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COMMENT

FROM TIN PAN ALLEY TO TITLE 17: DISTINGUISHING DRAMATIC FROM NONDRAMATIC MUSICAL PERFORMANCE RIGHTS

OVERTURE

Before the final bows, . . . before the opening night, . . . before the highstrung rehearsals and the unstrung auditions, . . . the producer of a musical show must obtain a certain license in order that the performers may legally strain their chords to lavish the audience with a rendition of a copyrighted musical work. The nature of this license depends on whether the musical performance is deemed “dramatic” or “nondramatic,” the difference between which is a controversy brimming with possibilities.

Although this issue is rarely litigated, the courts, producers, and experts alike assiduously disagree as to when and how a nondramatic license is adequate for any given performance. To illustrate, the most recent of cases on this topic, *Frank Music Corp. v. Metro-Goldwyn-Mayer Studios*,¹ indicated a discrepancy in viewpoints between an experienced theatrical producer and the Ninth Circuit. Defendant MGM Grand Hotel produced a musical revue based on songs from past MGM Hollywood film musicals, including five numbers from the plaintiff’s musical, *Kismet*. The defendant had proceeded through the production process on the belief that the performance had been authorized through a previously attained nondramatic performance license.² The court, however, ruled that the nondramatic license did not encompass this presentation of songs because the performance was accompanied by costumes and scenery that represented the original work from which the songs were taken. The court noted: “Whether some visual representations, less significant than those presented here . . . would be enough to take a performance out of the [nondramatic] license is a more difficult question, which we need not resolve.”³ Here, it is clear to see that the defendant, who had previously proceeded through productions of its well known, highly theatrical presentations under a nondramatic license, added certain specific visual

1. 772 F.2d 505 (9th Cir. 1985).

2. *Id.* at 510.

3. *Id.* at 512 n.3.

effects, thereby stepping subtly over the dividing line between a nondramatic and dramatic performance.

ACT I, PROLOGUE

The essence and overture of this discourse is the principle that it is not the type of musical work that should be categorized as dramatic or nondramatic; rather, it is the nature of the use of that work that should be categorized as such. In order to substantiate this precept, the riddle to resolve is: What constitutes a dramatic, or "grand" performance right, as distinguished from a nondramatic, or "small" performance right, in relation to any given performance of a musical composition? "Seek, and ye shall find" has come to mean little with regard to this issue. The ongoing search for a standard definition of these terms has perpetually befuddled the legal profession,⁴ the music industry,⁵ and performing entities at large.

ACT I, SCENE 1: THE BACKGROUND OF TERMS

"Dramatic" and "nondramatic" were left undefined by the Copyright Act, resulting in a Tower of Babel over the meaning of these terms.

The 1976 Copyright Act designates five fundamental rights granted to copyright owners, composing a "bundle of rights" that constitutes a copyright.⁶ Bastioned in the bundle is the copyright owner's exclusive right to perform publicly his copyrighted musical work and to authorize a performance of that work.⁷ In providing the scope and limitations of this exclusive right,⁸ the framers of the Act employed the terms "dramatico-musical work"⁹ and "nondramatic musical work"¹⁰ to specify the

4. "Grand performing rights [are] 'dramatic' rights as opposed to 'nondramatic' rights, which are known as 'small performing' rights. Simple? Were it so! Unfortunately, it has yet to be determined with any degree of consistency what constitutes a grand performance." A. SIEGEL, *BREAKING INTO THE MUSIC BUSINESS* 11 (1983).

5. "I have never seen a definition of [grand rights] which completely satisfied me, and in having discussed this matter with colleagues in the business over a number of years, I have never heard of a definition which either satisfied them or myself completely." *Gershwin v. The Whole Thing Co.*, 208 U.S.P.Q. 557 (1980) (deposition of Frank Mandel, manager of Copyright Department at Chappell Music Company).

6. 17 U.S.C. § 106 (1982).

7. *Id.* § 106(4).

8. *Id.* §§ 107-18 (1982).

9. *Id.* § 110(3).

10. *Id.* § 110(2), (3), (4), (6) and (7); § 112(c); § 115(a)(1); § 116(a) and (e)(3); and § 118(b), (d) and (f) (1982).

types of works which may be subject to some of these limitations. However, the terms themselves were left undefined within the Act.

The legislative history of the Act makes no mention of definitions of these terms, nor does it offer any explanation as to why they were left undefined. As a result, only vague notions have followed as to what truly constitutes a "dramatic" or "grand" right versus a "nondramatic" or "small" right. ("Grand rights" is a term of art used both in the music industry and in the musico-legal field in reference to performance rights of a dramatic presentation. "Grand" and "dramatic" are interchangeable terms when referring to the performance right, and will be used as such below. Conversely, "small rights" is used in reference to performance rights for a nondramatic presentation, and is generally interchangeable with "nondramatic rights.")¹¹

One study prepared for the Subcommittee on Patents, Trademarks, and Copyrights ("Subcommittee") analyzed the basic issues of performing rights in musical works.¹² The study offered this rationale for distinguishing between dramatic and nondramatic work: "One of the reasons frequently given for treating dramatic performances differently from performances of nondramatic works is that people who attend a performance of a dramatic work will be less likely to attend a second performance of the same work."¹³ Not only is this reasoning too subjective to consider as a guideline for the issuance of performance rights, but it recognizes only that there are distinctions between dramatic and nondramatic, not what the distinctions consist of. A comment on this study noted: "We often speak of the difference between the 'grand right' and the 'small right' and know pretty well what is meant by each of these terms"¹⁴ Nothing could be farther from reality, for there has since been a steady stream of inconsistent, overly-broad, overly-narrow, self-serving, head-shaking definitions of what may constitute "dramatic" versus "nondramatic." Without a handle on the meaning of these terms, it is difficult at best to issue the proper performance rights to correlate with any one of many types of performances.

11. See 3 M. NIMMER, *NIMMER ON COPYRIGHT*, § 10.10(E) at 10-89 (1976).

12. Varmer, *Study No. 16-Limitations on Performing Rights*, 1 *OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY, COPYRIGHT LAW REVISION STUDIES 1-19*, at 77 (1960).

13. *Id.* at 115.

14. Schulman, *Comments and Views Submitted To The Copyright Office on Limitations on Performing Rights*, 1 *OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY, COPYRIGHT LAW REVISION STUDIES 1-19*, at 125 (1960).

ACT I, SCENE 2: THE APPROACH

Although the Act sets forth its provisions for performance rights based on the type of musical work at issue, courts and experts have developed guidelines for performance licenses based on the performance of that musical work, rather than on the work itself.

In order to consider and contrast the varied definitions and guidelines of performance rights set forth by courts and experts, the key basis of these guidelines must first be fully recognized, to wit: The Copyright Act refers literally to dramatic (or "dramatico-musical") and nondramatic musical "works."¹⁵ Yet, the courts and the numerous experts have approached the subject matter not from a "dramatic or nondramatic works" standpoint, but from a standpoint considering the "dramatic or nondramatic performance of the works." In other words, these terms are being applied absent a literal statutory interpretation, for they are not employed as descriptives for the musical work itself, but rather are utilized to describe the performance of that musical work.

Many of the deciding factors in cases dealing with infringement of performance rights have been based upon nonmusical aspects of the musical performance, such as costumes, scenery, staging, or a storyline. In *Robert Stigwood Group v. Sperber*,¹⁶ the Second Circuit held that the concert use of a majority of songs from an opera or musical, staged in a sequential fashion that resulted in the preservation of the original storyline, constituted a dramatic performance, even absent costumes, scenery, or intervening dialogue.¹⁷ The district court in *Gershwin v. The Whole Thing Co.*¹⁸ recognized that, even absent a story line, the performance of some forty popular tunes would be deemed dramatic if the presentation encompassed visual effects such as scenery, costumes, and staging.¹⁹ In these and other decisions,²⁰ no connection has been drawn between the terms "dramatic" or "nondramatic" and the musical work itself, nor has any song been labeled dramatic or nondramatic based solely on its melody, lyric, subject matter or content.

Publishers, scholars, and performing rights societies have also devel-

15. See *supra* notes 9 and 10.

16. 457 F.2d 50 (2d Cir. 1972).

17. *Id.* at 55.

18. 208 U.S.P.Q. 557 (1980) (order granting preliminary injunction).

19. *Id.* at 560.

20. See, e.g., *Rice v. American Program Bureau*, 446 F.2d 685 (2d Cir. 1971); *April Prods. v. Strand Enters.*, 221 F.2d 292 (2d Cir. 1955); *M. Witmark & Sons v. Pastime Amusement Co.*, 298 F. 470 (E.D.S.C. 1924); see *supra* note 1.

oped definitions of these terms based on the interpretation or performance of the work, rather than upon the literal musical work itself. Frank Mandel, manager of the Copyright Department at Chappell Music Company, has summarized: “[G]rand rights is really a fixing of . . . dramatic elements [dialogue, costumes, scenery, and lighting], to the musical elements.”²¹ The general ASCAP²² view, as recited in numerous cases²³ and discussions,²⁴ revolves around the presence or absence of a specific plot as furthered by the musical performance. Countless treatises and articles on the subject have followed suit in this approach. The most notable treatise in the field of copyright law,²⁵ that of Melville Nimmer, contains discussions on numerous views of performance rights, all of which are based upon a performance of a musical work.²⁶

Further, the Subcommittee study on performance rights²⁷ takes this same approach toward performance rights. Although the study prescribes no guidelines per se with regard to the issuance of performance rights, it does offer a logical avenue by which these guidelines may be developed. The study refers not to dramatic or nondramatic “works,” but to the dramatic or nondramatic “performance” of those works.²⁸ In light of this smattering of guidance, and by no way of any legislative signpost, the on-going search for definition between dramatic and nondramatic performance rights has evolved into a most practical approach: It’s not what you say, it’s how you say it.

Truly, any issue regarding the application of dramatic and nondramatic rights should be premised on the concept that it is not the musical composition itself that is the determining factor in the issuance of grand or small rights; but rather, it is the type of performance by which the musical work is presented that is determinative. It is senseless to categorize any single musical composition as a “nondramatic musical work” versus a “dramatic or dramatico-musical work” based solely upon the text or meaning of the work itself, or alternatively, based upon the nature of the original publication or performance of the work. For example, songs that are of the “Top-40” vein are presumed to be inherently nondramatic. To categorize these songs as such for purposes of issuing performance licenses would rob the copyright owner of the benefits of

21. See *supra* note 5.

22. See *infra* text accompanying note 40 for a discussion of performing rights societies.

23. *M. Witmark*, 298 F. at 483.

24. *M. NIMMER*, *supra* note 11, § 10.10(E) at 10-91.

25. *Id.* at 10-89.

26. *M. NIMMER*, *supra* note 11, § 2.06(A) at 2-60.

27. *Varmer*, *supra* note 12, at 77.

28. *Id.* at 115.

royalties due through his or her exclusive right to issue a dramatic performance license of that work. With the advent of the music video, this area of dispute has taken on a far greater significance than was first imagined.²⁹ Equally, to categorize a song from *My Fair Lady* as dramatic based upon the nature of its original performance would undermine the benefits of ASCAP and BMI³⁰ licenses to the user of that musical work who wishes only to perform the work in a cabaret.

ACT I, SCENE 3: THE PROPOSAL

The Copyright Act should be amended to reflect the courts' and experts' approach toward the issuance of performance rights, based on the performance of the musical work rather than on the work itself.

The following sections and subsections of the Copyright Act include the terms "dramatic" or "dramatico-" and "nondramatic" in relation to a copyrighted musical work. Only the relevant phrases of each section are designated, and are followed by this author's proposals³¹ for amendment:

§ 110. Limitations on exclusive rights: Exemption of certain performances and displays.

PRESENTLY:

- (2) performance of a nondramatic . . . musical work . . . by or in the course of a transmission
- (3) performance of a nondramatic . . . musical work or of a dramatico-musical work of a religious nature
- (4) performance of a nondramatic . . . musical work otherwise than in a transmission to the public
- (6) performance of a nondramatic musical work by a governmental body or a nonprofit agricultural or horticultural organization
- (7) performance of a nondramatic musical work by a vending establishment open to the public at large without any direct or indirect admission charge³²

29. See *infra* text accompanying notes 46-50. See also text accompanying notes 96-100.

30. See *infra* text accompanying notes 40-45.

31. This author suggests that these proposed amendments pertaining to the performance of musical works also be considered regarding the Copyright Act's provisions for literary works.

32. 17 U.S.C. § 110 (1982).

PROPOSED:

- (2) *nondramatic performance of a . . . musical work . . . by or in the course of transmission*
- (3) *nondramatic performance of a . . . musical work or dramatic performance of a musical work of a religious nature*
- (4) *nondramatic performance of a . . . musical work otherwise than in a transmission to the public*
- (6) *nondramatic performance of a . . . musical work by a governmental body or a nonprofit agricultural or horticultural organization*
- (7) *nondramatic performance of a . . . musical work by a vending establishment open to the public at large without any direct or indirect admission charge*

§ 112. Limitations on exclusive rights: Ephemeral recordings.

PRESENTLY:

- (c) . . . a particular transmission program embodying a performance of a nondramatic musical work of a religious nature³³

PROPOSED:

- (c) . . . a particular transmission program embodying a *nondramatic performance of a musical work* of a religious nature

PRESENTLY:

§ 115. Scope of exclusive rights in nondramatic musical works: Compulsory license for making and distributing phonorecords.

In the case of nondramatic musical works, the exclusive rights provided by clauses (1) and (3) of section 106, to make and distribute phonorecords of such works, are subject to compulsory licensing under the conditions specified by this section.

- (a)(1) When phonorecords of a nondramatic musical work have been distributed to the public³⁴

PROPOSED:

§ 115. Scope of exclusive rights in *nondramatic performances*

33. *Id.* § 112.

34. *Id.* § 115.

of musical works: Compulsory license for making and distributing phonorecords.

In the case of *nondramatic performances of musical works*, the exclusive rights provided by clauses (1) and (3) of section 106, to make and distribute phonorecords of such *performances*, are subject to compulsory licensing under the conditions specified by this section.

(a)(1) When phonorecords of a *nondramatic performance of a musical work* have been distributed to the public

PRESENTLY:

§ 116. Scope of exclusive rights in nondramatic musical works: Public performances by means of coin-operated phonorecord players.

(a) LIMITATION ON EXCLUSIVE RIGHT - In the case of a nondramatic musical work embodied in a phonorecord

. . . .

(e)(3) A "performing rights society" is an association or corporation that licenses the public performance of nondramatic musical works on behalf of the copyright owners

. . . .³⁵

PROPOSED:

§ 116. Scope of exclusive rights in *nondramatic performance of musical works*: Public performances by means of coin-operated phonorecord players.

(a) LIMITATION ON EXCLUSIVE RIGHT - In the case of a *nondramatic performance of a musical work* embodied in a phonorecord

(e)(3) A "performing rights society" is an association or corporation that licenses the *nondramatic public performance of musical works* on behalf of the copyright owners

. . . .

§ 118. Scope of exclusive rights: Use of certain works in connection with noncommercial broadcasting.

PRESENTLY:

(b) . . . determining reasonable terms and rates of royalty payments for the activities specified by subsection (d) with respect to published nondramatic musical works

. . . .

35. *Id.* § 116.

- (d) . . . a public broadcasting entity may . . . engage in the following activities with respect to published nondramatic musical works
- (f) Nothing in this section shall be construed to permit, beyond the limits of fair use as provided by section 107, the unauthorized dramatization of a nondramatic musical work³⁶

PROPOSED:

- (b) . . . determining reasonable terms and rates of royalty payments for the activities specified in subsection (d) with respect to *nondramatic performance of published musical works*
- (d) . . . a public broadcasting entity may . . . engage in the following activities with respect to *nondramatic performances of published musical works*
- (f) Nothing in this section shall be construed to permit, beyond the limits of fair use as provided by section 107, *the unauthorized dramatization of a musical work*

There are clear-cut reasons for amending the Copyright Act in this fashion. First, the wording as it now stands is inaccurate. A good example is in section 116(e)(3),³⁷ which defines a "performing rights society" as an association that licenses public performance of *nondramatic musical works*. The Act's definition is inconsistent with the workings of the performing rights societies, which literally issue licenses for *nondramatic public performances* of musical works. The societies' repertoires encompass songs from all facets of the music world, including Broadway, opera, and other types of music which may have originated in a dramatic context. Users who obtain a blanket license from one of these societies have the option to cause a nondramatic public performance of any of the musical works contained in the society's catalogue.³⁸ Hence, in practice, the limitation of "nondramatic" pertains specifically to the type of performance involved, not to the musical composition being performed as the Act designates.

Second, the present wording of the Act, taken literally, is too limiting to the user of a musical work. For instance, section 118³⁹ sets the

36. *Id.* § 118.

37. *Id.* § 116(e)(3).

38. Comment, *Controlling The Market Power of Performing Rights Societies: An Administrative Substitute for Antitrust Regulation*, 72 CALIF. L. REV. 103 (1984).

39. 17 U.S.C. § 118 (1982).

parameters for use of copyrighted musical works by educational broadcast stations and nonprofit institutions. As it presently reads, the licensee is limited to the use of nondramatic musical works if it wishes to qualify for a specially provided royalty rate. Literally construed, this would mean that public broadcasting systems could not air a performance of what may be considered by some to be a "dramatic musical work," such as a Broadway tune, no matter how nondramatic the presentation, if it wished to remain within the parameters of a specially provided educational/nonprofit broadcast license. As ludicrous as this may seem, a literal interpretation of section 118 could lead to discord with the very philosophy behind the Act's special royalty rate provisions for educational and nonprofit organizations: to maximize the availability of an author's work to the public, and to expose the masses to, and educate them through, presentations of music.

Third, and most important, by tagging a musical work as "dramatic" or "nondramatic" in accordance with the current wording of these sections of the Act does not reflect a practicable approach to the issuance of performance licenses. A song which may be considered nondramatic per se, such as a folk song or rock song, can be reconsidered as dramatic when performed in the context of a stage play or perhaps, as will be discussed below, in a rock video. Likewise, any song from any opera or Broadway show can be performed in a nondramatic fashion in a night club or on a concert stage. Therefore, it is not the type of song that should be categorized as dramatic or nondramatic; rather, it is the *nature of the use* of that song that should be categorized as such. The courts say so. The experts say so. The Act should say so, as well.

INTERMISSION

ENTR'ACTE

Proceeding on the premise that "dramatic" and "nondramatic" are to be used to describe musical performances does not resolve the riddle regarding the "how, when, and why" a particular performance may fit under either category. The importance of a common view of performance rights goes beyond the pragmatism of a cohesive amendment to the unfitting terms of Title 17. The difference between dramatic and nondramatic performances may be inconsequential to audience members who have enjoyed the fruits of a good songwriter's labor, regardless of the context in which it was performed. However, for the owner of the copyright of that song, the difference between a dramatic and a nondramatic

performance is highly significant with regard to the owner's exclusive right to perform or to authorize a performance of his work publicly.

ACT II, SCENE 1: THE IMPETUS

Ambiguities with the musical performance guidelines can result in numerous problems for the copyright owner and the user alike.

Copyright owners of musical compositions almost always assign the nonexclusive right to license nondramatic performances of their works to a performing rights society. The two most prominent are the American Society of Composers, Authors and Publishers (ASCAP), and Broadcast Music, Inc. (BMI). These societies then issue blanket licenses entitling users of the copyrighted works to cause nondramatic performances of any of the works in the societies' repertoire. However, the copyright owner retains his or her exclusive right to license dramatic performances. The owner thereby maintains personal control over the dramatic use of the work, which is much less frequent than a nondramatic use and is therefore easier to monitor. Public nondramatic performances typically occur in nightclubs, bars, restaurants and cabarets, on radio and television, or in concerts. It would be very burdensome, if not impossible, for the copyright owner to monitor these performances, due to the frequency of presentations, the spontaneity regarding which songs will be performed at any given time, and the enormous costs of negotiations and license processes with the many users.⁴⁰ By contrast, public dramatic presentations are usually planned well in advance and most often run in an advertised series of consecutive performances. The copyright owner is thereby more able to monitor and license these performances, resulting in his or her ability to control market saturation, to avoid commercial competition or conflict, and to receive royalties substantially higher than those received for a nondramatic performance through an ASCAP or BMI blanket license.

The ambiguity in performance rights guidelines can cause unpleasant problems between the copyright owner and the user of the copyrighted musical work. One problem may result from intentional attempts by users to avoid possible rejection from the copyright owner, or to dodge large dramatic performance royalty payments, by manipulating the vagueness of the law in their favor. For instance, suppose the owner of a typical night spot wants to produce a musical revue based on the life and music of Cole Porter. The club had for years presented pop-

40. See *supra* note 38 at 107-11.

ular songs in a cabaret format under an ASCAP blanket license, including a vast array of Cole Porter tunes. The owner may very well be able to argue (most likely against the irritated copyright owners) that the revue should be covered under the ASCAP license because it is being performed inside a nightclub using material previously performed in that very club under a nondramatic license, even though the performance may contain costumes, scenery, staging, and narration on the life of the composer. As will be discussed more fully later, the guidelines currently available to judge a performance as dramatic or nondramatic are so inexact and nebulous that often times a user may use these ambiguities to excuse its way out of a dramatic license requirement.

On the flip side, those who cause a public performance of a copyrighted work without first obtaining proper authorization from the copyright owner are infringers under section 501 of the Act.⁴¹ A potential user of the copyrighted work must be able to distinguish between dramatic and nondramatic performances in order to ascertain whether the use of the work falls under one of the categories of exemptions provided for in the Act⁴² or whether an already-existing ASCAP or BMI license is adequate for a particular performance. As discussed above, if the performance is to be deemed dramatic, the user must receive the copyright owner's permission, negotiate a separate license, and incur additional costs in royalties. Disputes have resulted from infringements by users who mistakenly believed that a nondramatic performance license was adequate. This very situation occurred in *Frank Music Corp. v. Metro-Goldwyn-Mayer Studios*,⁴³ where the defendant believed that its performance was a nondramatic rendition of the plaintiff's music and therefore required only an ASCAP license.⁴⁴ The plaintiff had in fact previously granted to ASCAP the right to license nondramatic rights in the music from *Kismet*, and the defendant had innocently proceeded, as it had done in times previous, to present songs from Broadway musicals while relying on its ASCAP license. But this time, the defendant staged the material in a manner visually representative of the work from which the music had originated. Thus, according to the Ninth Circuit, the defendant unwittingly took its presentation out of the scope of its ASCAP license.⁴⁵

Another, less common mistake of this type can occur when what may be considered a dramatic musical performance is presented by the

41. 17 U.S.C. § 501(A) (1982).

42. See *supra* note 8.

43. 772 F.2d 505 (9th Cir. 1985).

44. *Id.* at 510.

45. *Id.* at 511.

user in a non-Equity or Equity-waiver house. (Actors Equity Association is an actors' union which covers all legitimate stage [theatre] performances. A non-Equity house is a theatre where only non-union actors are permitted by the union to work. An Equity-waiver house is a ninety-nine-or-less-seat theatre where the producers are allowed to hire union actors to perform, in exchange for which the actors "waive" their salaries, their pension and welfare benefits, and often times their health.) Even experienced persons in the theatrical profession may associate these types of theatres with "nonprofessional," hence "amateur," shows, and will from this conclude that the performance is covered by the house's ASCAP blanket license and is therefore beyond the scope of the copyright owner's exclusive right to issue a dramatic public performance license of his musical work. So far as current case law and experts have established, the guidelines for issuing dramatic and nondramatic musical performance licenses are not in any way connected with or dependent on an actors' union's participation in that musical performance. The issuance of any musical performance license is based on whether the performance is public, regardless of its status as professional or amateur. However, it is easy to see that when an Equity-waiver show producer delights at the prospect of mounting a show without the cost and nuisance of union contracts, he or she may mistakenly assume that no one else involved gets paid either . . . including the owner of the music.

A most notable matter to date regarding the importance of definition between dramatic and nondramatic performances stems from the rock video revolution. According to a recent article by Melvin Simensky⁴⁶ over eighty percent of the Top-100 songs have accompanying music videos.⁴⁷ Mr. Simensky notes that, although music video users are currently paying royalties through nondramatic performance blanket licenses from ASCAP or BMI, he sees clearly the possibility that some music videos may fall into a dramatic performance category.⁴⁸ In order, then, to be able to categorize a video as a small rights or grand rights performance, it may be necessary to consider the varying characteristics of each individual video—some may simply be concert performances of a song, while others may contain a well presented story line. Because the economic potential for the copyright owner is substantially more through a dramatic performance than a nondramatic performance, there is currently a demand for clear categorization of dramatic and nondramatic

46. Simensky, *Rights to Music Videos Affected by Classification of Music as 'Dramatic' or 'Non-Dramatic'*, N.Y.L.J., Jan. 17, 1986, at 5.

47. *Id.* at 5, col. 2.

48. *Id.* at 5, col. 5.

performances. The music video's growing worth in the field of entertainment has definitely created incentives to set the standards for its use.⁴⁹

The coming of age of the music video also gives new impetus to an old issue: traditionally, it is an accepted notion that the performance of only one song cannot constitute a dramatic performance, that there must be two or more songs presented in some sequential order in order for a dramatic performance to occur. Although there has been only one case, in 1924, that has suggested otherwise,⁵⁰ this question will be forced to the surface in light of this new performance medium, and in view of the perplexities involving the established standards for licensing performance rights.

ACT II, SCENE 2: VARIATIONS ON A THEME

The existing guidelines for establishing whether a performance is dramatic or nondramatic are as varied as the performances they attempt to categorize.

When considering the musical performance rights guidelines laid down by the courts and experts, it is important to remember that many of the courts' viewpoints and categorizations were based on a sole judgment of a specific performance in question. More often than not, these courts refused to comment as to the breadth of the guidelines they had utilized or established. Because musical performances may vary in an infinite number of ways—from show to show, and even from night to night—it may be that the courts felt uneasy in establishing any dogmatic classifications for what may constitute a dramatic or nondramatic musical performance.

One of the narrower definitions of what constitutes a dramatic musical performance appeared in *April Productions v. Strand Enterprises*.⁵¹ Here, the plaintiff sued the owner of a nightclub for use of songs from *The Student Prince*, performed in a medley in a musical revue format⁵² on the nightclub stage. The court held that the performance of the plaintiff's songs required grand rights only if they were performed in the con-

49. *Id.* at 5, col. 1.

50. *M. Witmark & Sons v. Pastime Amusement Co.*, 298 F. 470 (E.D.S.C. 1924).

51. 221 F.2d 292 (2d Cir. 1955).

52. *Id.* at 293. Musical revue formats are most often based on a specific theme which is generated in different styles throughout the presentation; they usually do not carry through a storyline. The format of a revue may combine many manners of performance, from concert presentations, musical productions numbers, and comedy and tragedy skits, to everything in between. In *April Prods.*, the defendants presented a show reminiscent of the old burlesque and vaudeville-type sketches, including within these sketches the musical performances at issue.

text of *the* dramatic story from which they originally derived, or alternatively if they were performed with the dialogue, costumes accompanying dramatic action, or scenic accessory of the dramatic work from which the songs originated.⁵³ This definition has been rejected by a host of experts in the field as being much too narrow to suffice. It offers no protection for the copyright owner's option to issue grand rights in circumstances where the musical work, outside of its original context, is nevertheless being performed in a dramatic fashion. "Under the rule of this case one could by simply obtaining an ASCAP license perform in a new musical play of all the music from *South Pacific*, providing the 'book' for the new production is not borrowed from *South Pacific*."⁵⁴ One commentator speculated that this guideline, although too narrow for most purposes, may accurately be applied to the performance of songs presented in context of their original opera or musical.⁵⁵ However, the *April Productions* definition is moot with regard to the issuance of a performance license for songs performed *within* their original context. If songs from *Cabaret* are being performed within the show *Cabaret*, the use of those musical works would not require a separate grand rights license to begin with; the music and the "book" of a musical are, for practical and economic purposes, always licensed together, usually through publishing houses such as Tams-Witmark.

Another narrow approach came from *Robert Stigwood Group v. Sperber*,⁵⁶ where the defendant claimed that a dramatic license was not necessary for the "concert" use of twenty out of twenty-three songs from the opera *Jesus Christ Superstar* ("*Superstar*"). The court held for the plaintiff, stating that grand rights were necessary because the story line of the opera had been preserved by the defendant's performance through the use of twenty songs performed in almost identical sequence to the original opera.⁵⁷ In addition, the court considered the fact that the singers entered and exited, occasionally gestured, and maintained specific roles throughout the concert.⁵⁸ In response to the defendant's argument that the presentation contained no costumes and scenery representative of the original opera, the court referred to a similar case, *Rice v. American Program Bureau*,⁵⁹ which involved similar facts surrounding use of the songs from *Superstar*: "As *Rice* instructed, the lack of scenery or

53. *Id.* at 296.

54. M. NIMMER, *supra* note 11, § 10.10(E) at 10-91.

55. Simensky, *supra* note 46, at 5, col. 3.

56. 457 F.2d 50 (2d Cir. 1972).

57. *Id.* at 55.

58. *Id.* at 54-55.

59. *Id.* at 54 (citing *Rice v. American Program Bureau*, 446 F.2d 685, 690 (2d Cir. 1971).

costumes . . . does not ipso facto prevent [the performance] from being dramatic."⁶⁰

Unlike the court in *Stigwood*, the court in *Rice* did not prevent the entire performance of its defendant's production of *Superstar*, but instead limited the defendant's presentation to the scope of their ASCAP license, which limited its scope to nondramatic renditions of separate musical compositions.⁶¹ The defendant's ASCAP license excluded three narrow dramatic categories: "(1) the overall work, (2) accompanied by words, dance, pantomime or visual representation, and (3) fragments or instrumental selections accompanied by words, costumes, dialogue, scenery, etc."⁶² The *Rice* case is therefore also limiting. Although the court recognized that a performance could be considered dramatic despite a lack of costumes, scenery, and the like, it did not prohibit or limit use of these elements as long as they did not "lend a visual representation of the work from which the music is taken."⁶³

The holdings of *Stigwood* and *Rice* maintain a somewhat narrow scope of what may constitute a dramatic performance: both cases combined hold that a dramatic performance entails (1) songs presented in such a fashion as to relay the story from which they originated, or (2) fragments of songs accompanied by dialogue, scenery, costumes, etc., that reflect or represent the work from which the songs are taken. This seems to parallel the holding in *April Productions*, in addition saying that if fragments of songs from, in these cases *Superstar*, were performed with enormous production elements that did not depict or resemble those of the *original* context of the music, the performance may indeed fit within the scope of a nondramatic license. However, it should be noted that the *Rice* court, while limiting the necessity of a dramatic license to songs accompanied by production values of the work from which the songs were taken, also commented, "it cannot be concluded that the mere singing of the songs—without more—would fall within the [ASCAP] license's excluded category [of dramatic performances]."⁶⁴

Another guideline was suggested by Herman Finkelstein, former General Attorney of ASCAP. Finkelstein maintained a definition of nondramatic performances as "renditions of a song . . . without dialogue, scenery or costumes."⁶⁵ This definition was criticized by the late Mel-

60. *Id.* at 55.

61. *Rice v. American Program Bureau*, 446 F.2d 685, 689 (2d Cir. 1971).

62. *Id.* at 689.

63. *Id.*

64. *Id.* at 690.

65. Finkelstein, *The Composer and the Public Interest-Regulation of Performing Rights Societies*, 19 LAW & CONTEMP. PROBS. 275, 283 n.32 (1954).

ville Nimmer as being too broad in one sense and too narrow in another.⁶⁶ It is too broad in the sense that there can exist a dramatic musical performance without dialogue, scenery or costumes. It is too narrow in the sense that there can be performances containing these three elements which should be categorized as nondramatic. "A literal acceptance of this definition would mean that any nightclub, vaudeville or television performance would be dramatic if the singer is not dressed in street clothes, or if a backdrop other than the curtain is used or if the singer engages in introductory patter."⁶⁷

One highly accepted standard was suggested to Nimmer by the late R. Monta of Metro-Goldwyn-Mayer: "Delete the proposed musical performance from the production (be it stage, motion picture or television); if after such deletion the continuity or story line of the production is in no way impeded or obscured, then the proposed performance is nondramatic—otherwise it is dramatic."⁶⁸ This standard would have a profound effect in situations where the performance in question contains no story line to begin with, as in a musical revue, or where the entire performance is musical, as in an opera or music video. Deleting the proposed musical performance would not only impede the continuity—it would destroy the entire performance. The standard seems to test logically only in stage, television, and film musical performances. However, in these performance situations, deletion of a musical work may in no way impede the continuity or story line, and yet the performance of that work may still warrant a dramatic performance license.

R. Monta's guideline rides on the assumption that all songs in all dramatico-musical shows are of some significance to the storyline, and by this significance, the musical performance is deemed dramatic. This assumption is generally incorrect, however, especially as applied to the musical theatre. It was not until the landmark 1943 musical *Oklahoma!* that songs became so integrated into a musical as to be essential to or supportive of the plot.⁶⁹ For the most part, songs falling into the older musical-comedy or musical theatre category, while weighty in their entertainment values, are often of minor or no importance in furtherance of a plot. Indeed, many, if not most, of the musical numbers from old

66. M. NIMMER, *supra* note 11, § 10.10(E) at 10-90.

67. *Id.* at 10-92.

68. *Id.*

69. See G. BORDMAN, *AMERICAN MUSICAL THEATRE 534-35* (1978) (referring to *Oklahoma!* as "chang[ing] the fashions of musicals for two decades . . . a reversion to the standards of long-departed comic opera."); See also M. GOTTFRIED, *BROADWAY MUSICALS 185-86* (1979) ("*Oklahoma!* finally established the musical theater as a stage form to be reckoned with It is music fitted to a story, music for the stage, all of a piece.").

Hollywood and Broadway musicals can be removed without any impediment to the story line or to the continuity of the performance. For instance, consider any one of the production numbers from Busby Berkeley musicals. Few would disagree that, as amazing as any number may be, it can easily be cut from the film without impeding the plot in any way. Application of R. Monta's standard would thus render the performance of "By a Waterfall"⁷⁰ or "The Shadow Waltz"⁷¹ as nondramatic simply because removal of these numbers would not impede the story line. Anyone who has ever seen these numbers, or any other lavish musical numbers, would find this conclusion unacceptable. The theatrical elements involved—the costumes, the sets, the lighting, the choreography, the cinematography—all lend to a very "drama-filled" performance. The mere fact that deletion of one of these musical performances would in no way impede the plot of the movie should not affect that number's, or any other musical number's, standing as a dramatic performance.

The court in *Frank Music Corp. v. Metro-Goldwyn-Mayer Studios*⁷² based its decision on the same criterion as did the *Rice* court: if the songs being performed were accompanied by sufficient visual representations derived from the work in which the songs originated, the performance then placed the songs' use beyond the scope of a nondramatic license. The *Frank Music* court did acknowledge the narrow scope of this definition, leaving open the possibility that visual production values which are *not* representative of a song's original dramatic context may still lend to the necessity for a dramatic performance license of that song. However, it noted that the question raised by this possibility is difficult to approach, and one which was unnecessary to resolve for purposes of the decision in the case.⁷³

The case of *Gershwin v. The Whole Thing Co.*⁷⁴ arose from a dispute over the scope of an agreement between Ira Gershwin and the estate of George Gershwin, the producers of a musical revue,⁷⁵ and the publishers of the Gershwin repertoire; the issue was whether the production could, in accordance with this agreement, relocate from Los Angeles to Broadway. Mr. Gershwin had, through communication with his publishers,

70. From Busby Berkeley's motion picture *Footlight Parade*. See T. THOMAS & J. TERRY, *THE BUSBY BERKELEY BOOK* 65-71 (1973).

71. From Busby Berkeley's motion picture *Gold Diggers of 1933*. See T. THOMAS & J. TERRY, *supra* note 70, at 57-61.

72. *Frank Music Corp.*, 772 F.2d at 505.

73. *Id.* at 511-12. See *supra* text accompanying note 3.

74. *Gershwin*, 208 U.S.P.Q. at 557.

75. One of the producers of the show at issue, *Let's Call The Whole Thing Gershwin*, is the author of this article.

authorized the defendants to produce a musical revue based on the music and lyrics of the Gershwin brothers. It was performed in a legitimate theatre by eight singer/dancers and an eight-piece jazz band, costumed in general evening attire stylistic of the Gershwin era. The show contained approximately forty musical compositions, both instrumental and noninstrumental. There was introductory dialogue throughout the show to establish a program format; however, there was no storyline. Although the lawsuit did not stem directly from the question of whether the defendants had presented a dramatic or nondramatic performance,⁷⁶ the district court nevertheless acknowledged this issue in an attempt to determine whether the defendants had actually secured a proper grand rights license from Mr. Gershwin through the publishers. Here, a two-tier test was used to determine when dramatic performance rights are required. The first tier was based on a guideline endorsed by Professor Nimmer: "Grand rights are required if . . . a song is used to tell a story."⁷⁷ If no story line is found, the court would then apply the guideline endorsed by Finkelstein: "Grand rights are required if . . . a song is performed with dialogue, scenery or costumes."⁷⁸

The two-tier approach adopted in *Gershwin* may be the fairest method thus far for determining whether a performance requires grand rights. Professor Nimmer's suggestion that a song used to tell a story requires dramatic performance rights widens the scope of the *April Productions* and *Stigwood* criteria to encompass the performance of songs when that performance is supportive of any storyline, not limited to the plot of the work from which the songs originally derived. However, it does not acknowledge production values as potential elements of a dramatic performance. The alternative test by Finkelstein is also faulty, as earlier explained.⁷⁹ Yet, if the Finkelstein test is applied in combination with the Nimmer test, the overly broad aspects could be eliminated, to wit: Finkelstein's test is too broad because there may exist dramatic musical performances without dialogue, scenery, or costumes. However, if in addition to the lack of dialogue, scenery, and costumes, there exists no

76. The defendants agreed that their production required a dramatic performance license, but argued that Mr. Gershwin (who read, approved, and took part in the production of the show) had expressly authorized the publishers to issue a grand rights license. Although the publishers were able to account for this communication, Mr. Gershwin denied it, stating that the publishers were only authorized by him to license small performance rights.

77. *Gershwin*, 208 U.S.P.Q. at 560 (citing M. NIMMER, NIMMER ON COPYRIGHT, § 10.10(G) at 10-94 (1976)).

78. *Id.* at 560 (citing Finkelstein, *The Composer and the Public Interest-Regulation of Performing Rights Societies*, 19 LAW & CONTEMP. PROBS. 275, 283 n.32 (1954)).

79. See *supra* note 66 and accompanying text.

plot or storyline in connection with the musical performance, it would be difficult to find necessity for a dramatic license. Still, this two-tier approach does not overcome the overly narrow aspects of the Finkelstein guideline, as there may be performances containing dialogue, costumes, and scenery which should nevertheless be held as a nondramatic performance, such as a nightclub or cabaret performance.

The ASCAP view, taken from a blanket network television license, was highlighted by Professor Nimmer in his discussion on the distinction between grand and small performance rights:

[A] dramatic performance was defined as “. . . a performance of a musical composition on a television program in which there is a definite plot depicted by action and where the performance of the musical composition is woven into and carries forward the plot and its accompanying action. 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 shall not be deemed to make such performance dramatic.”⁸⁰

This viewpoint is similar to that endorsed by Nimmer.⁸¹ The notion of introductory dialogue as a nondramatic element is important to recognize in considering live presentations, in addition to television. Most nightclub and cabaret formats utilize introductory dialogue during typically nondramatic musical performances. This is precisely why Finkelstein's definition of a dramatic performance as one using dialogue is too narrow.⁸²

It must be noted that the publishers, copyright owners, and performing rights societies have set less stringent performance rights guidelines for television and motion pictures than they have for live stage presentations. The reason for this is simple. The use of musical compositions in those media is so frequent and widespread that it has become customary for ASCAP or BMI to issue blanket licenses to cover most uses. Since the frequency in use has resulted in such large royalties, the publishers and copyright owners usually have not required from these entities a separate agreement for many of the types of musical performances that may be considered dramatic were they performed on the live stage. Therefore, the above-stated ASCAP definition of a dramatic musical performance, although insufficient for purposes of live presentations,

80. M. NIMMER, *supra* note 11, § 10.10(E) at 10-91 (citing Timberg, *The Antitrust Aspects of Merchandising Modern Music: the ASCAP Consent Judgment of 1950*, 19 LAW & CONTEMP. PROBS. 294, 296 n.6 (1954)).

81. *Id.* at § 10.10(E) at 10-92.

82. *Id.*

is applicable to the television and film media. An illustration was recently offered by H.J. "Pete" Lunn, Manager of the Music Rights Department at NBC: the television performance of songs from *Oklahoma!* would be covered under an ASCAP or BMI blanket license as long as the songs are not presented within their original context. However, unlike live stage presentations where a musical performance within *any* storyline is beyond the scope of a nondramatic license, the songs may be presented on television within a completely new context or storyline, as was performed on many variety shows of the past. According to Lunn, "one could, within a new storyline, perform 'The Surrey with the Fringe on Top' under an ASCAP blanket license, as long as the performer was not sitting in a surrey, as in the original play, but instead was sitting in a wheelbarrow." Lunn noted, however, that television presentations of musical performances within their original plot, whether film or stage play, are authorized for the most part by the publishers or authors of the works.

ACT II, SCENE 3: SAM, YOU MADE THE PANTS TOO LONG

The established guidelines for dramatic and nondramatic musical performance rights are insufficient as applied to the overall spectrum of musical performances.

In approaching a definition of dramatic or "grand rights" performance, it is beneficial to start with a very simple thought: there is a performance aspect of any song, pure and simple, which we tend to call the nondramatic, or small, performance. This entails only basic elements characteristic of all public musical performances—a melody, a lyric, a voice, an option for instrumental accompaniment, and a public place in which to perform. When we add to or combine with these basic elements certain extraneous nonmusical components, the presentation moves on a spectrum toward the dramatic, or grand, performance. The nonmusical components include the few discussed previously, such as costumes, lighting, scenery, staging, dialogue, and storyline. Others may include the number of performers, the number of songs, the arrangement of the music, the place of the performance (e.g., nightclub or theatre), and the medium of the performance (e.g., tape, film or live). The reason it seems to be so difficult to arrive at an exact definition of a dramatic performance is because these elements vary so tremendously from one type of performance to another. We may recognize either end of the spectrum regarding what will constitute dramatic rights and what will constitute nondramatic rights. However, what is often unclear or undefinable is the area in between.

"Viva to the Diva"

Of all the many types and styles of musical performances, opera stands out as the ultimate grand rights performance. The opera virtually satisfies every established guideline as a dramatic musical performance, no matter how narrow the test. Its characteristics include: (1) a story line [Nimmer/*Gershwin*] from which the musical works generally cannot be deleted without impairment [R. Monta], (2) characters and staging [*Stigwood*], (3) costumes, scenery and lighting [*Frank Music/Rice*], and (4) dialogue (sung) [Finkelstein]. Further, an opera is for the most part performed in a theatre or opera house as opposed to a nightclub, which substantiates its categorization as a dramatic, or grand rights, performance.

Musical theatre shows, or "book" musicals, generally contain all but one of the same characteristics as does the opera. Often, they contain musical works which can be deleted without impairment to the storyline.⁸³ However, as discussed previously, R. Monta's definition is limited at best in characterizing a musical performance as dramatic or nondramatic. Still, those in agreement with this particular guideline may find support in the modern trend in musicals, which has led to a cross-over toward a more operatic presentation, including many Stephen Sondheim musicals such as *Pacific Overtures*, *Sweeney Todd* and *Sunday In The Park with George*, as well as most of the Andrew Lloyd Webber musicals, such as *Evita* and *Cats*. Apart from the variance in stereotypical performance levels between the opera's "grandeur" and the musical's "flash," book musicals are moving from their "musical-comedies-are-less-dramatic-than-operas" category into a category elbow-to-elbow with the opera as a consummate grand rights performance.

"Saturday night at the Rose and Crown"

At the other end of the spectrum are performances considered closest to the "pure and simple" nondramatic presentation: nightclub and concert performances. Of course, nonmusical (theatrical) elements are now often added to these types of performances, but they generally receive their nondramatic categorization from the fact that the songs are not performed with any conceptual sequence or particular context. This is not to say that a nightclub or concert performance is not preconceived and rehearsed in order to achieve desired reactions from the audience members. However, these types of performances generally do not convey to the audience a purpose, plot, or situation regarding the songs in rela-

83. *Id.*

tion to each other, nor does the performer generally carry on a specific character throughout the show.

During the average nightclub performance, the production values, such as costumes, lights, and scenery, are usually less theatrical than those values found in a musical or opera. Still, in situations where there is great difficulty in monitoring the types and frequency of musical performances, ASCAP or BMI blanket nondramatic performance licenses will cover the performance of songs despite spectacular visual effects, such as in a Las Vegas showroom.⁸⁴ Concerts may also go beyond average nightclub performances in the area of lighting and scenic effects, varying visually from a James Galway recital at Carnegie Hall to a Queen concert at the Los Angeles Forum. In addition, just as a theatre or opera house will naturally influence the status of a performance as dramatic, so too will a nightclub or concert hall create a presumption that the performance is nondramatic.

"The plot can be hot, simply teeming with sex"

When does a grand rights performance stop and a small rights performance begin? One cannot simply say that all musical performances containing costumes, scenery and dialogue are dramatic, because there are performances containing these elements which are nondramatic. Nor can one say that all musical performances in a theatre are dramatic and all those in a nightclub nondramatic—these, too, may cross over. There is one element, however, that if present, will secure the classification of a performance as dramatic: a plot or storyline. The use of any musical compositions within the context of a storyline is an accepted criterion for deeming the performance inherently dramatic.⁸⁵ This concept goes to the very definition of "dramatic" itself—"of or relating to the drama ('a composition in verse or prose intended to portray life or character or to tell a story through action and dialogue and designed for a theatrical performance')."⁸⁶ Hence, whether a performance containing a storyline takes place in a theatre or cabaret should not matter. Moreover, a nightclub performance of musical works within the context of a plot should in a sense rebut the presumption that nightclub or cabaret performances are nondramatic.

84. Telephone interview with Entertainment Department at MGM Grand Hotel, Las Vegas (Bill DeLangeous, Director) (March 22, 1986).

85. M. NIMMER, *supra* note 11, § 10.10(G) at 10-94.

86. WEBSTER'S NEW COLLEGIATE DICTIONARY 252 (7th ed. 1971).

"I don't know if we're in a garden, or on a crowded avenue . . ."

The absence of a storyline may place a musical performance closer to the "nondramatic" end of the spectrum, but it does not remove the performance out of the dramatic category. The use of characters, costumes, scenery, dialogue, and staging may all be characteristics of both dramatic and nondramatic performances. It seems that a popular approach in deciding where, absent a storyline, a dramatic performance stops and a nondramatic performance begins centers on where the performance is taking place. Although the courts and experts have yet to verbalize the *place* of performance as a major consideration, there have been practical and economic reasons within the industry for treating certain musical performances as nondramatic when performed in nightclubs or cabarets, even though that same performance may fit into a dramatic category when placed on the legitimate stage.

Some of these reasons are as follows: while some nightclubs may charge competitive ticket prices, maintain a full menu, or have other sources of revenue, often times a nightclub presents a musical revue while adhering to the club's regular patron format—a small "cover" or entertainment charge, a limited snack menu, and a two or three-drink minimum. The weekly gross under these conditions certainly would not compare to the box office gate of a typical legitimate theatre presentation, where the tickets may range from \$20.00 to \$50.00. The nightclub owner, while maintaining an ASCAP license, could not economically afford the larger royalty payments that accompany a dramatic performance license (usually ten to twenty-five percent of the gross receipts), nor would the copyright owner of the musical work necessarily become aware of this type of performance within the vast nightclub and cabaret circuit in order that the performance may be properly licensed and monitored.⁸⁷ In this situation, the ASCAP license assures some financial gain for the owner of the work while allowing the club owner to keep the show running through minimal royalty payments.

A good example of a type of performance common to both nightclub and theatre is the musical revue, which typically lacks a storyline but contains a high level of production values. A 250-seat Los Angeles nightclub, "The Horn,"⁸⁸ exemplified the difference between what may be categorized as a dramatic musical performance in the theatre and what may be considered such in a simple nightclub/cabaret setting.

87. *See supra* text accompanying note 40.

88. "The Horn," on Wilshire and 26th, was the oldest and most notable nightclub in Los Angeles when it closed its doors after 31 years in January, 1984. It was known as "L.A.'s discovery room," and launched the careers of many famous singers and comics.

Every winter, the owner of this club presented a musical revue of thirty or forty popular holiday songs by various composers, performed in a lively fashion (with introductory dialogue) by fourteen singer/dancers and five musicians. The show utilized costumes, characterizations, limited lighting and sound effects, and occasional scenic accessories. The format of the performance included full-cast production numbers and vaudeville-type skits with musical performances. Throughout the club's history, the owner's presentation of this musical revue continued without dispute under an ASCAP license. Had this same musical performance been presented in legitimate theatre rather than a nightclub, it almost certainly would have been deemed dramatic. Just as the criteria for deeming musical performances as "grand" or "small" are less stringent for television than for live presentation, for practical purposes a nondramatic musical performance in a nightclub or cabaret will sometimes include elements that would place an identical presentation in the dramatic performance category if presented on a theatre stage.

This idea carries through to "showroom" performances as well. In *Frank Music Corp. v. Metro-Goldwyn-Mayer Studios*⁸⁹ the performance of the plaintiff's five songs was deemed dramatic, based only on the fact that the visual aspects were representative of the original musical from which those five songs were taken. This created a unique situation for the defendant, for, aside from this circumstance, the MGM Grand Hotel's productions of its musical revues are always licensed as nondramatic performances under ASCAP.⁹⁰ It is difficult to rationalize why these very "theatrical" performances are considered nondramatic except to say that Las Vegas, Reno, Tahoe, and Atlantic City showrooms may (1) provide enough revenue under a nondramatic license to satisfy the owners of the copyrighted music (as is the case with television), or (2) be too difficult to monitor and too expensive to license separately due to the constant turnover in the use of a large variety of musical works (as is the case with nightclubs). These types of musical revues, using a vast array of production values, may also fall toward the dramatic end of the spectrum were they produced in a theatrical house. In fact, the long-running hit *Sugar Babies* is very similar to a Las Vegas showroom revue, complete with extravagant vaudeville, burlesque, and musical comedy production values. However, it is performed in a theatre, not a showroom, and thereby takes its rightful place on the spectrum as a dramatic performance. Thus, the definitions for a dramatic performance which are based on the presence or absence of nonmusical, or theatrical, elements

89. See *supra* note 1.

90. See *supra* note 74.

of a performance are not applied across the board (as was suggested by Finkelstein), but seem to be considered in light of the type of establishment in which that performance is presented. That is to say, more production values are acceptable under a nondramatic license when the performance takes place in a nightclub or showroom.

"First you say you do, and then you don't . . ."

The area of musical revues is a difficult one to pinpoint on the spectrum of dramatic and nondramatic performances, aside from the consideration as to where the performance takes place. This style of musical performance is truly representative of the gray area between dramatic (e.g., book musical) and nondramatic (e.g., concert), for although revues are often "theatre pieces," not slipping clearly into a nondramatic category, they usually do not contain a plot to render them inherently dramatic. The difficulty lies in the variations inherent within the revue format as next of kin to the great vaudeville, burlesque, and variety show formats of yesteryear.

Recently, one of the only "absolutes" in this area was recognized in *Gershwin v. The Whole Thing Co.*⁹¹ *Gershwin* established that a musical revue based predominantly on one composer's music and one lyricist's words (enhanced by costumes, lighting, and introductory dialogue, but without a storyline or characters) is considered a dramatic musical performance.⁹² Contrasting the above example of a nightclub revue using the works of a variety of composers and lyricists, a revue centered on one composer's and/or one lyricist's work would most likely necessitate a grand rights license for a nightclub or cabaret format, as well as in a theatre. The publishers and estates of the "Golden Age" composers⁹³ are generally very protective of their music when it is performed "in bulk," as opposed to when one or two tunes are being performed amidst a pot-pourri of other songs. Further, there is a strong market for revues based on a single composer's work;⁹⁴ the publishers and estates are cautious of

91. See *supra* note 18.

92. See *supra* note 18.

93. "The Golden Age of composers" is a term coined by various musical historians and by those active in the music and musical-theatre businesses. The Golden Age was a time during the 1920's, 1930's, and 1940's, when some of the timeless musical works in American history were created by the likes of George and Ira Gershwin, Irving Berlin, Cole Porter, Jerome Kern, Richard Rodgers, Frank Loesser, Lorenz Hart, Gus Kahn, Oscar Hammerstein II, Noel Coward, Harold Arlen, Duke Ellington, and several others.

94. Within the last ten or twelve years, the professional theatre has produced many revues based primarily on the musical contributions of a single songwriter or songwriting team, for example: *Oh! Coward* (Noel Coward), *Side by Side by Sondheim* (Stephen Sondheim), *Ain't Misbehavin'* ("Fats" Waller), *Cole* (Cole Porter), *Eubie* (Eubie Blake), *Let's Call The Whole*

oversaturation, and will monitor and control the use of the composer's material with a swift and steady sword. Since the requirement of a grand rights license is implemented by these very entities, a rule of thumb can be inferred in categorizing as dramatic any musical revue which utilizes an abundance of musical works created by a specific composer or lyricist.

One of the revue's most prominent features is often its visual production elements, a characteristic of both small rights and grand rights performances; thus far, there is no clear application of the Finkelstein guideline to show "how much" or "how little" production values are necessary to deem any musical performance dramatic or nondramatic. Thus, whether a musical revue can ever be considered a nondramatic performance outside a nightclub or showroom may best be exemplified by considering the similarities and differences between a revue and a concert (which is a nondramatic performance). The similarities include (1) a lack of plot or storyline, (2) the use of a variety of musical works, (3) occasional use of introductory dialogue, and (4) visual production values. The most distinctive difference between these two types of performances (which, not incidentally, may play a large part in deeming a revue as dramatic and a concert as nondramatic) is based in the *conceptual* aspect of the performances: a musical revue stars "the songs," while a concert stars "the singer." Of course, a revue may be performed by well known personalities, just as a concert performer may present a group of well known hits. However, the true purpose of a revue centers on the special treatment and performance of certain songs, whereas the performer in a concert is the true featured entity, conceivably free to alter whatever songs are performed from night to night. It would follow that the copyright owners of the songs in the revue would desire to monitor more closely and benefit more financially from a performance in which those songs were the star attractions. This general thought helps to rationalize why a revue would require a grand rights license while a concert, performed in the same place, and containing identical production elements to the revue, and perhaps the identical songs, would only require a small rights license. In other words, if Tony Bennett, in a concert set at the St. James Theatre, decided to sing only songs with melodies by Richard Rodgers, a nondramatic performance license would be sufficient.⁹⁵ If,

Thing Gershwin (George and Ira Gershwin), *Sophisticated Ladies* (Duke Ellington), *Get Happy* (Harold Arlen), and *Jerry's Girls* (Jerry Herman).

95. Telephone interview with Norman Maibaum, Director and General Manager of the Westwood Playhouse, Los Angeles (March 22, 1986). Mr. Maibaum confirmed that ASCAP/BMI per-program blanket licenses are always used when performers are presenting concerts in a theatre. He has presented in his theatre, under an ASCAP or BMI license, concerts by performers such as Peggy Lee, Ella Fitzgerald, Bobby Short and Barbara Cook.

however, "A Salute to Richard Rodgers," featuring Tony Bennett, was running at the St. James Theatre, a grand rights license would be required.

"Why don't you do right . . . ?"

Overall, it seems that showrooms, nightclubs, and certain television programs are offered what amounts to be *exemptions* from dramatic status for dramatic musical performances which (1) do not portray a storyline, (2) do not contain visual aspects representative of the work from which the songs originated, or (3) in the case of musical revues, do not utilize or represent a particular songwriter's works. Although there is no spoken precedent for this supposition, the practices of the industry certainly lend credence to this theory. If a performance is considered dramatic in a theatre, why would that same performance be considered nondramatic in a nightclub or on a television show? The answer, of course, is economics and expedience, as discussed above. Unfortunately, these "reasons" do not reflect the performance itself. It is no wonder that there is such difficulty in establishing accurate guidelines for the issuance of performance rights. Whether a performance is deemed dramatic or nondramatic should be based on that performance, not on the box office or the size of the house or the time it takes to receive the proper license. Receiving status as a "dramatic" performance in a nightclub or showroom need not burden the song user's bankroll nor create additional labors for the song owner; rather, an "exemption" category should become part of licensing performances in nightclubs, showrooms, and on certain television programs, which would recognize the performance as "dramatic" for the purpose of establishing or adhering to some steady guidelines, then continue on to allow a "dramatic exemption" categorization of the performance. This category could be licensed in a simple fashion, identical to or coexistent with the licensing of nondramatic performances.

"I'll walk alone"

There is an undeveloped theory that a performance of a single song, no matter how or where it is performed, will not fit at the dramatic end of the spectrum. There has been nothing to substantiate this notion, and not much available to contradict it. Since the majority of cases in the area of performance rights have resulted from disputes over the use of several songs, a lack of resolution on this issue is somewhat understanda-

ble. *M. Witmark & Sons v. Pastime Amusement Co.*⁹⁶ was the first, and probably the last, case in the area of dramatic and nondramatic performances which developed from a dispute over the performance of a single musical work. This case suggested that the performance of one song may be deemed dramatic, although it did not find so with regard to the performance at issue.⁹⁷ The main purpose in addressing this notion is to consider whether certain musical performances in music videos, presently given a nondramatic performance status, may fall into a dramatic performance category.

In most disputes stemming from musical performance licensing, the dramatic performance in question has consisted of several songs presented in sequence thereby conjuring up the context or storyline from which the songs were taken. Hence, a notion may have developed that a performance of a single song may not embellish enough on its original context or storyline to warrant a grand rights license, if for no other reason, because the performance may be too short to relate to the audience a notable part of the originating plot. Since the “*the story*” concept had been broadened by Nimmer to include in a dramatic category any musical performance which tells or becomes integral to “*a story*,”⁹⁸ there should no longer be concern as to whether a musical performance has enough bulk to reflect the song’s original context; the length of a musical performance should be immaterial with regard to its categorization as dramatic or nondramatic. It follows that a short, one-song performance, which furthers or supports any storyline, should be as much a dramatic performance as the lengthy performance of fifteen songs which further that storyline. In order for a single-song performance to be deemed dramatic, it need only possess whatever qualities may be found to deem dramatic any performance containing more than one song.

Just as the performance of a single song within a plot may be dramatic, it is conceivable that a single-song performance, absent a surrounding storyline, may be deemed dramatic by containing a *plot within the performance* of that song. A performance of one song could be presented as a type of “mini-opera,” where the lyrics work as a dialogue, and the staging and costumes and all the other theatrical elements are in support of a story. This concept can be seen clearly in a few of the old Busby Berkeley numbers, particularly “The Lullaby of Broadway.”⁹⁹

96. 298 F. 470 (E.D.S.C. 1924).

97. *Id.* at 474.

98. See *supra* text accompanying note 77.

99. From Busby Berkeley’s motion picture *Gold Diggers of 1933*. See T. THOMAS & J. TERRY, *supra* note 70, at 57-61.

Berkeley took one simple tune and added within the performance of this tune a short plot, transforming his presentation into one of the most haunting fantasies ever to appear on the screen. It differs from an operatic performance only in length; all elements which make an opera the ultimate dramatic performance are also integral to this performance. Taking this concept one step further, there may be many music videos which fit well into a "mini-opera" category.

Music videos are almost always one song in length. The current issue whether the "one-song" music video performance may be deemed dramatic stems from the varying types of performances which have developed in the video market over the last few years: some consist of taped concerts, some of plotless, kaleidoscopic theatrical effects, and still others of fully produced storylines. While the "concert" videos fit well into a nondramatic performance category (as would live concerts), the more theatrical videos, with their use of full productions values and storylines, may warrant consideration as dramatic performances. Michael Jackson's ever-popular "Thriller" serves as a paramount example of a rock song's dramatization through storyline, dialogue, scenery, costumes, and dancing. "Thriller" is traditional of the classic horror film yarns: a typical teenage girl falls in love with what appears to be a typical teenage boy, later to find that he transforms into a zombie when the moon is full. This fourteen-minute video performance actually extends beyond the mini-opera category into what may be considered a short motion picture, for the musical performance is preceded and surrounded by action and dialogue which depict a definite plot. However, most "storyline" videos reserve the performance to length of the song itself (usually three to five minutes), and contain the plot and action within that musical performance, as would a mini-opera. One of many illustrations is Lionel Richie's "Hello," where the musical performance depicts the story of a teacher whose unrequited love for his blind student is fulfilled by her display of reverence for him. As music videos are, more and more often, being produced with storylines, there is a growing need to recognize that a single-song performance may indeed be considered dramatic, and that the performance of the storyline videos should therefore require a grand rights license.

Absent a storyline, if the performance of several songs can be deemed dramatic through the use of costumes, scenery, staging, and the like, as in a musical revue, may a performance of a single song accompanied by these same visual elements be considered no less a dramatic performance? This issue is a difficult one to address because the performance in question would not be deemed inherently dramatic

through a storyline, length of performance or a sequential use of songs. Further, the use of visual elements are often characteristic of both dramatic and nondramatic performances. However, it is an important question to consider in the area of performance rights for music videos, due to the fact that the majority of commercial videos, sans plot, make unparalleled use of visual production values. Most, if not all, live single-song performances outside the context of a storyline are licensed as nondramatic—these would basically include nightclub, showroom and concert performances. However, it is possible that some of these performances entail theatrical qualities such that they may be considered dramatic under the above-suggested “dramatic-exemption” standpoint, just as would a multi-song performance under similar circumstances. This same rationale could be applied in the area of non-plot music videos, where the practicality of the ASCAP/BMI guidelines¹⁰⁰ has thus far lead only to a nondramatic categorization, regardless how theatrical the performance.

ACT II, SCENE 4: BEFORE THE PARADE PASSES BY

A combination of several performance factors must be considered in establishing musical presentations as dramatic or nondramatic.

It can be concluded that the available performance rights guidelines essentially pass over the spectrum of musical performances. Their application is too limited by the fact that each standard is based on only one or two performance factors which may not be relevant to every type of musical presentation. In consideration of these various viewpoints and standards, this author suggests a more extended guideline by which dramatic and nondramatic performance rights may be issued, based on several performance factors and expressed in the following four-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 PREDOMI-

100. See *supra* text accompanying note 40.

NANTLY 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.

FINALE

To call a musical performance dramatic or nondramatic is such a subjective judgment for legal entities to bring about that the issue will most likely play an unceasing part of the "business" of musical performance. The indecisiveness in establishing one consummate performance guideline probably stems from inherent differences between the very philosophy of legal entities (who quest for the ultimate truth and reality through all available means) and that of creative/performance entities (who quest to *alter* truth and reality through all available means). Justice Oliver Wendell Holmes voiced this very concern in a dispute regarding pictorial art: "It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits."¹⁰¹ For purposes of performance rights licensing, the "worth" is both the royalty and the commercial value of a musical composition. Both are more richly gained through dramatic than through nondramatic licenses, hence, there exists a perpetual dispute between creative entities (the user and the owner) based on creative factors (the aspects of the musical performance) which can only be solved through legal means.

Basic goals for the licensing of performance rights are reflected in the Constitution,¹⁰² and are well provided for in Title 17¹⁰³: (1) to grant

101. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903).

102. U.S. CONST. art. I, § 8, cl. 8. "To promote the progress of science and useful arts, by

to the artist certain monopolies on his or her original works, and (2) to both protect and limit those monopolies. These grants, protections, and limitations are as much a part of the public performance of a musical work as are the creative contributions of the songwriter or the interpretive contributions of the user. However, since the collateral issue of what may constitute a dramatic or nondramatic musical performance for licensing purposes has yet to be addressed by the legislature, the copyright owners and users must continue to depend on the lawyers, the courts, and the musico-legal experts to create, reconcile, and hopefully conform to all public performances some clear, compact standards by which a musical performance may be distinguished as dramatic or nondramatic. For now, these standards are evasive, and almost as numerous and diversified as the public performances upon which they are based.

BILL

The Theatuh, the Theatuh -

(he sits up)

- what book of rules says the Theatre exists only within some ugly buildings crowded into one square mile of New York City? or London, Paris or Vienna?

(he gets up)

Listen, junior. And learn. Want to know what the Theatre is? A flea circus. Also opera. Also rodeos, carnivals, ballets, Indian tribal dances, Punch and Judy, a one-man band—all Theatre. Wherever there's magic and make-believe and an audience—there's Theatre. Donald Duck, Ibsen and the Lone Ranger. Sarah Bernhardt, Poodles Hanneford, Lunt and Fontanne, Betty Grable—Rex the Wild Horse and Eleanore Duse. You don't understand them all, you don't like them all—why should you? The Theatre's for everybody—you included, but not exclusively—so don't approve or disapprove. It may not be your Theatre, but it's Theatre for somebody, somewhere . . .

securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.”

103. See 17 U.S.C. §§ 102-18 (1982).

EVE

I just asked a simple question.¹⁰⁴

CURTAIN

*Marilee Bradford**

104. C. CAREY & J. MANKIEWICZ, MORE ABOUT *All About Eve*, at 142 (1972) (excerpt from *All About Eve*, screenplay by Joseph L. Mankiewicz (1950)).

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