gain. In the context of copyright infringement, commercial advantage has been used in conjunction with private financial gain.[78] The Copyright Act of 1976 defines "financial gain" as "includ[ing] receipt, or expectation of receipt, of anything of value, including the receipt of other copyrighted works."[79] The House Report lists commercial advantage under "profit motive."[80] It reiterates the construction of a "for profit" limitation on the exception of Section 110 as adopted by the courts. It states 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."[81] This implies that, generally, a commercial advantage is gained by either receiving a financial profit or by otherwise obtaining a competitive position in the industry.

Nonetheless, the statute requires only a purpose of such a commercial advantage. This means that it is not necessary to actually realize financial gain or commercial advantage.[82] Of course, financial gain in itself will easily fulfill the requirement of "purpose of commercial advantage."[83] In absence of actual financial gain and commercial advantage the purpose of such can be inferred from a "course of dealing or through expressed or implied intent of the parties."[84]

In the context of educational institutions, this might only come into play with for-profit schools, such as charter schools, dance schools, most language schools and other proprietary schools. Most universities are nonprofit organizations and are created and designed to fulfill only educational or other charitable purposes.[85] However, universities might achieve commercial

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77. Lauren F. Landsburg, *Comparative Advantage*, Library of Economics and Liberty, http://www.econlib.org/library/Topics/Details/comparativeadvantage.html [https://perma.cc/Z5R2-6SS9].
78. 17 U.S.C. § 506(a) (2008).
79. 17 U.S.C. § 101 (2010).
80. H.R. Rep. No. 94-1476, at 85.
81. *Id.*
82. U.S. Dep't of Just. Archives, Crim. Res. Manual 1801–1899, 1851. Copyright Infringement–Fourth Element–Commercial Advantage Or Private Financial Gain, https://www.justice.gov/usam/criminal-resource-manual-1851-copyright-infringement-fourth-element-commercial-advantage-or [https://perma.cc/E4P8-DNV7].
83. Crim. Res. Manual, *supra* note 82 ("We conclude, based on a preliminary review of pertinent case law, the legislative history of successive revisions to copyright act, and other published works on the subject, that while such transactions certainly satisfy the statutory requirement of commercial purpose, they are not necessary conditions upon which violations must be predicated.").
84. *Id.*
85. Radek Gadek, *For-Profit Colleges vs. Nonprofit Colleges*, Online College Report, https://www.onlinecollegereport.com/for-profit-colleges-vs-not-for-profit-colleges

advantages over other universities in terms of student enrollment if a performance is targeted at the recruiting of prospective students.

2. No Payment of Fees or Other Compensation

The second limitation under Section 110(4) provides that no fees or other compensation can be made to any of the performers, promoters, or organizers of the performance. On first glance, this might seem fairly straightforward. If money is paid, the performance is excluded from the provision. However, it is not quite that simple. The purpose underlying this provision 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."[86] The House Report makes clear that this underlying purpose would not be lost if a payment of an annual salary was made to those organizers and participants, especially in light of the inherent educational and charitable purpose for which most educational institutions are created.[87] Congress explicitly excluded salary from "fees" and "compensation" in this regard. This would make exempt all performances conducted by school orchestras, choruses, show choirs, and bands conducted by a university employee and a faculty-advisor, and most likely exempt the music played in university cafeterias and stores. However, it is unclear from the House Report whether hourly paid student workers fall within the realm of "salary" or if such employees would make musical performances within cafeterias and stores fall outside the scope of Section 110(4). Notwithstanding this provision, it is important to always keep in mind that the performance must still be that of a nondramatic musical work, which would exclude most operas and musicals, must not be a transmission to the public and fulfill all the other requirements discussed below.

3. Proceeds Used for Educational Purposes

The third limitation under Section 119(4) deals with proceeds from the public performance. The entire provision of Section 110(4) is subject to restriction by subsection (A) and (B), which provide that any eligible performance—after consideration of its nondramatic characteristics, exclusion of transmission to the public, and determination of its commercial aspects, such as competitive advantage and compensation paid—is only exempt if "there is no direct or indirect admission charge; or the proceeds, after deducting the reasonable costs of producing the performance, are used exclusively for educational, religious, or charitable purposes."[88] These limitations present a close

[https://perma.cc/462H-9JRP].

86. H.R. Rep. No. 94-1476, at 85.

87. *Id.*

88. 17 U.S.C. § 110(4) (2005).

relation to the law of tax-exempt organizations. This is only logical considering that most universities are tax-exempt organizations and have a 501(c)(3) status.[89]

The first part of the provision is simple enough. As long as there is no admission charge for a performance, and all the previous conditions of Section 110(4) are met, the performance is exempt and there is no need for an institution to obtain a license for it.

In the second part, reasonable deduction can be made for the costs incurred for a performance. This may include payment of salaries to the performers, organizers or promoters of the performance, but also relates to venue charges, electricity used, depreciation costs of the equipment, instruments, and technology, administration fees, upkeep of the facilities, which allow the institution to continuously operate and put on concerts and other performances. After a deduction of all these costs, which may vary from institution to institution, the rest of the profits made must be channeled into educational, religious, or otherwise charitable purposes exclusively. This language is taken from the requirements of a tax-exempt organization under 26 U.S.C. Section 501(c)(3). Within that Section it is made clear, that the term "exclusively" takes on a strict interpretation. No part of the earnings made by an organization may inure to the benefit of any private shareholder or individual,[90] or otherwise leave the path of one of the exempt purposes. Again, this correlation of the language between the statutes is only logical considering the number of educational institutions being registered as tax-exempt organizations.

Once all the restrictions of Section 110(4) are met, a copyrighted nondramatic musical work is exempt and can be publicly performed without remuneration to the author. There are circumstances, however, when one or more of the restrictions of the exemptions are not met, when for example admission is charged, the performance is that of a musical, or is transmitted to the public, which will force a university or other educational institution to acquire rights to public performance either through the author himself or through a PRO, which in some cases might be undesirable. The Copyright Act provides a possible path to nonetheless avoid the requirement of licensing under a fair use analysis. It is crucial to note here, however, that fair use is only a defense to infringement and not an exception, which means that a determination will be made ex post.[91] This next Part will consider use of musical composition in an educational and nonprofit setting under a fair use analysis.

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89. *Tax-Exempt Status of Universities and College*, Ass'n of Am. Univs. (Feb. 13, 2019), https://www.aau.edu/key-issues/tax-exempt-status-universities-and-colleges [https://perma.cc/D8YM-YHXG].
90. 26 C.F.R. § 1.501(c)(2) (2017).
91. Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 551 (1985).

II. Musical Performances at Educational Institutions Under a Fair Use Analysis

The fair use doctrine is codified in Section 107 of the Copyright Act of 1976. Fair use is generally considered to be a defense against a claim of copyright infringement. It allows for use of a copyrighted work without the permission of the author under an equitable consideration. The definition of "fair use" is highly ambiguous and vague, which makes it hard to determine what kind of uses qualify under the provision. The only sure way of knowing whether a particular use is fair or not is to have it determined by the courts. Nonetheless, the preamble lists a number of purposes that intend to give a general idea of what types of works are considered as fair. It identifies "purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research."[92] The Copyright Office stated that those purposes are merely "examples of activities that may qualify as fair use."[93] This relates back to the intended vagueness of the provision, giving immense discretion to the courts in balancing equity. In addition to the purposes enumerated in the preamble, the provision calls for consideration of four factors,[94] which serve as a guideline to resolving a question of fair use.[95] Most courts will consider fair use on the basis of these factors but might also consider other factors. Throughout the common law, some courts have considered a fifth factor in the fair use analysis, namely whether the infringer has acted in good faith.[96] The Ninth Circuit, in *Fisher v. Dees*, stated that "[b]ecause 'fair use presupposes good faith and fair dealing,' courts may weigh 'the propriety of the defendant's conduct' in the equitable balance of a fair use determination."[97] In comparison to the exceptions of Section 110, which presuppose strict compliance with the requirements,[98] fair use is "an equitable rule of reason, which permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster."[99] Such a doctrine can be used in favor of universities and other educational

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92. 17 U.S.C. § 107 (1976).
93. U.S. Copyright Office, *More Information on Fair Use*, U.S. Copyright Office Fair Use Index (Jan. 2020), https://www.copyright.gov/fair-use/more-info.html [https://perma.cc/55QJ-VDKW].
94. *Id.*
95. Rich Stim, *Measuring Fair Use: The Four Factors*, Stanford Copyright and Fair Use Center, https://fairuse.stanford.edu/overview/fair-use/four-factors [http://perma.cc/53QV-HHZH].
96. Jonathan Band, Interfaces on Trial: Intellectual Property and Interoperability in the Global Software Industry 459 (Westview Press, 1st ed. 1995).
97. Fisher v. Dees, 794 F.2d 432, 436 (9th Cir. 1986) (internal brackets, quotation marks, and citations omitted).
98. Band, *supra* note 96, at 459.
99. Stewart v. Abend, 495 U.S. 207, 237 (1990) (internal citations and quotation marks omitted).

institutions, which try to determine what types of performances need to be licensed and which performances may be available without permission and remuneration. If a performance is exempt under Section 110(4), the fair use analysis must not be undertaken.

This Part will consider each fair use factor in turn, and subsequently look at other suggestions that have been made on how to weigh a fair use analysis in light of substantial compliance with the exceptions of Section 110.

First, a court will consider the "purpose and character of the use, including whether such use is of commercial nature or is for nonprofit educational purposes."[100] A court will look at how the copyrighted work compares to the purposes listed in the preamble to Section 107 and whether the party claiming fair use has added something new to the work, altering its purpose or character, and thereby "transforming" it.[101] Courts are more likely to find that transformative uses and nonprofit educational purposes are fair use than commercial and nontransformative usages.[102] A determination of commerciality of a certain use plays into the analysis of the fourth factor and weighs heavily against a finding of fair use. Nonetheless, this first factor is weighed against all the remaining three factors and other policy considerations, which in some cases might render nonprofit usages outside the scope of fair use and commercial usages within the limits of the provision. Courts are also more likely to find "transformative" use fair in light of the constitutionally set goal of copyright to "promote science and the arts."[103] Whenever a work is altered with "new expression, meaning, or message,"[104] new creative content is produced which in turn promotes science and the arts. However, transformative use is not required for a finding of fair use.[105]

For universities and other educational institutions, this type of transformative use might come into play with recitals, musicals, and other musical performances. Generally, students as well as faculty, take their own interpretation of a copyrighted work when performing it. They might perform renditions with a reduced set of instruments, add their own inflections, or perform it in conjunction with a newly written musical theater production. Such performances also have an inherently different purpose than most copyrighted musical works because they are a means of furthering education whereas most musical works are created for public dissemination and profit. Each time a music department at a university lets their students perform, it is to further their understanding of what it means to be professional, performing artists.

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100. 17 U.S.C. § 107(1) (1976).
101. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994).
102. U.S. Copyright Office, *supra* note 93.
103. U.S. Const. art. I, § 8, cl. 8.
104. *Acuff-Rose Music*, 510 U.S. at 569.
105. *Id.* at 579 (citing Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 455 n.40 (1984)).

These performances are so integral to the curriculum of any music or theater program, that failure to participate results in failing the entire class regardless of past successes. This might qualify them for the teaching category of the fair use preamble as well as fall under educational/nonprofit use. Most such performances are without any pursuit of profitmaking but rather geared towards the education of the students. And even in those instances where admission is charged, the proceeds are also absorbed into the educational purpose by allowing for cheaper education through scholarships, newer instruments, or better teachers. However, whether a specific performance fulfills the first factor will ultimately have to rest upon the determination of the court.

Second, a court must consider the nature of the copyrighted work.[106] This factor analyses "the degree to which the work that was used relates to copyright's purpose of encouraging creative expression."[107] Courts are concerned with the "value of the materials used."[108] The further away a certain usage comes from the "core of intended copyright protection,"[109] the less likely it is to be fair under the second factor. Courts consider whether a work is published or unpublished and whether the work rests mostly on factually based expression or is creative. Most courts consider this factor the least relevant in a fair use analysis.[110] Nevertheless, this factor would most likely favor copyright holders if a court decides to consider the fact relevant at all. Musical works are inherently creative in nature. However, most musical compositions utilized by the constituents of universities and other educational institutions are purchased by universities in the form of sheet music, which would render the musical composition published, which weighs against the copyright holder. Usage by educational institutions presupposes publication since unpublished musical works cannot be known to the institutions generally.

Third, a court will consider "the amount and substantiality of the portion used in relation to the copyrighted work as a whole."[111] A court determines how much of the work was used and whether it was reasonable to do so in light of the circumstances. This is done under a qualitative and quantitative analysis commonly known in copyright infringement cases.[112] Under a fair use analysis, however, this factor is intertwined with the first factor, which inquires into the purpose and character of the use. It examines "whether the extent of copying is consistent with or more than necessary to further the purpose and character

106. 17 U.S.C. § 107(1) (1976).
107. U.S. Copyright Office, *supra* note 93.
108. *Acuff-Rose Music*, 510 U.S. at 586.
109. *Id.*
110. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 586 (1994); Cariou v. Prince, 714 F.3d 694, 710 (2d Cir. 2013); Authors Guild, Inc. v. HathiTrust, 755 F.3d 87, 98 (2d Cir. 2014); Cambridge Univ. Press v. Patton, 769 F.3d 1232, 1270 (11th Cir. 2014).
111. 17 U.S.C. § 107(3) (1976).
112. Warner Bros. Entm't Inc. v. RDR Books, 575 F. Supp. 2d 513, 534 (S.D.N.Y. 2008); Newton v. Diamond, 388 F.3d 1189, 1195 (9th Cir. 2004).

of the use."[113] In *Nunez v. Caribbean Int'l News Corporation*, the First Circuit found the use of the entirety of a picture to be fair under the third factor because anything less would have rendered the picture useless to the story the defendant was trying to convey.[114]

In the context of educational institutions, it must be determined whether the performance of musical works that fall outside the scope of Section 110(4) are used in accordance with this factor. This mainly depends on the type of usage and the context of the usage. The transmission of an entire song during a sport event might not find the same justifications as an entire song used during a musical performance. Sport activities might be limited to the use of segments of a copyrighted work during timeouts or other interferences with the game, as is common in ice hockey, in order to fall within the limits of this factor, because the usage of the entire work might not be necessary to support its purpose. The purpose of musical interludes during sport events generally has the purpose of keeping the audience entertained and keeping the enthusiasm high. In order to fulfill this purpose, snippets of high-energy songs are generally sufficient. On the other hand, in the context of recitals, the use of the entire work would most likely be justified due to its inherent educational purpose. Students learn how to perform music in a live setting, which requires that a musical work be performed in the same setting it would be if the student were a professional. This generally means that the use of the entire work is justified in fulfilling this real-life scenario purpose.

Fourth, courts consider the "effect of the use upon the potential market for or value of the copyrighted work."[115] Courts analyze if and to what extend the unlicensed usage of the copyrighted work harms the existing and future intended market of the right holder's original work.[116] Courts consider whether the use of the work substitutes for the original on the market, and whether it usurps the market of the original. It must be determined whether "unrestricted and widespread conduct of the sort engaged in by the defendant . . . would result in a substantially adverse impact on the potential market for, or value of, the plaintiff's present work."[117] Such adverse impact might be achieved if the usage diverts sales from the original work to the new use as a substitute work. It is presumed in every fair use case that the copyright owner loses some share of his potential market in the form of license fees.[118] However, this and other market share losses such as through criticism do not affect an analysis under the fourth factor. There is a presumption of market harm

113. Castle Rock Entm't, Inc. v. Carol Publ'g Grp., Inc., 150 F.3d 132, 144 (2d Cir. 1998) (internal quotation marks omitted).
114. Nunez v. Caribbean Int'l News Corp., 235 F.3d 18, 24 (1st Cir. 2000).
115. 17 U.S.C. § 107(4) (1976).
116. U.S. Copyright Office, *supra* note 93.
117. 4 Nimmer on Copyright § 13.05[A][4] (2019).
118. *Id.*

whenever the unlicensed use of a copyrighted work is in pursuit of commercial advantage and a presumption against market harm whenever a work is transformative.[119] If, however, it is a noncommercial or nonprofit use the likelihood of market harm must be demonstrated.[120]

The potential market harm for copyright owners by universities and other educational institutions is marginally low. Universities generally do not have performances every day, and the amount of performances scheduled per semester is limited to few live performance, sports events and outreach programs. In comparison to other commercialized venues, who invite musicians to play every night, publishers who distribute copyrighted material to millions of people on a daily basis, or record labels, which make music available to the general public through a mass-marketing scheme, universities and other educational institutions do not even come close to taking up a significant market share in the distribution or reproduction world. The harm that is done to copyright owners is therefore minimal.

In determining, when and to what extend fair use might apply to performances at universities and other educational institutions, it is also helpful to consult the considerations made by Jonathan Band, adjunct professor at Georgetown Law and successful IP attorney, in determining to what extend substantial compliance with the exceptions under Section 110 would impact a fair use analysis.[121] He suggests that the closer a certain usage is to qualifying as an exception under Section 110, the more positive should the effect on a fair use analysis be in cases where the qualifications are nonetheless not met. In these "near-misses," as he calls them, "a court should give great weight to the substantial compliance with the exception," in considering the first factor of the fair use analysis regarding the purpose and character of the use.[122] To support his approach, Band provides evidence of courts giving effect to a statute even though the defendant did not strictly comply with the requirements, but rather complied only substantially.[123] Whenever a defendant is found to substantially comply with an exception under Section 110, a court may infer good faith, which is underlying any fair use analysis.[124] This would weigh in favor of fair use, even though a determination under the other factors still needs to be made. Section 107 is open enough, with enough discretion given to the courts, to allow for such a determination.[125] This would most likely be useful in the analysis of dramatic musical works, since those works are excluded from the exception. The use of such musical works can nonetheless meet all other

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119. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 570–71 (1994).
120. *Id.* at 579.
121. Band, *supra* note 96, at 453.
122. *Id.*
123. *Id.*
124. Fisher v. Dees, 794 F.2d 432, 436 (9th Cir. 1986).
125. Band, *supra* note 96, at 460.

requirements of the exception, which would make the outcome of a fair use analysis swing in favor of the universities. Similarly, as long as the educational purpose underlying the exception is consistently met, a transmission to the public of a musical work might also qualify under an analysis of the first fair use factor. Band's proposition would most likely find little acceptance whenever a performance is for commercial purposes and the proceeds do not flow back to the educational purpose. His suggestions, therefore, would weigh in favor of an analysis under the first fair use factor in cases where the musical works performed are of a dramatic nature or are transmitted to the public. This substantial-compliance test would weigh in favor of universities and other educational institutions under the first factor, but courts would still need to make a determination under the other fair use factors.

Conclusion

This analysis demonstrates that there are several different usages of copyrighted material which are exempt from licensing. The first step in determining whether the exception of Section 110(4) applies to a university's specific performances is to analyze the nondramatic versus dramatic nature of the work. If the analysis points to a copyrighted work being nondramatic, such a performance of the work is always exempt under Section 110(4) as long as all other requirements are met. If the work is deemed dramatic under the analysis and the performance is as well, grand rights are always required. If the work is dramatic but its performance is nondramatic, the performance of such work falls outside the scope of Section 110(4) and requires a license. Here, a university or other educational institution must engage in an economic analysis on whether grand rights or blanket licenses are more viable. This will be determined by the number of nondramatic performances of dramatic works per academic year and by comparing the price of individual grand rights and an obligation under a blanket license fee agreement. The higher the number of these performances, the more likely blanket licenses will be the most financially feasible. But as has been pointed out, most musical public performances conducted by departments such as the music department or even the theater department fall within the exception of Section 110(4). Fair use might play a significant role in cases where no licenses have been acquired but the use falls without the limits of the exception. In such a case, substantial compliance with the exception should weigh in favor of a defendant.