

Skating On Thin Ice: The Intellectual Property Ramifications of a Figure Skater's Public Performance

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COMMENTS

Skating on Thin Ice:

The Intellectual Property Ramifications of a Figure Skater's Public Performance

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INTRODUCTION

Imagine a figure skater gliding on ice while performing choreographed athletic and artistic maneuvers for an audience. Now imagine this performance is done in utter, complete silence. Her moves would look odd without the sound of music, which is an inherent part of competitive figure skating. This is not a positive image. The music a skater uses is essential to the sport of figure skating because it tells a story.¹ Figure skating is composed of both athletic and artistic maneuvers set to music. Judges evaluate a skater's interpretation of the music she performs to. Because music choice is important for the competitive component of the sport, skaters are challenged to find music that appeases the sport's judges, spectators, and potentially judges in a court of law.

1. See Kelly Whiteside, *For figure skaters, choosing music comes with risk*, USA TODAY (Jan. 07, 2014, 2:08 PM), <http://www.usatoday.com/story/sports/olympics/sochi/2014/01/06/how-figure-skaters-choose-music-olympic-trials/4347817/>.

Historically, figure skaters performed to the instrumental music of classical composers like Tchaikovsky and Chopin.² These pieces fell well inside the public domain for use in performance and thus, no one had a legal claim on the works.³ Additionally, there was no legal claim on the composition as there is no public performance requirement for sound recording. As a result, skaters could skate to works inside the public domain without worry of Intellectual Property (IP) ramifications at rinks across the world.

However, recent rule changes to international and national figure skating competition now permit the use of vocal music in the competitive performances of men, ladies, pairs, ice dancing, and synchronized skating.⁴ This rule was made to increase public interest in the sport.⁵ American skaters may perform season-long across the United States and globally with vocal music. As a result, skaters are performing competitive free programs, not to the music in public domain, including the classical pieces, but instead to the popular music of Michael Jackson and Pink Floyd.⁶ This Comment will address this recent change of rules and its IP implications. While a fair amount of the compositions skaters historically performed to, such as the Firebird Suite and Rhapsody in Blue, may still fall under copyright protection; recent works could pose a greater threat because the composers are alive and actively protecting their copyright.

This research is significant because figure skating is a sport practiced by many and if musical artists attempt to enforce their intellectual property rights against amateur athletes of all levels in the sport, there would be ramifications that could change the sport. Specifically, this Comment seeks to address the copyright protections that are impacted by the skater's performance to copyrighted material.

This Comment will discuss whether skaters have permission to use music, how a skater could obtain permission, whether the performance of a skater using particular music constitutes performance under copyright laws, and the ramification of such use. Further, this Comment will examine what skaters need to do to protect themselves and prevent intellectual property conflicts. Section I consists of a copyright law review analysis of copyright infringement and public performance. Section II consists of a historical case law application of copyright law in relation to figure skater use of copyrighted material.

2. *Id.*

3. *See* AL KOHN & BOB KOHN, KOHN ON MUSIC LICENSING 354 (4th ed. 2010).

4. Christopher Clarey, 'Rhapsody in Blue' or Rap? Skating Will Add Vocals, THE N.Y. TIMES (Feb. 18, 2014), <http://www.nytimes.com/2014/02/19/sports/olympics/rhapsody-in-blue-or-rap-skating-will-add-vocals.html>

5. *Id.*

6. *See* Whiteside, *supra* note 1.

I. COPYRIGHT LAW OVERVIEW

The intellectual property right at issue here is copyright law. The Copyright Act of 1976 grants copyright owners' rights to their work.⁷ Copyright law incentivizes creators to place their work into the marketplace.⁸ It protects "original works of authorship."⁹ Under section 106 of the Copyright Act, copyrighted work owners have exclusive rights in their work including the right to reproduction, right to make derivative works, and exclusive rights to publicly perform the work.¹⁰ The focus of copyright law is on the public deriving benefit and the rights of the author are secondary to this focus.¹¹ While the public derives benefit from skating performance through enjoyment, inspiring future skaters, and exposure to music, that benefit may not outweigh copyright protection. Thus, owners of copyrights can license part of their copyrights to others to ensure protection.¹²

A. Copyright Law and Music

Musical recordings contain two separate copyrights: (1) "the copyright in the underlying music composition (the song)" and (2) "the copyright in the performing artist's rendering of the composition (the sound recording)."¹³

Copyright law has a special interplay with music. A musical work, including any accompanying words, is one of the eight categories of works of authorship established in the Copyright Act of 1976.¹⁴ The characterization as a musical work is important for legal ramifications.¹⁵ For example, "an owner of a copyright in sound recording does not enjoy a performance right."¹⁶ "Sound recordings" are works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture of other audiovisual work.¹⁷ Works of authorship, such as musical works, are distinguishable from sound recordings because a sound recording is a captured performance.¹⁸ The works at issue in this Comment are

7. Matt Jackson, *From Broadcast to Webcast: Copyright Law and Streaming Media*, 11 TEX. INTELL. PROP. L.J. 447, 451 (2003).

8. *Id.* at 480.

9. MARSHALL A. LEAFFER, UNDERSTANDING COPYRIGHT LAW (5th ed. 2010).

10. Cynthia Blake Sanders & Sara L. Alpert, *Background Music in Sports Sampling, Copyright Law and the Infringing Gymnast*, MD. B.J. 4, 6 (2007).

11. LEAFFER, *supra* note 9, at 2.

12. 17 U.S.C. § 202 (2012).

13. Jackson, *supra* note 7 at 452.

14. 17 U.S.C § 102(a) (2012).

15. LEAFFER, *supra* note 9, at 100.

16. *Id.*

17. 17 U.S.C § 101 (2012).

18. LEAFFER, *supra* note 9, at 137.

musical works and thus enjoy a full performance right.¹⁹ Skating programs consist of the use of both compositions and sound recordings. However, this Comment considers the public performance rights and, therefore, only the composition copyright, or musical work applies.

Skaters have a choice of selecting musical works in the public domain or those with active copyright protection. It would be best for skaters to try to find music in the public domain in order to avoid issues with obtaining permission to use copyrighted music. Using musical works in the public domain provides skaters with options, because popular songs may not fall outside of the public domain since many new songs are based off songs already in the public domain.²⁰ For example, “the author need add very little to the public domain to meet the standard of originality.”²¹ Therefore, it is likely that the popular songs skaters choose to use presently is copyrighted material. Permission to use the work needs to be obtained from both of the copyrighted works.²² There are organizations that help facilitate permissions for use of copyrighted work.

B. Copyright and Public Performance Right

Copyright law can pose a problem for a figure skater because the use of copyrighted material in routines could require permission from a copyright owner. The Copyright Act established an exclusive public performance right for musical works.²³ “To ‘perform’ a work means to recite, render, play, dance, or act it, either directly or by means of any device or process.”²⁴ Songwriters have a performance right, and individuals or business entities that want to publicly perform a song must obtain permission from the copyright owner.²⁵

A work performed publicly is defined in the Copyright Act of 1976. A public performance is defined as performing “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 acquaintance is gathered.”²⁶ A person performing at home for friends is not publicly performing because the home is not a place open to the public.²⁷ However, performances in public places and ‘semi-public’

19. *Id.*

20. *Id.* at 136–137.

21. *Id.* at 137.

22. Jackson, *supra* note 7, at 452.

23. 17 U.S.C. § 106(5) (2012).

24. 17 U.S.C. § 101 (2012).

25. Jackson, *supra* note 7, at 452.

26. 17 U.S.C. § 101.

27. Michael Walker, Jr., *A Better Public Performance Analysis for Digital Music Locker Storage*, 87 ST. JOHN’S L. REV. 629, 645 (2013).

places such as skating rinks are subject to copyright control.²⁸ A work is also publicly performed when an unauthorized individual transmits a performance or display of the work by any device or process whereby images or sounds are received beyond the place from which they are sent.²⁹ It is not necessary for members of public to actually receive the transmission.³⁰ They only need to be capable of receiving the performance.³¹ Therefore, a skating performance at a rink that could be transmitted elsewhere would constitute a public performance.

A performance is not only the original rendition by any further act “by which that rendition is transmitted to the public.”³² Modern technology provides “endless opportunities to perform copyrighted works” because any time work is sung, played via cassette, or on the radio, the work is performed.³³ A copyright owner only can control public performances.³⁴ The larger and more diverse a gathering, the more likely it will be deemed public.³⁵

Under § 101 of the Copyright Act, “‘public performance’ is defined as performing in a place open to the public or at any place outside the family social circle.”³⁶ “Public performances include radio and television broadcasts and performances in bars, restaurants, concert halls, etc.”³⁷ Public performance of a song can be either a live rendition of song or playing of recording on a CD, MP3, etc.³⁸ As defined above, a skating performance in a skating area constitutes public performance. Whether the performance is in front of a small audience or is recorded and broadcast on YouTube or national television, a competitive professional skating program would be a public performance.

Exemption from the exclusive right of public performance includes non-profit performances and performances by “small public establishments by means of radio broadcasts,” record stores playing music to demonstrators, state fairs, and public broadcasting.³⁹

Using works in the public domain also provides protection for public performance. Public domain “means a work is no longer protected by copyright

28. *Id.*

29. *Id.* at 646.

30. *Id.*

31. *Id.*

32. LEAFFER, *supra* note 9, at 341.

33. *Id.*

34. *Id.*

35. *Id.* at 345.

36. Sanders & Alpert, *supra* note 10, at 6.

37. Jackson, *supra* note 7, at 452.

38. *Id.*

39. KOHN, *supra* note 3, at 1254–56.

and can be freely distributed.”⁴⁰ A public domain work is one in which: “(1) for which copyright protection was never available, (2) for which copyright protection was never secured, or (3) for which copyright protection, though it may have once existed, has expired or otherwise been lost.”⁴¹ Computer databases are usually considered in the public domain and are protected by compilation copyrights. Works in the United States that were first published prior to 1923 fall within the public domain.⁴² There is a 95-year term of copyright protection for works first published from 1923-1977.⁴³ For works published after 1978, they have a copyright term based on the life of the last surviving author plus 70 years.⁴⁴ Musical works in the public domain are not uniformly presented in an official list.

C. Performing Right Organizations and Licensing

Songwriters have performing rights organizations (PROs) that administer public performance rights and collect resulting royalties.⁴⁵ These royalties account for a songwriter’s revenue.⁴⁶ Businesses that frequently use the protected performance may obtain “blanket licenses” from a PRO to allow the use of any song administered by the organization.⁴⁷

Purchasing a song legally on iTunes does not provide a right to perform publicly, especially when one did not obtain permission from the owners of the musical works.⁴⁸ A skating arena must have licenses from the PRO for public performance of the music used by the performer.⁴⁹ Whether or not fees are due depends on if the work is performed publicly.⁵⁰ Public performance occurs when a work is viewed by an audience in person or in separate locations over a receiving unit like a radio, television or computer.⁵¹

Almost one-half of all music publishing revenue comes from revenue from public performances.⁵² Persons seeking permissions for public performances

40. *IMPSL: Copyright Made Simple*, IMSLP/ PETRUCCI MUSIC LIBRARY, http://www.imslp.org/wiki/IMSLP:Copyright_Made_Simple (last visited Jan. 4, 2015).

41. KOHN, *supra* note 3, at 354.

42. IMSLP/ PETRUCCI MUSIC LIBRARY, *supra* note 40.

43. *Id.*

44. *Id.*

45. Jackson, *supra* note 7, at 452.

46. *Id.*

47. *Id.*

48. Sanders & Alpert, *supra* note 10, at 10.

49. *Id.*

50. *See id.*

51. *Id.*

52. KOHN, *supra* note 3, at 1247.

of music can apply for licenses from one of the performance right societies.⁵³ Three types of licenses are: (1) blanket licenses, (2) source licenses and direct licenses, and (3) per program licenses.⁵⁴ A ‘blanket license’ has broad coverage that allows unlimited performance in a catalog for an annual fee.⁵⁵ A ‘source license’ and direct license is obtained directly from the composers and publishers of the music.⁵⁶ A ‘per program’ license is a modified blanket license because a station pays each society “only for televisions that contain music controlled by that society pursuant to a prescribed formula.”⁵⁷

Broadcast Music, Inc. (“BMI”) and the American Society of Composers, Authors, & Publishers (“ASCAP”) conduct most of the licensing of performing rights to musical compositions in the United States.⁵⁸ These performing rights societies purchase all rights that a copyright holder possesses to perform and to license third parties to perform their work.⁵⁹ BMI licenses are composed of two categories: broadcast and non-broadcast. Broadcast licenses are for television stations and radio stations. Non-broadcast licenses are for hotels, dance studios, colleges, skating rinks, bars and restaurants.⁶⁰ Most rinks, especially those hosting national-level competitions, will have ASCAP and BMI site licenses.

The BMI’s Music License for Skating Rinks provides that “BMI grants LICENSEE a non-exclusive license to publicly perform at the Licensed Premises all of the musical works of which BMI controls the rights to grant public performance during the Term.”⁶¹ This license allows arenas to pay seasonally for the time music is needed on the premises.⁶² The price for the license is contingent on the size of the arena and the price of admission for spectators.⁶³ However, the permissions provided by the license are not all-inclusive, especially when performances are broadcast. The skating rink’s license does not protect “performances of music via any form of televised transmission, whether over-the-air broadcast, telecast, cablecast, and other electronic transmission (including satellite, the Internet, or online services) to persons outside the licensed premises.” The ASCAP also prohibits broadcast

53. *Id.* at 1263.

54. *Id.* at 1263–66.

55. *Id.* at 1263.

56. *Id.* at 1264.

57. *Id.* at 1265.

58. *Broadcast Music, Inc. v. Moor-Law, Inc.*, 527 F. Supp. 758, 759 (D. Del. 1981).

59. *Broadcast Music, Inc. v. 84-88 Broadway*, 942 F. Supp. 225, 226–27 (D.N.J. 1996).

60. *Moor-Law, Inc.*, 572 F. Supp. at 760.

61. *Music License for Skating Rinks*, BMI (Jan. 2016), <http://www.bmi.com/forms/licensing/gl/skt1.pdf>.

62. *Music Licensing for Skating Rinks & Centers*, BMI, http://www.bmi.com/licensing/entry/skating_rinks (last visited Feb. 21, 2016).

63. *Id.*

of its music outside of the premises in its License Agreement to Roller Rinks.⁶⁴

D. Copyright Law and the Figure Skater

Where a routine-oriented athlete like a figure skater seeks to perform a routine to a composer's song in an arena, permission to publicly perform the song must be obtained.⁶⁵ Even if skaters use only a portion of a song, permission should still be obtained.⁶⁶ If a skater uses a sample that is so similar to the original material that average audience would recognize it, the copying is considered infringing.⁶⁷ If a skater plans to use a mix of music for a performance, the skater should make sure that the arena has a policy that permits the use of the mixes.⁶⁸ The use of royalty-free music would prevent the skater from infringing on copyrights and paying penalties.⁶⁹

Copyright infringement occurs when a third party violates a copyright owner's exclusive rights.⁷⁰ A copyright owner must prove (1) ownership of a valid copyright in the work, (2) copying by the defendant, and (3) that the defendant's copying constitutes an improper appropriation, in order to succeed in an action of infringement.⁷¹ In court, copyright owners could seek to obtain an injunction or apply for damages. As applied to this Comment's inquiry, a skater would copy a copyright owner's work to use for performance of a competitive or exhibition routine. The improper appropriation would be proven when the copyright owner demonstrated that the defendant copied "a sufficient amount of protectable elements of the plaintiff's copyrighted material" as a defendant could copy ideas.⁷² The scenario of this Comment would satisfy improper appropriation. In this case, copyright owners could possibly pursue copyright infringement because skaters directly copied the work. In essence, copying a substantial portion of a song will constitute infringement unless the use is licensed or allowed by fair use.

There are some ways that figure skaters could protect themselves from copyright infringement suits. One defense is fair use. The fair use of copyrighted works include copying work for purposes of criticism, comment,

64. See *LICENSE AGREEMENT – ROLLER RINKS*, ASCAP (2016), <http://www.ascap.com/~media/files/pdf/licensing/classes/skateroller.pdf>.

65. Sanders & Alpert, *supra* note 10, at 6.

66. *Id.*

67. *Id.*

68. *Id.* at 11.

69. *Id.*

70. LEAFFER, *supra* note 9, at 419.

71. 17 U.S.C § 106 (2012).

72. LEAFFER, *supra* note 9, at 424.

new reporting, teaching, scholarship, or research.⁷³ This would not be considered an infringement of copyright.⁷⁴ If a skater is able to establish fair use, then the skater would be able to withstand a copyright infringement lawsuit.

Fair use is determined by the evaluation of four factors: (1) “the purpose and character of the use” and whether it is for commercial or educational purpose, (2) “the nature of the copyrighted work,” (3) “the amount and substantiality of the portion used in relation to the copyrighted work as a whole,” and (4) “the effect of the use upon the potential market for or value of the copyrighted work.”⁷⁵ Applying these factors to a skater’s use of copyrighted music, the skater could argue that use of the copyrighted material for a skating program constitutes fair use because the use of the musical piece is minimal and it accounts for less than five minutes of usage for an entire piece of music. The skater could also argue that the use of the music could benefit the copyright holder by increasing exposure to the copyrighted work and increasing the possibility of future purchase of the work. But the skater would also need to combat the fact that the use of the program is for commercial purposes when performed for a competition that has a monetary prize or when performing at a paid exhibition. Further, if a skater uses two-and-a-half minutes for a four minutes song, then the skater is using a substantial portion of the copyrighted work. These competing interpretations highlight the difficulty in proving a fair use.

Therefore, a skater would be best protected by avoiding a lawsuit altogether. A skater has options on how to best proceed in performing a routine without the worry of infringement lawsuits. For example, a music license would allow the skater to obtain a permission to use the music that he or she would not have the privilege to use otherwise.⁷⁶ This music license would provide a skater with permission to use copyrighted material.⁷⁷

It is important to determine who needs to obtain permission: the skater performing a piece or the arena where the skater is performing. This distinction determines who can best obtain a license to use the music. As explained earlier, it would behoove both the skaters and arena to obtain licenses from the copyright owner. However, due to the nature of competitive figure skating, the skater would be the best person to protect usage of the song as the skater will be traveling from rink to rink to perform the routine and it could be unknown

73. 17 U.S.C. § 107 (2012).

74. *Id.*

75. *Id.*

76. KOHN, *supra* note 3, at 351.

77. *Id.* at 367.

whether each rink holds a blanket license that includes the musical work.

Another option to prevent litigation would be for the skater to use music found in the public domain as no permission is required for these works.⁷⁸ However, even if a work loses protection in the United States, it does not mean protection is lost in the rest of the world.⁷⁹ There are sites like Musopen that provide an online repository of music in the public domain.⁸⁰ A skater could access Musopen and find musical works to use for performances that are in the public domain, and thus, completely avoid the potential of legal issues in the future.

II. CASE LAW OVERVIEW

The bulk of copyright litigation regarding the unauthorized public performance of copyrighted work has been made against establishments and not individuals. This section will review case law relating to the copyright infringement and the public performance right. The case law will provide a cursory view of the past case law leading to statutory changes as well as the present state of the performance right.

A. Licensing and Copyright Infringement

The case *Broadcast Music v. 84-88 Broadway* demonstrates that users of copyrighted material need to be sure to obtain the proper license to avoid future litigation. In *Broadcast Music*, the bar, J.P. Anthony's, was found guilty of infringing on copyrighted material because the sub-license subscription it obtained for background music from BMI did not include the right to host live performances or play CDs of the copyrighted music licensed by BMI.⁸¹ Licenses can be purchased for both background music and for live and disc jockey performances.⁸²

BMI conducted investigations and determined that the bar was still using the music on numerous occasions.⁸³ The bar's sub-licensing agreement limited the use of the copyrighted music and did not allow for use of compositions in the license for hosting live or disc jockey performances.⁸⁴ The agreement stated the bar "could not record the music for other replay, could not interrupt the programming for commercial announcements, and could not use the

78. *Id.* at 354.

79. RICHARD STIM, PATENT, COPYRIGHT & TRADEMARK: AN INTELLECTUAL PROPERTY DESK REFERENCE 358 (12th ed. 2012).

80. *FAQs*, MUSOPEN, <http://musopen.org/faq> (last visited Jan. 4, 2015).

81. *Broadcast Music, Inc. v. 84-88 Broadway*, 942 F. Supp. 225, 227 (D.N.J. 1996).

82. *Id.*

83. *Id.*

84. *Id.* at 230.

programming to replace live music or as an accompaniment for dancing, skating or similar entertainment.”⁸⁵

The court did not sympathize with a defense of ignorance of use by the defendant, or the defendant’s argument that its subscription purchase included live performance.⁸⁶ According to the court, allowing businesses to buy limited licenses to encompass a wide variety of use would be inequitable to copyright owners.⁸⁷

The court evaluated the statutory damages that the plaintiff could seek. The Copyright Act of 1976 permits a plaintiff to seek statutory damages between \$500- \$20,000 per infringement.⁸⁸ If infringement is found to be willful, a court can increase the award to up to \$100,000.⁸⁹

While obtaining a BMI license could prevent a skating rink from violating copyright protection, the licensing does not necessarily protect skater’s use of music as they move from rink to rink during a competition or exhibition season. For example, the arena’s license protection would not extend to televised performances or performances transmitted online like competitions that many top-level skaters participate in. Further, if an arena only holds a BMI or an ASCAP license, then there is a possibility that the selection of music by the skater would not be covered under the license. The statutory damages for copyright infringement for skaters may be too much to pay. Also, the ASCAP license does not license the right to record music as part of an audio-visual work.⁹⁰ The right to record music for visual purposes and synchronization rights requires permission from writers or publishers.⁹¹ Case law dictates that courts will not be sympathetic if parties do not go through proper channels to obtain a license to music.

B. The History of Public Performance Rights

The public performance right affects figure skater performance and intellectual property legal implications because the inherent nature of the sport has skaters publically perform routines to music. In *Remick Music Corp. v. Interstate Hotel Co.*, the court found a Nebraska state statute unconstitutional because it limited copyright owners’ rights to protection from the unauthorized

85. *Id.*

86. *Id.* at 231.

87. *Id.*

88. *Id.* at 232; 17 U.S.C § 504(c)(1) (2012).

89. *84-88 Broadway*, 942 F. Supp. at 232; 17 U.S.C 504(c)(2) (2012).

90. *ASCAP Licensing: Frequently Asked Questions*, ASCAP, <http://www.ascap.com/licensing/licensingfaq.aspx#general> (last visited on Feb. 22, 2016).

91. *Id.*

public performance of copyrighted works.⁹² This case examined the public performance right for profit.⁹³ Performances for profit were eliminated by the Copyright Act of 1976 and limited to just the performance right for copyright owner's protection.⁹⁴ This case demonstrated the court's desire to protect the public performance right.

In *MCA, Inc. v. Parks*, the Court affirmed a copyright infringement decision against a roller skating rink that failed to pay royalties to ASCAP for use of music in a jukebox.⁹⁵ Jukebox performances are also handled by a special section of the Copyright Act.⁹⁶ Skating rink patrons paid no fee to enter the building and could listen to the music for free.⁹⁷ Patrons could choose to pay to use the jukebox, to play video games, or to skate.⁹⁸ No music was played unless someone paid for the jukebox.⁹⁹ The court found the establishment did not qualify for the jukebox exemption because there was an indirect or direct charge for admission.¹⁰⁰

The *MCA, Inc.* court ruled that "indirect charge for admission" exists only when the nexus between the jukebox music and admission charge is immediate and direct.¹⁰¹ It held that the music closely related to the rink's business because patrons went to the rink to hear music.¹⁰² This is similar to the issue of this Comment because the music that figure skaters use is pivotal for the spectators and judges. Likely, spectators would not attend if skaters did not perform to music. In 1991, the skating community removed compulsory school figures from the sport which were maneuvers done on the ice without music because fans were not interested in the silent discipline in the sport.¹⁰³ *MCA, Inc.* highlights the importance of knowing the clientele of a business to determine whether more licensing is necessary to avoid litigation.

In *Tallyrand Music, Inc. v. Stenko*, the defendant ignored a request to stop use of copyrighted music.¹⁰⁴ The defendant requested a license from ASCAP

92. *Remick Music Corp. v. Interstate Hotel Co. of Neb.*, 58 F. Supp. 523, 545-46 (D. Neb. 1944).

93. *Id.* at 533.

94. KOHN, *supra* note 3, at 1253.

95. *MCA, Inc. v. Parks*, 796 F.2d 200, 201 (6th Cir. 1986).

96. 17 U.S.C. § 116 (2012).

97. *MCA, Inc.*, 796 F.2d at 201.

98. *Id.*

99. *Id.* at 202.

100. *Id.*

101. *Id.* at 204.

102. *Id.*

103. ELLYN KESTNBAUM, *CULTURE ON ICE: FIGURE SKATING & CULTURAL MEANING* 152 (2003).

104. *Tallyrand Music, Inc. v. Stenko*, Nos. 1:CV-89-1131; 1:CV-90-0735, 1991 U.S. Dist.

for performance of music composition but was denied.¹⁰⁵ The court stated that attorney's fees are likely rewarded "when a defendant has failed to come forward with a justification for his action to any colorable grounds upon which a defense or mitigation can be predicated."¹⁰⁶ The court reviewed several factors for determining whether attorney fees in copyright infringement cases were warranted.¹⁰⁷ These factors include: frivolousness, motivation, objective unreasonableness of facts and legal components of the case, deterrence, financial strength of the parties, whether expense of counsel was necessary, the amount at stake, and the resources of the parties.¹⁰⁸ The court found the defendant liable for attorney fees as the defendant used the musical compositions on the date of the complaint and continued to use the musical composition at the rink following the complaint.¹⁰⁹ This case demonstrates that a skater should be weary of potential attorney's fees in a suit if they knowingly use a copyrighted piece without obtaining the correct permissions.

In *Coleman v. ESPN, Inc.*, members of the ASCAP sued ESPN, Inc. because many of its programs contained "non-dramatic public performance of copyrighted musical compositions" for which ESPN was not licensed.¹¹⁰ One of the complaints was for a performance of Stephen Sondheim's "Send in the Clowns." The song was performed as part of the figure skating competition Skate International America performed on November 14, 1988.¹¹¹ Another complaint was for use of Prince's "U got the Look" during the 1988 National High School Cheerleading Championships.¹¹² ESPN admitted that the twenty compositions identified in the complaint were correct and had been broadcast on ESPN.¹¹³ The court found that "transmissions by a cable network or service to local cable companies who in turn transmit to individual cable subscribers constitute 'public performance' by the network under 17 U.S.C. § 101(2) separate from the live public performances which fall under section 101(1).¹¹⁴ The decision in *Coleman* affected both skaters and networks because the performances were broadcast on major networks in the United States and a license was required for the use of music.

LEXIS 14590 at *3 (M.D. Pa. Mar. 15, 1991).

105. *Id.* at *7.

106. *Id.* at *19.

107. *Id.*

108. *Id.*

109. *Id.* at *21.

110. *Coleman v. ESPN, Inc.*, 764 F. Supp. 290, 292 (S.D.N.Y. 1991).

111. *Id.* at 292–93.

112. *Id.*

113. *Id.*

114. *Id.* at 294–95.

C. Music Sampling and Copyright Infringement

High level figure skaters edit musical pieces to fit two minute to four-and-a-half minute programs. These edits consist of using samples from one or more musical pieces. Such sampling can be subject to copyright infringement claims.

The case *Newton v. Diamond* involved a copyright infringement claim against the Beastie Boys and analyzed copyright law in relation to samples of music.¹¹⁵ Sampling entails the incorporation of short snippets of prior sound recording into new recordings.¹¹⁶ Sampling was developed in the United States in the 1970s and has continued to increase in popularity due to technology.¹¹⁷ The *Newton* court held that unauthorized use of copyrighted material was actionable only when the use was substantial.¹¹⁸ A use is not actionable and has no legal consequence if the copying was *de minimis*.¹¹⁹ *De minimis* use occurs “only if the average audience would not recognize the appropriation.”¹²⁰ The court ruled that the Beastie Boys’ use of a small segment of three notes was not sufficient for a copyright infringement claim.¹²¹

The music at issue in *Newton* differs from most figure skating musical pieces. Most skating music uses either recognizable full pieces of music or samples spliced together because the music used is to be readily identifiable to the spectators. Skaters will often use more than a few notes of the copyrighted material. Therefore, the use would likely be substantial enough to be actionable for legal consequence.

The case *Bridgeport Music, Inc. v. Dimensions Films* also examined the sampling of copyrighted material.¹²² The court emphasized that the amount of copyrighted material used is of little importance.¹²³ The court reasoned that “even when a small part of a sound recording is sampled, the part taken is something of value.”¹²⁴ In relation to figure skating, many times skaters use a portion of a musical piece to fit into a two to four minute performance, and these skaters must realize even a small amount is still protected. “For the sound recording copyright holder, it is not the ‘song’ but the sounds that are fixed in the medium of his choice.”¹²⁵ The samples that skaters use are taken directly

115. See *Newton v. Diamond*, 349 F.3d 591 (9th Cir. 2003).

116. *Id.* at 593.

117. *Id.*

118. *Id.* at 594.

119. *Id.*

120. *Id.*

121. *Id.* at 598.

122. See *Bridgeport Music, Inc v. Dimension Films*, 410 F.3d 792 (6th Cir. 2005).

123. *Id.* at 802.

124. *Id.* at 801–02.

125. *Id.* at 802.

from a fixed medium.¹²⁶

Skaters face additional concerns regarding the issue of music sampling when compiling the music for a performance. There is currently no license to be granted for creating musical selections for figure skating programs. Potentially, coaches could make a fair use argument for putting together a program. However, considering the fact that the making of a skating program involves copying, copyright law would be implicated.

CONCLUSION

The lack of copyright infringement case law against figure skaters creates the impression that individual skaters may have found a loophole in copyright law. An infringement case against an individual skater would be one of first impression as many copyright infringement lawsuits in this area attack a business and not an individual. However, the fact that skaters perform musical pieces across the world at different rinks poses a unique threat to copyright holders. In reality, professional skaters can perform in front of thousands for months on end. How can a copyright holder stop them?

While tradition has had skaters provide the music's composers to the federation and attributed on the television screen prior to performance, it is unclear if that attribution is enough. Also, it is unclear if the local, national, and international skating federations are adequately protecting skaters from liability if they pay for licenses to use. Further, the skater's use of the copyrighted material is exposed in international competitions and exhibitions that put the spotlight on skaters who perform to Beyoncé. Also problematic is the skater's use of samples to create the perfect piece of music that captures the audience.

Hopefully, this Comment will make skaters think about the music they use to perform to prevent copyright claims if a skater's use is not fully licensed before this loophole closes in on the sport. Stopping the music altogether may not be necessary, but skaters should think twice.

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126. *Id.*

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