

ADMINISTRATION OF GOVERNMENT GENERALLY: VIRGINIA FREEDOM OF INFORMATION ACT.

Audio tapes, lyric sheets, and other materials submitted to State Song Subcommittee in conjunction with 1998 State Song Competition constitute "official records" subject to Act's disclosure requirements. Copyrighted nature of work does not preclude reproduction and release in response to Freedom of Information Act request or other activity within exclusive rights granted under Copyright Act if copyright owner has given express or implied consent or if activity constitutes fair use of work. FOIA does not require reproduction and dissemination of copyrighted material that would violate federal copyright law. Copies of copyrighted works released by Subcommittee should include copy of copyright notice, or, if not apparent, cover letter notifying requester that work may be protected by copyright, and that permission should be obtained from copyright owner before making any further copies, public distribution or other copyright-protected use of work.

The Honorable Emmett W. Hanger Jr.

Member, Senate of Virginia

September 23, 1998

You inquire regarding application of The Virginia Freedom of Information Act¹ to submissions made by contestants to the 1998 State Song Competition.

You advise that 1998 House Joint Resolution 107 directs the Virginia Advisory Commission on Intergovernmental Relations (the "Commission") to establish a subcommittee to recommend a new state song.² You advise further that the Commission established the State Song Subcommittee ("Subcommittee") at its May 18, 1998, meeting.

You relate that the Subcommittee established a 1998 State Song Competition inviting individuals to submit entries for consideration. Such entries must include a completed and signed Official Entry Form, an audio cassette of the song, and a lyric sheet. Contestants are apprised by notation on the Official Entry Form that their songs may be reproduced for the judges of the competition. A release form, which apprises contestants that any song selected as one of the finalists in the competition will be posted on the Internet, must be signed by any and all songwriters who own the copyright to the song.³

You also advise that the Subcommittee anticipates that it will confront requests from the public and the media for copies of the materials submitted by contestants. Some of the materials are copyrighted and others are not.

You first inquire whether materials, such as audio tapes and lyric sheets, submitted to the Subcommittee in conjunction with the 1998 State Song Competition may be released under The Virginia Freedom of Information Act, and whether there is any distinction between copyrighted and noncopyrighted material.

The Virginia Freedom of Information Act establishes a general rule that all records of public bodies are open to inspection and copying by citizens of the Commonwealth, "[e]xcept as otherwise specifically provided by law."⁴ The Act contains a strong policy statement in favor of public access to government records, providing that "[a]ny exception or exemption from applicability *shall* be narrowly construed in order that no thing which should be public may be hidden from any person."⁵ The use of the word "shall" in a statute ordinarily implies that its provisions are mandatory.⁶

Section 2.1-341 of the *Code of Virginia*, a portion of The Virginia Freedom of Information Act, broadly defines the term "official records" to mean

all written or printed books, papers, letters, documents, maps and tapes, photographs, films, sound recordings, reports or other material, regardless of physical form or characteristics, prepared, owned, or in the possession of a public body or any employee or officer of a public body in the transaction of public business.

All official records are open for inspection and copying during regular office hours, unless otherwise specifically provided by law.⁷ The Freedom of Information Act does not require requests for official records to be made in writing or to mention the Act.⁸ One of the following responses to a request for official records must be made: (1) the public body must provide the official records to the requester within five work days, or if "practically impossible" to produce, or determine the availability of, such records within that period, the public body must so notify the requester and shall have seven additional work days within which to respond; or (2) if an exemption applies to *all*, or only to *some*, of the records, the public body must provide a written explanation describing why the records will not be produced, citing the applicable statutory exemption, and must provide the official records that are not segregatable due to the exemption.⁹

The Commission is a public body, subject to the Act's disclosure requirements.¹⁰ The definition of "official records" in the Act includes "sound recordings ... or other material, regardless of physical form or characteristics."¹¹ The Freedom of Information Act requires that "[a]ny exception or exemption from applicability shall be narrowly construed."¹² Consequently, I must conclude that the audio tapes, lyric sheets, and other materials submitted to the Subcommittee in conjunction with the 1998 State Song Competition clearly are "official records" under the Act.

Section 2.1-342(B) neither specifically exempts nor excepts such materials from disclosure pursuant to a request made under the Act. Consequently, you also inquire regarding any distinction between copyrighted and noncopyrighted material. For the purposes of this opinion, I shall assume that some of the material received by the Subcommittee is in the public domain and, therefore, clearly must be released, while other such material is protected by copyright. I note that persons who create original works of authorship generally enjoy copyright protection¹³ even if no copyright notice is affixed to such work.¹⁴

In the case of *Sony Corporation v. Universal City Studios, Inc.*,¹⁵ the Supreme Court of the United States notes that

[c]opyright protection "subsists ... in original works of authorship fixed in any tangible medium of expression." 17 U.S.C. § 102(a) (1982 ed.). This protection has never accorded the copyright owner complete control over all possible uses of his work. Rather, the Copyright Act grants the copyright holder "exclusive" rights to use and to authorize the use of his work in five^[16] qualified ways, including reproduction of the copyrighted work in copies. All reproductions of the work, however, are not within the exclusive domain of the copyright owner; some are in the public domain. Any individual may reproduce a copyrighted work for a "fair use";^[17] the copyright owner does not possess the exclusive right to such a use.

"Anyone who violates any of the exclusive rights of the copyright owner," that is, anyone who trespasses into his exclusive domain by using or authorizing the use of the copyrighted work in one of

the five^[18] ways set forth in the statute, "is an infringer of the copyright." § 501(a). Conversely, anyone who is authorized by the copyright owner to use the copyrighted work in a way specified in the statute or who makes a fair use of the work is not an infringer of the copyright with respect to such use.^[19]

Therefore, the copyrighted nature of a work does not preclude reproduction and release in response to a Freedom of Information Act request or other activity within the exclusive rights granted under the Copyright Act if the copyright owner has given his express or implied consent or if the activity constitutes a fair use of the work.²⁰

Whatever presumption of consent that might arise under ordinary circumstances from a copyright owner's submission of original work as part of the documentation of a public body's transaction of public business, for purposes of this opinion, I shall assume that the Subcommittee has entered into a contract with the copyright owner specifying that copies of material submitted for the competition may be made only for the judges, unless the work is selected as a finalist. The Subcommittee may, of course, choose to contact the copyright owners for a broader consent.²¹

The Subcommittee may choose not to contact the copyright owner if it determines that certain requests for materials will be for purposes that constitute a "fair use." Such a determination will, however, depend on the facts and circumstances of the individual requests.²² The Freedom of Information Act does not require reproduction and dissemination under circumstances that would violate the Copyright Act.²³

Your final inquiry concerns the question of responsibility the Subcommittee may have, if any, regarding the use by entities to whom the contestants' materials have been released, if such materials are subject to disclosure under The Virginia Freedom of Information Act.

For purposes of this inquiry, I shall assume that the Subcommittee has obtained a copyright owner's consent to release a copy of the work or that the Subcommittee has determined such release to be a "fair use" that is authorized by the Copyright Act.²⁴ Copies that are released should include a copy of a notice of copyright. If such notice is not apparent, it would be advisable to include a cover letter or other form of notification to the requester that the work may be protected by copyright, and that permission should be obtained from the copyright owner before making any further copies, public distribution or other copyright-protected use of the work.

¹Va. Code. Ann. §§ 2.1-340 to 2.1-346.1.

²"As part of its responsibilities, the Commission shall establish a subcommittee to make a recommendation for a new official state song, which among other things invokes visual images of the historic, natural and scenic beauty that the Commonwealth's citizens celebrate....

"The Commission shall complete its work in time to submit its findings and recommendations to the Governor and the 1999 Session of the General Assembly as provided in the procedures of the Division of Legislative Automated Systems for the processing of legislative documents." 1998 Va. Acts H.J. Res. 107.

³You have provided copies of (1) the Commission's "1998 Virginia State Song Competition Official Entry Form"; (2) the Commission Secretary's August 17, 1998, memorandum acknowledging receipt of contestants' 1998 State Song Competition entries; and (3) the Commission's "1998 State Song Competition Internet Release Form."

⁴Section 2.1-342(A).

⁵Section 2.1-340.1 (emphasis added).

⁶See *Andrews v. Shepherd*, 201 Va. 412, 414-15, 111 S.E.2d 279, 282 (1959) ("shall" in statute indicates legislative intent to impose imperative duty); see also *Schmidt v. City of Richmond*, 206 Va. 211, 218, 142 S.E.2d 573, 578 (1965); Op. Va. Att'y Gen.: 1997 at 16, 17; 1996 at 20, 21; 1991 at 126, 126.

⁷Section 2.1-342(A).

⁸*Id.*

⁹Section 2.1-342(A)(1)-(4).

¹⁰Section 2.1-341 (defining "public body").

¹¹*Id.*

¹²Section 2.1-340.1.

¹³See 17 U.S.C.A. § 102(a) (West 1996).

¹⁴See 17 U.S.C.A. § 401 (West 1996) (stating that "a notice of copyright ... may be placed on publicly distributed copies from which the [copyrighted] work can be visually perceived").

¹⁵464 U.S. 417 (1984).

¹⁶The Copyright Act currently sets forth six exclusive ways for copyright owners to authorize the use of their work. Under the Act, a copyright owner has authority

"(1) to reproduce the copyrighted work in copies or phonorecords;

"(2) to prepare derivative works based upon the copyrighted work;

"(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

"(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;

"(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and

"(6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission." 17 U.S.C.A. § 106 (West 1996 & Supp. 1998).

¹⁷"In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

"(1) the purpose and character of the use, including whether such use is of a commercial nature or is 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 upon the potential market for or value of the copyrighted work."
17 U.S.C.A. § 107 (West 1996).

¹⁸ See *supra* note 16.

¹⁹ 464 U.S. at 432-33 (citations omitted) (footnotes omitted).

²⁰ Compare 17 U.S.C.A. § 106 with § 107 (West 1996).

²¹ This may be the most reliable course to avoid potential liability for violation of any copyrights for handling the requests that you anticipate receiving.

²² See *supra* note 17.

²³ See § 2.1-342(A) (providing for inspection and copying of official records, "[e]xcept as otherwise specifically provided by law").

²⁴ I assume also that your release of the copy is not with the knowledge that the recipient intends to infringe the copyright. Release under such circumstances could result in liability as a "contributory" infringer. See *Gershwin Publishing Corp. v. Columbia Artists Man., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971) (noting that one who has knowledge of infringing activity, and induces, causes or materially contributes to infringing conduct of another, may be liable as "contributory" infringer).