

TRAPPED!

AVOIDING A POTENTIAL PITFALL OF NEVADA'S OPEN MEETING LAW

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Any attorney will attest to the fact that many existing areas of law frequently intersect in unexpected fashion and, regardless of the practitioner's particular specialty or concentration, the practitioner must, from time to time, give considerable attention to topics that fall far outside the usual scope of his or her practice. One such intersection of laws that receives little recognition concerns the interplay between Nevada's Open Meeting Law (OML), federal copyright law and state sovereign immunity. This overlap of laws not only significantly impacts attorneys and their clients, but may also create a surprising but genuine legal hurdle for attorneys to overcome.



Nevada's Open Meeting Law Requirements

Attorneys representing state and local agencies should be intimately familiar with the OML, codified in Nevada Revised Statutes (NRS) chapter 241, which governs meetings of such agencies.¹ NRS 241.020(1) requires, with some exceptions, that all meetings of a public body be open and public. NRS 241.020(5) also requires public bodies to provide, upon request, "supporting material provided to the members of the public body for an item on the agenda," except for materials that:

1. Were submitted pursuant to a nondisclosure or confidentiality agreement that pertains to proprietary information;
2. Relate to the closed portion of the meeting; or
3. Have been declared confidential by law, unless those persons whose interests are protected under the order of confidentiality agree otherwise.

Additionally, NRS 241.020(7) requires certain governing bodies of counties and cities to post such supporting material to their websites. Alternatively, a public body may also, under certain circumstances, distribute supporting material by electronic mail pursuant to NRS 241.020(8).

Although NRS 241.020(5) clearly exempts certain supporting material from the OML's requirements, notably absent from the OML is any provision exempting material that is copyrighted.² The absence of an express exemption creates a thorny situation for counsel, who must balance competing interests of advising clients to act in accordance with the OML while also avoiding the unauthorized reproduction, distribution or display of any material that would risk exposure to liability resulting from a claim of copyright infringement under superseding federal law. What issues should counsel consider then if, for example, supporting material that is copyrighted and must be provided to members of the public under NRS 241.020 was submitted to the public body by someone other than the copyright holder?

"Fair Use" By the Government Under the Copyright Act

The Copyright Act, 17 USC § 101 Et seq., provides

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legal protection to creators of “original works of authorship fixed in any tangible medium of expression,” grants exclusive rights to reproduce, display and distribute those works and creates a cause of action for infringing those rights.³ The act also expressly preempts any state law conferring such rights or equivalent rights.⁴ Generally speaking, any person who uses a copyrighted

work without the copyright holder’s permission infringes the copyright. Moreover, an infringer explicitly includes, under § 501 of the act, the states, their instrumentalities, and the officers and employees thereof, when acting in their official capacities.

However, the fair use doctrine in copyright law, codified as § 107 of the act, allows for the reasonable use of copyrighted works without permission of the copyright holder for particular purposes such as criticism, comment, news reporting, teaching, scholarship and research. It is intended to strike a balance between the rights of a copyright holder and the public’s interest in disseminating the information. Under § 107, a determination of fair use must include consideration of the following four factors:

1. The purpose and character of the use, including whether the use is of a commercial

nature or for nonprofit educational purposes;

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 on the potential market for, or value of, the copyrighted work.

These factors must be weighed together but are not exhaustive; instead, a court may consider additional factors to determine fair use. (*Campbell v. Acuff-Rose Music*, 510 U.S. 569, 577-78 (1994); *Fisher v. Dees*, 794 F.2d 432, 435 (9th Cir. 1986)). Applying the factors does not, however, produce any bright-line rules, because the doctrine requires a case-by-case approach requiring the analysis to be tailored to each specific set of facts. (*Harper & Row, Publishers v. The Nation Enterprises*, 471 U.S. 539, 552 (1985)). Although § 107 of the act does not expressly include the use of copyrighted works by governmental entities for informational purposes in public meetings as fair use, a number of cases tend to support the proposition. (*See, e.g., Jartech v. Clancy*, 666 F.2d 403 (9th Cir. 1982), cert. denied, 459 U.S. 826 (1982) (unauthorized reproduction of copyrighted work by a city council for a nuisance abatement proceeding constituted fair use; the work was not used for its “intrinsic” purpose); *Williams & Wilkins v. United States*, 487 F.2d 1345 (Ct. Cl. 1973) (fair use for a nonprofit governmental library to photocopy and distribute limited copies of research articles)).⁵



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Examining each of the four factors and corresponding case law can fill an entire treatise. The point to remember is that counsel should closely inspect any material that is submitted for a public meeting and is copyrighted (i.e., not in the public domain) to reasonably determine, whenever possible, whether the reproduction, distribution or display of the material falls within the fair use exception.

State Sovereign Immunity as a Defense to Copyright Infringement

Similar to the fair use doctrine, a thorough discussion of state sovereign immunity would be voluminous, even in the limited context of how such immunity may shield states from federal copyright lawsuits. In brief, the 11th Amendment cloaks the states with broad, but not absolute, immunity from lawsuits in federal court. (*See Nevada v. Hall*, 440 U.S. 410, 420 n. 19 (1979)).⁶ Because the power of the federal judiciary is limited under Article III of the Constitution, a state will not be subject to federal suit without first providing consent absent a valid abrogation by Congress of the state's immunity. (*See Green v. Mansour*, 474 U.S. 64, 68 (1985)). State consent to federal court actions may be accomplished by waiver of the privilege. Furthermore, Congress may abrogate state sovereign immunity under the 14th Amendment.⁷

Having already decided in *Seminole Tribe* that Congress could not abrogate a state's sovereign immunity pursuant to Article I powers, the

United States Supreme Court turned its attention to two companion cases in 1999, involving the protection of intellectual property rights and addressing Congressional abrogation of state sovereign immunity under the 14th Amendment.⁸ In *Florida Prepaid*, the court held that Congress' attempt to abrogate state sovereign immunity with respect to patent infringement through its enactment of the Patent Remedy Act was not a valid exercise of the §5 enforcement power of the 14th Amendment. While patents could be viewed as property within the meaning of the Due Process Clause, Congress failed to adequately consider whether alternative remedies to infringement were available under state law or provide any evidence of widespread deprivation of constitutional rights. In *College Savings Bank*, the court also concluded that Congress' attempt to abrogate state sovereign immunity as to trademark infringement under the Trademark Remedy Clarification Act was invalid under the 14th

Amendment. Furthermore, the court declined to find that Florida had implicitly waived sovereign immunity by engaging in federally regulated activities, because there had been no clear declaration by the state to waive its privilege. One year after these decisions, the Fifth Circuit reviewed Congress' removal of state sovereign immunity from copyright actions through the Copyright Remedy Clarification Act of 1990 and, relying heavily on *Florida Prepaid*, determined that this attempted abrogation was similarly invalid.⁹

To date, a state's sovereign immunity from federal copyright actions remains intact. Furthermore, because NRS 41.031(3) expressly reserves for Nevada "its immunity from suit conferred by Amendment XI of the Constitution of the United States," Nevada has not statutorily waived its sovereign immunity.¹⁰

Accordingly, even if the unauthorized use of copyrighted works

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by a Nevada state agency is not fair use, a federal copyright lawsuit against the agency should be precluded by the state's sovereign immunity. However, counsel wishing to assert the privilege should note that the 11th Amendment does not preclude suits for prospective or injunctive relief against state officials for continued violations of federal law. (*Ex Parte Young*, 209 U.S. 123 (1908)).

Conclusion

In sum, attorneys representing public bodies subject to the OML should carefully consider implications of the federal copyright laws before advising clients to reproduce, distribute or display copyrighted materials submitted for a public meeting, and may need to consider if such action is advisable at all. A legal quagmire may surface when counsel is required to balance dual compliance with Nevada's Open Meeting Law and the Copyright Act, but the potential pitfall in the OML that could lead to infringement lawsuits may be avoidable by first applying the fair use doctrine and asserting, when appropriate, the immunity defense. **NL**

1. NRS 241.016 exempts Nevada's Legislature, most judicial proceedings and certain types of meetings from the OML's requirements.
2. In comparison, Nevada's Public Record Law, codified in NRS chapter 239, expressly provides that its disclosure requirements for public books and records do "not supersede or in any manner affect the federal laws governing copyrights or enlarge, diminish or affect in any other manner the rights of a person in any written book or record which is copyrighted pursuant to federal law." NRS 239.010.
3. 17 USC §§ 102(a), 106(1)-(6) and 501.
4. 17 USC § 301.
5. In the notes accompanying § 107, Congress also explicitly recognized that reproducing a work in legislative proceedings should constitute a fair use "where the length of the work or excerpt published and the number of copies authorized are reasonable under the circumstances, and the work is directly relevant to a matter of legitimate legislative concern." (H.R. Rep. No. 94-1476 (1976)).
6. Eleventh Amendment immunity does not, however, extend to units of local government, including cities and counties. See *University of Alabama v. Garrett*, 531 U.S. 356 (2001); *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30 (1994).
 7. See *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) (holding that Congressional abrogation of state sovereign immunity pursuant to Article I, §8 of the Constitution was unconstitutional because the 11th Amendment was ratified after Article I, but suggesting that abrogation could be valid pursuant to the §5 enforcement power of the 14th Amendment).
 8. *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank*, 527 U.S. 627 (1999); *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999).
 9. *Chavez v. Arte Publico Press*, 204 F.3d 601 (5th Cir. 2000).
 10. Counsel should be mindful of cases holding certain state conduct to be a waiver of immunity. See, e.g., *Lapides v. Bd. of Regents of Univ. System of Georgia*, 535 U.S. 613 (2002) (removal from state court to federal court invokes federal jurisdiction); *Baum Research and Developmental Co. v. Univ. of Mass. at Lowell*, 503 F.3d 1367 (Fed. Cir. 2007) (waiver of sovereign immunity by consenting to federal jurisdiction pursuant to an enforceable contract).



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