PERFORMANCE AND COPYRIGHT: AVOIDING THE PITFALLS

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Forensics competitions and interpretation festivals are, by their very natures, performance-oriented events. Competitors and festivals participants perform works written by others every week, without the authors' permission. Yet federal law, in essence, grants the exclusive right to perform those works, and the right to license performance, to the authors. This conflict may seem irreconcilable, but the law, as it often does, provides an escape route. This paper examines the potential conflict between copyright law and competitive or festival performance, and suggests two perspectives that would allow performance without violation of copyright law.

I. General Rights of Copyright Holders

The essence of current copyright law is that the holder of a copyright retains all rights in the work. These rights are set out explicitly in the Copyright Act of 1976, which protects a copyright owner's right to reproduce, prepare derivative versions of, distribute, perform publicly and display a work (U.S. Code X 101). Forensic competitions and interpretation festivals fall within this definition.

While it might appear that the combination of exclusive rights to public performance and the broad definition of public performance makes it impossible to perform works at a competition or festival without violating copyright law, that is not the case. The law provides several specific exemptions from copyright liability and, as detailed below, two of these exemptions have the potential to be applied to forensic competition and interpretation festivals. One of the exemptions allows performance of any work, while the other applies to nondramatic works only.

II. Educational Exception

The educational exception permits performances without permission under certain specified circumstances. Like all exceptions under the copyright law, the circumstances are closely circumscribed. However, this exception does have potential application to competitive or festival performances.

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The relevant portion of the educational exception reads as follows:

. . . 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 . . . . (U.S. Code XX110)

While it may not be immediately obvious from the text, this exception can be applied to competitive or festival performance. Moreover, it is applicable to performances of both dramatic and nondramatic literature.

In essence, this exception has four requirements. First, the performance must be by students or teachers. Second, it must be in the course of face-to-face teaching activities. Third, the performance must be related to the activities of a nonprofit educational institution. Finally, it must occur in a place devoted to instruction.

It is clear that forensic competition and interpretation festivals generally meet the first and third criteria. Performances are given by students, and they are almost always related to the activities of nonprofit educational institutions. While it would appear the requirements for face-to-face teaching and performance in a place devoted to instruction are more problematical, there is reason to believe that both criteria can be met by competitive forensics and festival interpretation.

The key to meeting the face-to-face teaching requirement is the purpose of the performance. In general, "performances or displays for entertainment or recreational purposes are not among those protected by the exemption," while use of copyrighted materials "in connection with 'teaching activities' of the institution" is protected (Copyright Law Reports a:xx2125). For instance, a showing of "Casablanca" in a film class could be exempted, but the same film, shown as a fundraiser by a fraternity or even for the Arts School's scholarship fund, would not be. In the case of forensic and festival performances, the primary goal of these performances is educational; while they may entertain, that is not their main purpose. The oft-stated premise that forensics and festival interpretation are intended as co-curricular activities reinforces this perspective on forensic and festival performances. It is important to understand that the statute does not require that a student's regular teacher see and evaluate the performance. In fact, a good argument can be made that performance evaluations by critic-judges add to the educational value of the exercise.
Finally, it is necessary for performances under the educational exemption to take place in a "classroom" environment. The legislative history of this provision helps to shed some light on what it means. According to that history, the term "classroom or similar place devoted to instruction" is not limited to a traditional classroom. It may include any place that might be used in the context of instructing a class, including an auditorium or gymnasium. This relatively broad definition is not limited to events like school assemblies or sports events (House Report 81-86).

The key here is the nature of the likely audience. An assembly or sports event is likely to have an audience that is not being instructed by a teacher. Typically, most of the audience participates for other reasons. The particular nature of forensic competition or interpretation festivals, by contrast, is much more in tune with the demands of the exception. It is not merely that the performances generally take place in classrooms. Much more important is that the typical audience is there, in large part, for instructional purposes, and not merely to be entertained. While this criterion is generally applied to the meetings of particular classes, there is no provision of the statute that forbids extending it to forensic contests or interpretation festivals (Copyright Law Reports, XX 2125).

Overall, there is significant reason to believe that the educational exception for performance could be applied to competitive forensics and festival interpretation. However, competitions or festivals that, for instance, were set up primarily to entertain outside audiences might well have difficulty qualifying for the exemption.

III. Free and Non-profit Performance Exception

A second exception to a copyright holder's exclusive rights which may be applied to forensic competition and festival interpretation is the exemption for free and non-profit performances. The scope of this exception is narrower than that of the educational exemption: it covers only "nondramatic" works, rather than all works that may be performed. However, it still may be applicable to performance of prose, poetry and other nondramatic copyrighted works.

The Copyright Act sets out the requirements for this exemption:

. . . the following are not infringements of copyright:

. . . 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 perform-
ers, promoters, or organizers, if—
(A) there is no direct or indirect admission charge; or
(B) the proceeds, after deducting the reasonable costs of produc-
ing 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. . . (U.S. Code xx110)

Again, the statute sets out particular criteria. Here, in order to
fall within the exemption, a performance must 1) be of a non-
dramatic work; 2) not be "transmitted" to the public; 3) be with-
out commercial character or compensation to the performers,
promoters or organizers; and 4) either be free to its viewers or
have the proceeds from admission used for charitable purposes.
These criteria are all fairly straightforward, unlike those for the
educational exemption. However, each should be examined in
turn.

First, the work must be nondramatic. This means that drama
and its musical correlative, opera, are excluded from the exempt-
tion. However, prose, poetry and other nondramatic forms may be
performed under this exemption.

Second, the performance must not be transmitted. Transmis-
sion occurs when a performance is communicated "by any device
or process whereby images or sounds are received beyond the
place from which they are sent" (U.S. Code xx101). The legisla-
tive history makes it clear that the purpose of this requirement is to
assure that "the exemption would be limited to public perform-
ances given directly in the presence of an audience" (House
Report). In this context, it is clear that performances at interpreta-
tion festivals and forensic competitions do not constitute "trans-
missions," and that this second prong of the test is satisfied.*

The first part of the third prong of this test is summarized in
the House Report as "no profit motive," and that is an accurate
description. While it is true that many forensic competitions and
interpretation festivals do earn profits, that does not destroy their
noncommercial nature. It is the overall nature of the enterprise
involved that matters. For instance, a free performance of excerpts
from a novel, sponsored by General Motors for the purpose of

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*This exemption would not apply if performances were videotaped for
later showing (Columbia Pictures). The law does not, however, preclude
 videotaping of predominantly original works that make "fair use" of other, copy-
righted works. Thus, videotapes of persuasive or extemporaneous speeches
would be unlikely to infringe copyrights held by individuals or publications
quoted in the speeches.
promoting a new car, would not be eligible for this exemption. A performance of the same novel sponsored by a scholarship fund could meet the requirements, even if admission were charged. Since the purpose of organizations sponsoring interpretation festivals and forensic competitions is non-commercial, this element of the third prong is satisfied.

The other key element of the third prong of this exception is that the performers, directors and organizers must not receive compensation for the performance. Simply put, compensation for the performance is not an issue so long as cash prizes for participants are not involved in the competition or festival. Even then, it would be arguable that there is no compensation for the mere performance of a work, although this would be more difficult to demonstrate.

Finally, the performance must either be free to its viewers or the proceeds from admission charges must be used for charitable purposes. Typically, this is not likely to be a problem, since admission is not generally charged to audience members at forensic competitions. Even if entry fees were considered to be admission charges, they would not invalidate the exception unless the net proceeds from the contest or festival were used for the individual profit of the organizer. Since most contests or festivals are sponsored by nonprofit organizations like colleges and universities, this is not a likely result. It should be noted that, if admission is charged, the copyright holder has the right to forbid the performance, provided that seven days' notice is given to the performer (U.S. Code xx110). However, it is unlikely that any copyright holder would have the opportunity to object prior to a competition or festival, given the difficulty of ascertaining what will be performed in advance.

Once again, it appears that the "non-profit" exemption would apply to both forensic competition and interpretation festivals. However, given the limited scope of this exception to the Copyright Act, it is not as useful as the educational exemption discussed above.

IV. Conclusion

While the Copyright Act of 1976 broadened the rights of copyright holders, there are exceptions to its provisions that permit performance without infringement of copyrights. Two of these exceptions, one covering all works and one for non-dramatic works only, can be applied to forensic competition and festival interpretation in order to demonstrate that performances at these
events are within the parameters permitted by the terms of the Copyright Act.

There are, however, important limitations to these conclusions. First, the exceptions in the Copyright Act only apply to works copyrighted under United States law. Foreign works are governed by the Berne Convention, and performance may not be permitted, depending upon the law of the copyrighting country. Second, performance rights are only one aspect of an author's rights under the Act. Authors have the right to prevent alterations to their works, although it is unclear to what extent the kind of editing normally permitted under competition rules would violate those rights. Nevertheless, the exceptions to authors' rights under the Copyright Act of 1976 discussed here do provide an important measure of protection for performance of copyrighted works in forensic competition and at interpretation festivals.

REFERENCES


