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Public Performance Analysis for Apartment Communities: Fitness Centers and Movie Rooms

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Executive Summary

The National Apartment Association (NAA) and the National Multifamily Housing Council (NMHC), with the assistance of Winstead PC of Dallas, Texas, have sought to obtain clarity for our members regarding the licensing of music used at apartment communities. We asked Prof. David Nimmer to review several fact scenarios that commonly occur at apartment communities. Prof. Nimmer, current author of the seminal treatise in the field, *Nimmer on Copyright*, is widely regarded as a foremost expert on copyright law in the U.S. As explained in the accompanying memorandum, Prof. Nimmer reviewed the hypothetical scenarios and based on U.S. statutes and case law, has determined that a music public performance license is not needed in the following situations:

- When individual television screens are mounted onto fitness equipment in the fitness center (which is not publicly accessible), and where each television has its own cable box and the audio can only be heard through headphones.
- When wall-mounted televisions have been set to display closed captioning that accompanies broadcasts, but whose audio capabilities have been disabled.
- When a small movie room is available to be reserved by residents, but is otherwise inaccessible to the residents when not reserved.

These conclusions are limited to the hypothetical facts set forth in Prof. Nimmer's memorandum. If you have questions, please contact Greg Brown at gbrown@naahq.org or Jeff Tinker at jtinker@winstead.com.

The information provided herein is not legal advice. This memorandum is designed to assist in understanding the issues presented by applying legal analysis to hypothetical facts, but it is not intended to address specific factual circumstances or business situations. For legal advice, consult your attorney.

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MEMORANDUM

File: Winstead

Date: November 29, 2016

To: File

Re: Public performance analysis for apartment complex fitness and movie rooms

From: David Nimmer
Dennis J. Courtney

The client has asked us to evaluate several hypothetical scenarios relating to the contours of the public performance right under existing U.S. copyright law. This memorandum sets forth the details, which are ventilated below.

It is to be noted that nothing contained herein addresses legal protection outside of copyright law. Moreover, all the observations set forth below are limited to federal copyright law as set forth in Title 17, United States Code. Thus, matters of state law copyright and protection under the copyright laws of other nations are not addressed herein.

I. Public performance under the Copyright Act

The Copyright Act sets forth a definition of what it means to perform a given work "publicly," consisting of two paragraphs:

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

17 U.S.C. § 101. Abstracting from that language, one can schematize exactly four ways to perform a work publicly:

1A. To perform a work "at a place open to the public,"

1B. To perform a work "at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered,"

2A. To "transmit or otherwise communicate" a performance to a place specified in 1A or 1B,

> **2B.** To "transmit or otherwise communicate" a performance "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."

These labels 1A, 1B, 2A, and 2B afford short abbreviations of lengthy statutory definitions. They also emphasize that a "public performance" is a legal construct that can only arise in one of four enumerated ways. These four types are not mutually exclusive, but they are exhaustive. In other words, a performance is *not* a public performance unless it falls within one of those four categories.

II. Paradigmatic case 1: individual television screens and headphones

LMN Estates is an apartment complex with fifty units. Each unit at LMN Estates comes with a key to an on-site gym, which is accessible to tenants at all hours but whose door is always supposed to be locked. Access to the gym is therefore effectively restricted, at all times, to tenants and their invited guests.

The gym contains twenty pieces of exercise equipment—treadmills, ellipticals and the like—each with its own television screen and cable box. None of the cable boxes have the ability to play back programs that were broadcast earlier or to record programs for future viewing. Each screen is sized and placed so that it can only be viewed by a single person, namely the user of that particular piece of equipment. Audio from each television can only be heard through headphones.

It is noon on a given Monday, and five residents of the complex are using the gym. Three of them, each with headphones, are watching copyrighted works on the televisions attached to their equipment. Each sound track for the three shows and movies being viewed contains synchronized music. Accordingly, those three individuals are listening to that music. For current purposes, it is assumed that the compositions in question are all subject to subsisting U.S. copyright protection.

Working through the possibilities set forth in Section I above, it develops that the music in question is not being publicly performed at the gym located at LMN Estates. The analysis requires consideration of each of the four possible prongs.

A. Type 1A: The music is not performed "at a place open to the public"

As to type 1A public performances, a key feature of the inquiry into whether a performance occurs "at a place open to the public" is worth highlighting: besides an inquiry into the nature of the *location* of performance, this inquiry also requires analysis of the facts

and circumstances of the individual performance, including the characteristics of the location near the *time* of performance. Some examples illustrate.

- A night janitor who sings while cleaning a closed and locked building at 2am is not performing "at a place open to the public," even if the same place may be indisputably "open to the public" at 2pm (meaning that a type 1A public performance would occur there if he were to sing the same song in the same location at *that* time, under *those* circumstances).

- Similarly, a private rehearsal (say, by a solo pianist) before a concert is not a type 1A public performance simply because it occurs in a physical location that will be later opened to the public for the concert itself.

The point has been belabored as it can be easily lost if one (mistakenly) regards the determination as turning on the abstract characteristics of a place (or general features of a place at "typical" times), instead of the specific characteristics of the place near the time of the performance sought to be characterized.

The case law vindicates the above proposition that one must assess whether a performance occurs at a place "open to the public" by investigating the potential audience for the performance *at that time*. *See, e.g.*, *Broad. Music, Inc. v. Claire's Boutiques, Inc.*, 949 F.2d 1482, 1485-88 (7th Cir. 1991) (noting that defendants' stores were "open to the public *during normal business hours*"); *Hickory Grove Music v. Andrews*, 749 F. Supp. 1031, 1036 (D. Mont. 1990) (type 1A public performance occurred "because the defendants' performance took place in their restaurant *when it was open to the public*"); *Nat'l Football League v. McBee & Bruno's, Inc.*, 792 F.2d 726, 733 n.3 (8th Cir. 1986) ("Guttman's [bar] does not have a Sunday liquor license and is not open for business on Sunday; on that date, *the bar was closed* and the game watched only by Guttmann and three friends. *** such a viewing is not a public performance under Section 101 of the Copyright Act); *Columbia Pictures Indus., Inc. v. Prof'l Real Estate Inv'rs, Inc.*, 866 F.2d 278, 281 (9th Cir. 1989) ("While [a] hotel may indeed be open to the public, a guest's hotel room, *once rented*, is not") (all emphases added).

The potential audience for the music playing at noon in the gym—the set of all people with physical access to the screens in the gym of LMN Estates—is admittedly larger than the actual audience (*i.e.*, the person actually using the equipment at noon). Indeed, the size of the *actual* audience (if any) is generally irrelevant to the type 1A determination. A person who sings in a public park at noon performs publicly, whether or not others are listening or even happen to be in range at that instant to hear her.

The potential audience is nevertheless restricted, at all times, to *current residents of LMN Estates and their invited guests.* This feature distinguishes it from the public park.

The potential audience for the singer in the park is everybody who could *potentially* be in the park at the time of her performance — not a fixed list of people and their invited guests. Accordingly, the facts on the ground at LMN Estate do not encompass an audience that renders its gym "open to the public."

It follows that music played there does not qualify as a type 1A public performance. The case law indirectly bears out that proposition. *Cf. Hinton v. Mainlands of Tamarac*, 611 F. Supp. 494, 495 (S.D. Fla. 1985) (finding type 1A public performance in musical performance at a "clubhouse" in a condominium complex, as evidence showed that "the public can drive directly to [the] clubhouse without the visitor's receiving clearance for admittance from a gatekeeper, security guard, or watchman," no sign at the door excluded those who were not residents or invited guests, and the performance at issue was *actually attended* by nonresidents who were not guests of the complex's residents).

B. Type 1B: The music is not performed at a place "where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered"

The performance of a musical composition at noon on the given Monday in LMN Estates's gym likewise does not constitute a type 1B public performance. Two reasons undergird that conclusion; the first is specific to the facts assumed above, the second more general.

Turning to the first reason, at the time that the music is being played, the LMN Estates gym contains only five people. Although the case law offers no bright-line rules about what constitutes a "substantial number of persons outside of a normal circle of a family and its social acquaintances," five is likely too small to be considered "substantial." *See, e.g.*, H. Rep. No. 94-1476, at 64 (1976) ("Routine meetings of businesses and governmental personnel . . . do not represent the gathering of a 'substantial number of persons.'"); *Fermata Int'l Melodies, Inc. v. Champions Golf Club, Inc.*, 712 F. Supp. 1257, 1260 (S.D. Tex. 1989) (finding type 1B public performance when music played for 21 members, plus their guests, in private club's dining room). Indeed, if LMN Estates's gym had room for only five people, it would likely be too small to be capable of hosting a type 1B public performance at any time, by virtue of its size alone.

The second reason why no type 1B cognizable public performance should be deemed to have occurred at the place and time in question derives from how the equipment in the gym is configured. Recall that the screens on the equipment are sized and placed so that each can only be watched by a single person, and that headphones are necessary to hear any audio. When music is being played in the gym, *nobody* except the user of the equipment

playing the show or movie in question can hear it. This circumstance may suffice to prevent it from being considered a type 1B public performance.

The statute uses the term "gathered." A reasonable gloss is that a place where people are physically present but unaware of what each other are doing is not a place where people are "gathered" for purposes of type 1B analysis. The explicit examples given of type 1B public performances in the legislative history of the Copyright Act supports this reading: "performances at clubs, lodges, factories, summer camps, and schools." H. Rep. No. 94-1476, at 64 (1976). Presumably, the reference is to a performance at which everyone at a given summer camp or factory attends to the same show, correlatively excluding separate performances to individuals who happen to belong to the same lodge but are not paying attention to each other.

Basic logic equally leads to the same conclusion. If those separate activities by each individual were supposed to be aggregated for purposes of evaluating a "public performance," the result would cast the infringement net unreasonably broadly—if office workers are provided with cubicles and computers and allowed to use headphones, for example, then absent a requirement of collective awareness, *any* video played by *any* worker at *any* time would be a type 1B public performance, even if nobody else in the office was ever aware that a performance was even taking place. The same would apply to students of the same school each listening to music at their individual carrel.

The result of the type 1B determination might change if tenants were allowed to participate in *organized events* in which "substantial" numbers of gym users (outside of a normal circle of a family and its social acquaintances) collectively, simultaneously, and intentionally tune in to the same program (*e.g*. an exercise video or musical playlist). In that event, even though no two people may be watching the same screen, a group has nevertheless "gathered" with the *specific intent* of collectively experiencing the same copyrighted work. An apartment complex that wishes to avoid implicating the public performance right should refrain from organizing such events, perhaps (out of an excess of caution) even having tenants agree not to organize their own such events.

C. The music is not performed publicly under the "transmit clause"

The second paragraph of the statute defining the public performances of types 2A and 2B uses the term "transmit." To elucidate this "transmit clause," it is necessary to advert to a separate statutory definition: "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." 17 U.S.C. § 101.

Because each piece of equipment in LMN Estates's gym has its own cable box, the only transmissions potentially relevant to the current analysis are from the cable box (or something "upstream" from the cable box, such as the cable company) to an individual television (or the person on the exercise machine).

The question whether any of these transmissions can properly be attributed to LMN Estates (for purposes of direct or secondary liability) does not need to be resolved for current purposes. Regardless of how the "transmission" is characterized or to whom it is attributed, no performance of type 2A or 2B occurs at noon on Monday in the gym at LMN Estates.

1. Type 2A

A transmission can only be a type 2A public performance if it is made to a place that is either "open to the public" or "where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered." For the reasons discussed in § II(A) and (B) above, the gym is neither "a place open to the public," nor a place "where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered," at this time. Thus, no type 2A public performance takes place.

2. Type 2B

At noon on Monday in the LMN Estates gym, the music is not being transmitted "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" for the simple reason that the movie is not being transmitted "to the public." The rest of the statutory definition does not affect this conclusion.

The fact that the cable boxes do not have any recording capabilities renders it impossible for different users of the equipment to experience the same transmission at different times. (In other words: if any "transmissions" of performances occur in the gym at LMN Estates, they are either received more or less immediately after transmission, or not at all, and the "at the same time or at different times" language has no effect on the analysis of this case.)

Similarly, the "in the same place or in separate places" language does not complicate the analysis because of the way the equipment is set up. Each transmission is only made to a single person in the gym. Although "in the same place or in separate places" could be read as potentially enlarging the deemed audience of a cable transmission to *all* gym users presently watching the same program at the same time on separate machines, it does not enlarge the audience beyond the gym itself, nor change the outcome of analysis — first,

because only three people in the gym at noon are experiencing any performance, and second, because the potential audience for the transmission to the gym is not large enough to make the transmission "to the public." *See Am. Broad. Companies, Inc. v. Aereo, Inc.*, 134 S. Ct. 2498, 2511 (2014) ("an entity does not transmit to the public if it does not transmit to a substantial number of people outside of a family and its social circle"); § II(A) above (explaining why the gym is not "open to the public" at noon on Monday).

III. Paradigmatic case 2: televisions with no audio and closed captioning

Like LMN Estates, PQR Manor is also an apartment complex with fifty units and a gym equipped with twenty pieces of exercise machinery. Access to the gym at PQR Manor is similarly restricted, at all times, to tenants and their invited guests.

Instead of being outfitted with individual television screens on individual pieces of equipment, however, the gym at PQR Manor has only *two* televisions, mounted so as to be visible to all users of the gym. Each television has its own cable box. The two televisions may be operated independently, so that each is typically attuned to different stations—albeit it could also unfold, on occasion, that both televisions are simultaneously attuned to the same station. Although the televisions are set to display any closed captioning that accompanies the broadcasts, the audio capabilities of both sets are entirely disabled.

It is noon on a given Tuesday, and all twenty pieces of equipment in the gym at PQR Manor are in use. Both televisions are on, set to different channels. Some residents are watching a movie on one television, while others are watching a music video on the other; others still are simply exercising, paying no attention to either broadcast. The soundtracks for both broadcasts contain synchronized music, although it is in no way audible to the gym's users. Again, we assume that the compositions in question are subject to subsisting U.S. copyright protection.

A. The music is not "performed" in the sense of the Copyright Act

The absence of sound simplifies the requisite analysis: there is no need to specifically analyze whether compositions on the soundtracks subject to the broadcast are performed "publicly," because they are not being performed *at all* in the gym at PQR Manor.

To "perform" a work in the sense of the Copyright Act is "to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible." 17 U.S.C. § 101.

According to this definition, for example, both the film and music video on the screens at PQR Manor—"motion pictures" in the sense of the Copyright Act—are being performed whether or not there is any accompanying sound. Due to the way the televisions are configured, however, neither is capable of "recit[ing], render[ing], play[ing], danc[ing], or act[ing]" the *musical compositions* on the soundtracks of the broadcasts. Without a "performance," in the sense of the Copyright Act, there can be no public performance. The activities in the gym at PQR Manor simply do not implicate the public performance right in musical compositions.

Now let us alter the facts to posit that the music has lyrics that are displayed on-screen via closed captioning. Far from being a fanciful hypothetical, the Federal Communications Commission considers the inclusion of lyrics in soundtracks as a factor in its assessment of its regulatory requirement of "accuracy" in closed captioning, 47 C.F.R. § 79.1(j)(2)(i), and the FCC's recommended best practices state that music lyrics "should accompany" live artist performances. 47 C.F.R. § 79.1(k)(2)(v)(C). Even under this variant, the identical conclusion pertains: Given that the televisions have no audio capabilities, the subject lyrics are only *displayed*—not "recit[ed], render[ed], play[ed], danc[ed], or act[ed]." For that reason, they are not "performed," in the nomenclature of the Copyright Act.

Although those displays may potentially implicate *other* rights of a copyright owner—notably, the exclusive right "to display [a] copyrighted work publicly," 17 U.S.C. § 106(5)—the extent to which this might expose PQR Manor to other forms of copyright liability lies beyond the scope of this memorandum. This potential exposure may, for example, turn on highly fact-dependent inquiries into the broadcasts at issue and the terms of particular licenses for particular works.

IV. Paradigmatic case 3: a movie room

STV Apartments is also an apartment complex with 50 units. Unlike LMN Estates and PQR Manor, it possesses no on-site gym facilities. It does, however, feature a "movie room." This room boasts ten comfortable seats, a large screen, and the latest audiovisual equipment; as those seats are large, there is no additional standing room. Users of the room must bring their own media to watch. The movie room may be rented by any tenant of STV Apartments for four-hour blocks of time, during which only that tenant (and his or her invited guests) has access to the room. When not reserved for use, the movie room is closed and locked, even to tenants of STV Apartments.

It is Friday night, and a couple who lives in a unit at STV Apartments has reserved the room from 8 p.m. to midnight to watch a film; each member of the couple has invited four friends. Like the film played in the exercise room at LMN Estates, the film being

played in STV Apartments has a sound track containing synchronized music subject to subsisting U.S. copyright protection—and this music is being performed in the sense of the Copyright Act. Once again, however, no *public* performance of this music takes place when the film is played at 8 p.m. in the movie room of STV Apartments.

A. Type 1A: The music is not performed "at a place open to the public"

As observed in Section II.A above, a performance only occurs "at a place open to the public" if the collection of people hypothetically capable of experiencing that performance (at the location of the performance, and at or at least near the time of the performance) is sufficiently large.

Because of the size of the room and the reservation policy of STV Apartments, however, the potential audience for the performance in the movie room at 8 p.m. on Friday consists at most of a single tenant of STV Apartments and up to nine of his or her invited guests. Under the Copyright Act, a potential audience of this size is not large enough to make the movie room "open to the public." A counterfactual illustrates—if a performance were deemed to have occurred at a place "open to the public" whenever its audience consisted of a single person and a handful of his or her invited friends, then there would have been no need for the Copyright Act to set forth separately a stricter provision: that a work is performed publicly if it is performed "where a substantial number of persons *outside* of a normal circle of a family and its social acquaintances is gathered." 17 U.S.C. § 101 (emphasis added). The performance at 8 p.m. in the movie room of STV Apartments is not, therefore, a type 1A public performance.

B. Type 1B: The music is not performed at a place "where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered"

Similarly, the 8 p.m. performance in the movie room of STV Apartments is not at a place "where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered." As in the case of the gym at LMN estates, the first salient detail is the room's capacity: because the movie room can accommodate only ten individuals, that facility is incapable of hosting the requisite "substantial number" of people, whether at 8 p.m. on Friday, or at any other time. *See* Section II.B above (citing legislative history and cases on numbers likely to be "substantial" in the sense of the Copyright Act). More particularly, however, it is indisputable that the *actual* audience gathered for the film in question at 8 p.m. on Friday—one couple and four friends of each—is "a normal circle of a family and its social acquaintances."

The management of STV Apartments, if particularly risk-averse, could further minimize the possibility of a type 1B public performance being found in this room by explicitly conditioning reservations on a tenant's agreement to use the room only with invited friends (and not, for example, to use the room to host movie-watching events with open guest lists).

C. Types 2A and 2B: The performance is not performed publicly under the "transmit clause"

As observed in Sections IV.A and IV.B above, on Friday at 8 p.m., the movie room at STV Apartments is neither "open to the public" nor a place "where a substantial number of persons outside of a normal circle of family and social acquaintances is gathered." It should be recalled that a type 2A public performance takes place only when made to "to a place specified in 1A or 1B." It follows that the performance occurring at this time is not a type 2A public performance, irrespective of whether or not the film or its soundtrack is performed constitutes a "transmission" in the sense of the Copyright Act.

Similarly, for much the same reasons as in Section II.C.2 above, even if the performance at 8 p.m. in the movie room is the result of a "transmission" in the sense defined by the Copyright Act, this transmission is not made "to the public," and hence does not constitute a type 2B public performance. As in the case of the gym at LMN Estates, neither the "same place or in separate places" nor the "at the same time or at different times" language of the transmit clause affect this conclusion.

The type 2B analysis would potentially be different if users of the movie room were not responsible for bringing their own media. If STV Apartments were to make available its *own* collection of media for use by those who reserve the movie room, for example, it remains theoretically possible that sufficiently large numbers of people could, at different times, witness the *same* performance in the movie room, requiring a finer analysis of whether STV Apartments could in fact be transmitting a work "to the public" through its movie room. As STV Apartments has no role in providing the media played in its movie room, however, such complications do not arise.

D. If the movie room were also a lounge

The conclusions reached above do not require that the movie room at STV Apartments be *entirely* inaccessible to tenants when not reserved for use as a movie room. Suppose, for example, that when the affected space of STV Apartments is not reserved for use as a movie room, its screen is retracted, its audiovisual equipment is made inaccessible, and the facility is thereupon used as a lounge (or other common area) for all tenants of STV Apartments, who may freely come and go. These additional uses of the room, occurring as

they do at times *other* than the times of actual performances in this room, and having no bearing on the fact that only tenants with reservations who have brought their own media are capable of witnessing performances in this room, exert no effect on the type 1A, 1B, 2A, or 2B analyses set forth above. In other words, "non-movie" uses of the room at times when the room is not reserved do *not* change the conclusion above—that a performance at 8 p.m. on Friday night, while access to the room *is* restricted to a single tenant and his or her invited guests, does not amount to a public performance.