COPYRIGHT LAW AND YOUR NEIGHBORHOOD BAR AND GRILL: RECENT DEVELOPMENTS IN PERFORMANCE RIGHTS AND THE SECTION 110(5) EXEMPTION

David E. Shipley*

"Papa Joe's" was a typical student hangout, near the campus of a major university. Although the place was inexpensive and had ample supplies of beer and food, business was hurting. The owner, Joe, suddenly got a bright idea. He rented a wide-screen television from a local store, attached his own video-cassette recorder (VCR) and brought in videocassettes of a couple of movies he had taped at home from Home Box Office (HBO), and Cinemax broadcasts. When the lunch-time crowd came in, he turned down the lights, pulled the plug on the juke box and put on his tape of "Animal House." Most of that crowd stayed around watching the movie into the early afternoon. Joe sold a lot of beer and ran out of popcorn and peanuts. Later that afternoon Joe played his tape of "The Big Chill" and several groups of students went through three or four pitchers of beer. The following day Joe placed an ad promoting his movies in the student newspaper and rented several movies on videocassettes from a local video emporium. Within a week Papa Joe's was one of the most popular places on campus. He was showing movies almost constantly from noon until closing time and his food and beverage sales increased.

Joe was just about to buy his own wide-screen television when he received a letter from a local attorney representing Columbia Pictures, Paramount, Twentieth Century Fox and Universal Studios telling him that these companies owned the copyrights to several of the films he had shown and that his unauthorized public showings of these movies infringed their rights. The letter demanded that he stop showing the movies and warned that the companies would sue him if the practice continued. Joe could not believe it. He always paid the rental fee on the videocassettes to the local video rental store, he was not charging admission, and the majority of his customers paid to see these movies when they were first exhibited at theaters. He felt that the producers and studios did not need to be paid again. Does Joe have a legal right to show the films?

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* J.D., The University of Chicago. Visiting Professor of Law, Ohio State University College of Law. Professor of Law, University of South Carolina School of Law.

This hypothetical scenario is not far-fetched. Videocassette recorders, cable television and satellite dishes enable all of us to enjoy much greater access to movies and television programs than ever before. Hotels and motels, which once only had televisions capable of receiving network programs broadcast locally, now offer cable TV with HBO and other pay channels. Many apartment buildings and condominiums have cable television hookups available to their residential units and some establishments have installed their own satellite dish antennae or "earth stations." Also, many restaurants, bars, lounges and other commercial establishments have televisions or sound systems which provide entertainment for their patrons and customers.

Although most members of the viewing and listening public are probably pleased with these developments, they are a source of concern for the owners of the copyrights in the works which are being shown and heard. One of the most valuable rights granted by the Copyright Act is the exclusive right to control public performances of a work of authorship.[1] All works, except for sound recordings and pictorial, graphic and sculptural works,[2] are protected by this right, but it is not unlimited.[3] Sections 110, 111 and 118 of the 1976 Act contain a variety of restrictions on the copyright owner's rights that exempt performances of certain types of works in particular circumstances.[4] In addition, the Act's definitions of "perform" and "public" fix some limitations on the scope of this important right.[5]

The 1976 Act resolves a number of issues the courts grappled with when they interpreted and applied the performance right granted by the 1909 Act,[6] but this new statute generates its own set of difficult problems of interpretation for the courts and counsel.[7] These problems are made more complex by the advent of new technology. For instance, a small establishment like Papa Joe's could have an ordinary television tuned to the broadcasts of the local affiliate of NBC or another major network without infringing anyone's performance rights. Once he augments his standard television with a VCR and starts showing videocassettes, however, chances are he is outside any of the Act's exemptions even though his viewing audience stays the same.[8] The law must seem arbitrary to people like Joe. It is a challenging mix of definitions, rights, limitations and exemptions with which

1. Pub. L. No. 94-553 (Oct. 19, 1976), *codified at* 17 U.S.C. §§ 101 *et seq.* [hereinafter the 1976 Act or the new Act]. *See* 17 U.S.C. § 106(4) (1982) (the public performance right).

2. 2 M. NIMMER, NIMMER ON COPYRIGHT § 8.14[A] at 8-135 (1986).

3. Korman, *Performance Rights in Music Under Sections 110 and 118 of the 1976 Copyright Act*, 22 N.Y.L. SCH. L. REV. 521 (1977).

4. 17 U.S.C. §§ 110, 111 & 118 (1982).

5. *Id.* at § 101 (definitions of "perform" and "public performance").

6. *See generally* H.R. Rep. No. 1476, 94th Cong., 2nd Sess. 62-65, *reprinted in* 1976 U.S. Code Cong. & Admin. News 5659, 5677-78 [hereinafter H. Rep.].

7. *See, e.g.*, 2 M. NIMMER, *supra* note 2, § 8.14[C] at 8-137; *cf.* Kernochan, *Music Performing Rights Organizations in the United States of America: Special Characteristics, Restraints, and Public Attitudes*, 10 COLUM. J.L. & ARTS 333, 363-64 (1986). *See also id.* at 373 (The American Society of Composers, Authors and Publishers (ASCAP) reported that 751 matters were referred to counsel for action in 1984—an increase from 304 matters in 1974—and most of these involve infringement suits against non-broadcaster users like taverns, bars and restaurants).

8. 17 U.S.C. § 110(5) (1982); H. Rep. *supra* note 6, at 86. *Cf.* Columbia Pictures Indus. v. Redd Horne, Inc., 568 F. Supp. 494 (W.D. Pa. 1983), *aff'd*, 749 F.2d 154 (3d Cir. 1973).

the bench and bar must deal.[9]

This Article attempts to clarify the chaotic state of the law concerning performance rights. First, it briefly summarizes the history of this right and discusses some of the problems Congress sought to resolve when it passed the 1976 Act. Second, it outlines several of the Act's key provisions on the performance right. Finally, it discusses the recent decisions which have interpreted these provisions and analyzes their impact on the activities of commercial establishments like Papa Joe's. These decisions show that the pertinent sections of the 1976 Act provide reasonably clear guidelines outlining the ways in which copyrighted works can be publicly performed or exhibited without fear of infringement.

THE HISTORY OF THE PERFORMANCE RIGHT IN A NUTSHELL

Congress granted copyright owners the right to control public performances of dramatic compositions in 1856 and the right was extended to musical works in 1897.[10] Infringers could be liable for damages of not less than $100 for the first unauthorized performance and $50 for every subsequent unauthorized performance. If the challenged performance was found to be "willful and for profit," the infringer would be guilty of a misdemeanor punishable by up to one year imprisonment.[11] The 1897 statute was, however, rarely enforced by copyright owners since they believed that performances would stimulate sales of sheet music, the major source of revenue for composers at that time.[12] There was also concern that an unlimited right would subject performances at churches and schools to civil, and possibly criminal, liability.[13]

A comprehensive revision of the copyright law was enacted in 1909. That statute imposed limitations on the criminal sanctions[14] and restricted the right to control the public performance of nondramatic musical works to performances made "for profit."[15] Owners of copyright in dramatic works, however, were granted the exclusive right to control any public performance, regardless of whether or not it was for profit.[16]

Composers soon asserted their rights more aggressively and the scope of the "for profit" limitation was quickly tested in the courts. In *Herbert v. Shanley Co.*[17] the plaintiff alleged that an orchestra employed by the defend-

9. *Cf.* Kernochan, *supra* note 7, at 370, 374.

10. Act of August 18, 1856, ch. 169, 11 Stat. 138-39 (1856); Act of January 6, 1897, ch. 4, 29 Stat. 481 (1897). *See generally* Kernochan, *supra* note 7, at 336-37.

11. Act of January 6, 1897, ch. 4, 29 Stat. 481. Rev. Stat. § 4966.

12. A. LATMAN, THE COPYRIGHT LAW: HOWELL'S COPYRIGHT LAW REVISED AND THE 1976 ACT, 182 (5th ed. 1979); Korman, *supra* note 3, at 523.

13. Korman, *supra* note 3, at 523-24.

14. Congress limited criminal liablity to persons who knowingly aided or abetted an infringing performance. Korman, *supra* note 3, at 524.

15. *Id.*; 17 U.S.C. § 1(c)—(e) (1970) (1909 Act).

16. 17 U.S.C. § 1(d) (1970) (the performance right for dramatic works did not have the "for profit" limitation). When performing rights were extended to nondramatic literary works in 1952, the "for profit" limitation was imposed on them as well. Kernochan, *supra* note 7, at 337. *See also* 2 M. NIMMER § 8.15[A] at 8-144.2 (explaining the rationale for the distinction between the scope of the performance right for dramatic works in section 1(d) and for nondramatic musical and literary works in sections 1(c) and (e)).

17. 242 U.S. 591 (1917).

ant hotel infringed his copyrighted march when the orchestra performed it in the establishment's dining room for the entertainment of the patrons. Plaintiff argued that this was a performance for profit even though the hotel did not charge the customers an admission fee to hear the orchestra.[18] The Supreme Court agreed that this was a public performance for profit:

> If the rights under the copyright are infringed only by a performance where money is taken at the door they are very imperfectly protected. . . . It is enough to say that there is no need to construe the statute so narrowly. The defendants' performances are not eleemosynary. They are part of a total for which the public pays, and the fact that the price of the whole is attributed to a particular item which those present are expected to order is not important. . . . If music did not pay it would be given up. If it pays, it pays out of the public pocket. Whether it pays or not, the purpose of employing it is profit and that is enough.[19]

The federal courts subsequently applied the *Shanley* opinion's narrow reading of the "for profit" limitation in a variety of situations so that it became clear that incidental performances of music in restaurants, theaters, dance halls, hotels and on the radio were actionable infringements unless licensed. Copyright owners were able to control radio broadcasts which carried advertising as well as performances broadcast by a hotel to its guests' rooms even though there was no direct charge for that service.[20] The right was extended to cover performances by private nonprofit organizations which charged fees or tuition to meet expenses.[21] Similarly, a court held

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18. *Id.* at 593-94.

19. *Id.* at 594-95. A companion case involved professional singers, accompanied by an orchestra, who performed songs from plaintiff's comic opera while restaurant customers enjoyed their meals. This also was held to be a "for profit" performance even though the customers were not charged admission. The *Shanley* decision, with its approval of a compensable nondramatic performance right in a song and its expansive definition of when a "for profit" performance occurred, was an important development for copyright owners. It was applauded by the American Society of Composers, Authors and Publishers (ASCAP) which had backed the plaintiffs up to the Supreme Court. ASCAP had been founded in 1914 by, among others, the composer Victor Herbert, one of the plaintiffs in the *Shanley* case. This organization of copyright proprietors, which monitors, licenses and enforces its members' performance rights, was set up as a practical solution to the difficulties an individual copyright owner faces in trying to keep track of and police the many public performances of his work around the nation. A. LATMAN, *supra* note 12, at 183. ASCAP auditors listen to performances at public places like hotels, restaurants, and theaters. If a composition controlled by ASCAP as licensee is performed, then the establishment is warned of the possibility of an infringement suit and informed that it can purchase a license covering the ASCAP repertory. *Id.* ASCAP also monitors broadcasters and it has litigated many of the most important cases involving the performance right. It fought to establish the principle that public performances of protected nondramatic musical works for profit must be paid for. The other two major performing rights societies are the Society of European Stage Author and Composers (SESAC) and Broadcast Music, Inc. (BMI). ASCAP's and BMI's licensing practices and fee structures have been frequently attacked by broadcasters and others as violating the antitrust laws. *See, e.g.*, Broadcast Music, Inc. v. Columbia Broadcasting System, 441 U.S. 1 (1979) (blanket license not a per se violation of § 1 of the Sherman Act; the case was remanded so licensing practices could be analyzed under rule of reason). *See generally* A. LATMAN, R. GORMAN & J. GINSBURG, *Copyright for the Eighties* 383, 426-29 (2d ed. 1985); Kernochan, *supra* note 7, at 337-343.

20. M. Witmark & Sons v. L. Bamberger & Co., 291 F. 776 (D.N.J. 1923); Society of European Stage Authors & Composers v. N.Y. Hotel Statler Co., 19 F. Supp. 1 (S.D.N.Y. 1937) (performances need not be live to be for profit).

21. M. Witmark & Sons v. Tremont Social and Athletic Club, 188 F. Supp. 787 (D. Mass. 1960); Mills Music, Inc. v. Arizona, 187 U.S.P.Q. 22 (D. Ariz. 1975), *aff'd*, 591 F.2d 1278 (9th Cir.

that performances by a radio station operated by a nonprofit corporation for charitable purposes were "for profit" when the station allotted one-third of its programs to paying advertisers in order to support the remaining broadcast time for its sustaining programs.[22] That court stated:

> It can make no difference that the ultimate purposes of the corporate defendant were charitable or educational. Both in the advertising and sustaining programs [the defendant] was engaged in an enterprise which resulted in profit to the advertisers and to an increment to its own treasury whereby it might repay its indebtedness . . . and avoid an annual deficit.[23]

There was also litigation over when a performance was rendered "publicly." The courts had difficulty resolving whether performances before private groups consisting of a substantial number of persons infringed the copyright owner's rights. One court held that a performance made in a private club where only members and their invited guests were gathered was not public.[24] In contrast, if the private club did not place effective restrictions on attendance by uninvited members of the public at large, then the performances would be public and subject to control by the copyright owner.[25] The courts were, however, uncertain whether they should treat a performance before a restricted, private group as "public" for copyright purposes if that group was of a substantial size.[26]

Nevertheless, the courts did not have difficulty deciding that the performance right covered publicly played sound recordings embodying performances[27] as well as radio broadcasts of such performances, even though radio had not been developed at the time Congress passed the Act.[28] The broadcast of a live or recorded performance of a copyrighted musical work

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1979). *See also* M. Witmark & Sons v. Pastime Amusement Co., 298 F. 470 (E.D.S.C.), *aff'd*, 2 F.2d 1020 (4th Cir. 1924); Dreamland Ball Room, Inc. v. Shapiro, Bernstein & Co., 36 F.2d 354 (7th Cir. 1929).

22. Associated Music Publishers v. Debs Memorial Radio Fund, 141 F.2d 852, 854 (2d Cir. 1944), *cert. denied*, 323 U.S. 766 (1944). Twenty years earlier a federal court held that a radio broadcast of a copyrighted work was a public performance for profit when an advertisement for the program's sponsor marked the beginning and the end of the show. M. Witmark & Sons v. L.. Bamberger & Co., 291 F. 776 (D.N.J. 1923).

23. *Debs*, 141 F.2d at 855.

24. Metro-Goldwyn-Mayer Distrib. Corp. v. Wyatt, 21 C.O. Bull. 203 (D. Md. 1932) (the club's membership was exclusive).

25. Lerner v. Club Wander In, Inc., 174 F. Supp. 731 (D. Mass. 1959) (performances were open to the public provided patrons met standards for appearance and behavior); Broadcast Music, Inc. v. Walters, 181 U.S.P.Q. 327 (N.D. Okla. 1973) (3500 members in a club without printed rules, constitution, by-laws, membership screening committee, dues, or fees); M. Witmark & Sons v. Tremont Social & Athletic Club, 188 F. Supp. 787 (D. Mass. 1960) (200 to 300 members in club without printed membership application, no restrictions placed on admission, and the manager acted as the membership committee).

26. *See* 2 M. NIMMER, *supra* note 2, § 8.14[C] at 8-138. Some courts held that performances in such situations were public. *See, e.g.*, Lerner v. Schectman, 228 F. Supp. 354 (D. Minn. 1964) (2400 member club organized for owner's profit and although it was open only to members, almost any person with good appearance and credit could join upon paying the application fee); Porter v. Marriott Motor Hotels, 137 U.S.P.Q. 473 (N.D. Tex. 1962) (club maintained by hotel for lodgers and their guests was a public place).

27. Irving Berlin, Inc. v. Daigle, 31 F.2d 832 (5th Cir. 1929); 17 U.S.C. § 1(c)(d) & (c) (1909 Act); 2 M. NIMMER, *supra* note 2, § 8.18[A] at 8-183.

28. Puffer, *The Supreme Court and Copyright Liability for Retransmissions of TV and Radio Signals: A Dubious Performance*, 26 ASCAP COPYRIGHT L. SYMP. 127, 130 (1981).

to an unrestricted but geographically dispersed group is a public performance; the listening audience does not have to be physically assembled in one place. Although a broadcast is received in private homes, it is public because it is available to a substantial but scattered audience made up of members of the general public.[29]

The Supreme Court's decision in *Buck v. Jewell-LaSalle Realty Company*[30] expanded the scope of the performance right. It created the "multiple performance" doctrine. Under this doctrine a performance occurs when a broadcast of a performance (a radio program) is simultaneously communicated (retransmitted) in a public place by means of a receiving apparatus.[31] The defendant in *Jewell-LaSalle* operated a hotel equipped with a master radio receiver wired to speakers in each of the public and private rooms. This equipment enabled the hotel's guests to hear radio broadcasts throughout the premises. A copyrighted song was broadcast without authorization by a local radio station and it was received and simultaneously retransmitted by the hotel. The plaintiffs sued the station and the hotel operator for infringement; the trial court entered a decree against the radio station for failing to respond,[32] but the suit against the hotel went forward. The Eighth Circuit eventually certified the following question to the Supreme Court:

> Do the acts of a hotel proprietor, in making available to his guests, through the instrumentality of a radio receiving set and loudspeakers installed in his hotel and under his control and for the entertainment of his guests, the hearing of a copyrighted musical composition which has been broadcast from a radio transmitting station, constitute a performance of such composition within the meaning of 17 U.S.C. Sec. 1(e)?[33]

The Court's unanimous answer was "yes." The rationale for its conclusion that the defendant's acts constituted a performance simultaneous with the radio station's performance (broadcast) was based in part on an analogy to phonograph records: radio broadcasts require the receiving apparatus to be operated in order to make the broadcast audible, just as a record has to be played on a phonograph so that the composition it embodies can be heard; the reproduction of the original program in both situations amounts to a performance.[34] The Court also held it was immaterial that the hotel operator had no knowledge of what music the radio station would broadcast since

29. Jerome H. Remick & Co. v. American Auto. Accessories, 5 F.2d 411, 412 (6th Cir. 1925), *cert. denied*, 269 U.S. 556 (1925); Jerome H. Remick & Co. v. General Electric, 16 F.2d 829 (S.D.N.Y. 1926). *See also* Harms, Inc. v. Sansom House Enter. Inc., 162 F. Supp. 129 (E.D. Pa. 1958), *aff'd sub nom.* Leo Feist, Inc. v. Lew Tendler Tavern, Inc., 267 F.2d 494 (3d Cir. 1959); 2 M. NIMMER, *supra* note 2, §8.14[c] at 8-140; Comment, *"Watts" the Perimeter of the Doctrine of the Communication of a Radio Broadcast under Section 110(5) of the 1976 Copyright Act?*, 55 TEMP. L.Q. 1056, 1064 (1982).

30. 283 U.S. 191 (1931).

31. Cash, *Sailor Music: Exposing the Gaps in 17 U.S.C. § 110(5)*, 9 RUTGERS COMPUTER & TECH. L.J. 133, 137 (1982); Comment, *supra* note 29, at 1065. If such public retransmissions of broadcasts are unauthorized and for profit, then performance rights are violated.

32. *Jewell-LaSalle*, 283 U.S. at 195. *See also* Buck v. Duncan, 32 F.2d 366 (W.D. Mo. 1929) (a decree *pro confesso* was entered against the station).

33. *Jewell-LaSalle*, 283 U.S. at 195-96. The lower court had determined that the hotel's actions were public and for profit.

34. *Id.* at 200-02. *See also* Puffer, *supra* note 28, at 132.

the copyright statute did not require an intention to infringe.[35] The Court regarded the hotel's conduct in furnishing music to its guests by means of a radio set and speakers as substantially the same as engaging an orchestra to play live music for their entertainment; "[i]n each the music is produced by instrumentalities under its control."[36]

Copyright owners subsequently asserted that the courts should treat an establishment's commercial reception and distribution of a radio station's licensed broadcast, a secondary transmission, as an infringing public performance for profit, just like the LaSalle Hotel's reception and distribution of an unlicensed broadcast.[37] In response to a footnote in *Jewell-LaSalle*[38] they argued that a radio station's license to perform copyrighted works did not run in favor of persons picking up the broadcast. The standard ASCAP broadcast license soon included an express provision to that effect.[39] Thus, anyone who played a radio in public for commercial advantage ran the risk of infringing performance rights unless they obtained licenses from the owners of the copyright in the various works being broadcast.[40]

For over thirty years *Jewell-LaSalle* stood for the proposition that a single rendition of a work can give rise to more than one performance; a performance occurred whenever a broadcast was simultaneously retransmitted and communicated to the public by means of a receiving apparatus. In essence, a radio station performs when it broadcasts a copyrighted song, and a retail store equipped with a radio and speakers simultaneously performs that song when it tunes its radio to that station and makes the broadcast audible to its customers. With the advent of cable television (CATV) in the

35. Buck v. Jewell-LaSalle Realty Company, 283 U.S. 191, 198-99 (1931).

36. *Id.* at 201. On remand the court held that the hotel's action constituted a public performance for profit. 51 F.2d 726 (8th Cir. 1931). *See also* 2 M. NIMMER, *supra* note 2, § 8.18[A] (pointing out flaws in the Supreme Court's analysis).

37. Society of European Stage Authors & Composers, Inc. v. New York Hotel Statler Co., 19 F. Supp. 1 (S.D.N.Y. 1937).

38. *Jewell-LaSalle*, 283 U.S. at 199 n.5. The Supreme Court did not say what would have happened if the original radio broadcast had been licensed. A footnote suggested, however, that if the station's broadcast had been made with plaintiff's consent (under an ASCAP license) then a license for the commercial reception and distribution of the broadcast by the hotel might have been implied. The Court cited *Buck v. Debaum*, 40 F.2d 734 (S.D. Cal. 1929) for this proposition. This case involved a cafe owner whose radio received a licensed broadcast of copyrighted music and the court seemed to fashion an implied license theory to excuse the defendant's retransmission of the broadcast signals. *Id.* at 736. The decision also appeared to hold that the cafe owner was not performing when he made the broadcasts audible to his patrons, *id.* at 735, but that aspect of the decision seemed to have been overruled by *Jewell-LaSalle*. Puffer, *supra* note 28, at 132 nn.24 & 25. Nevertheless, since the station in *Jewell-LaSalle* was not licensed, the hotel's position was similar to one who performs an unlicensed phonograph record publicly for profit. 283 U.S. at 199 n.5. *See also* A. LATMAN, *supra* note 12, at 187.

39. A. LATMAN, *supra* note 12, at 187. The decision was the basis for ASCAP's licensing of commercial establishments which used radio broadcasts over loudspeakers. ASCAP did not, however, attempt to license small establishments of the "Mom and Pop" variety which used only home-type radios and no loudspeakers. Brief for Petitioners at 8, 9, Twentieth Century Music Corp. v. Aiken, 422 U.S. 151 (1975). The exemptions in the early versions of the bill that became the 1976 Act recognized differences between large and small establishments for purposes of liability for their unauthorized transmissions of broadcasts. S. 1361, S. Rep. No. 383, 93d Cong. 2d Sess. 130 (1974) [hereinafter S. Rep.]. *See also* Korman, *supra* note 3, at 528 & n.32.

40. Cash, *supra* note 31, at 137; A. LATMAN, *supra* note 12, at 186-87. *See generally* Comment, *Copyrights and TV—A New Use for the Multiple Performance Theory*, 18 U. CHI. L. REV. 757 (1951).

1960s, copyright owners argued that the *Jewell-LaSalle* multiple performance doctrine applied so that CATV systems performed when they received and retransmitted broadcasts of copyrighted television programs to their subscribers.[41]

The lower courts accepted this argument in *Fortnightly Corp. v. United Artists Television*, but the Supreme Court reversed.[42] The Court's analysis distinguished between the functions of broadcasters and viewers: broadcasters necessarily perform while the viewing audience merely receives the performance. It determined that the defendant CATV system fell on the viewer's side of the line between broadcasters and viewers because it did no more than merely enhance a viewer's capacity to receive the original broadcaster's signals. Thus, there was no infringement because the functioning of the CATV system did not constitute a performance.[43] The Court regarded *Jewell-LaSalle* as a questionable 35-year-old decision limited to situations where the original broadcast as unauthorized.[44] In contrast, Justice Fortas argued in dissent that interpretation of the term performance could not turn on whether the material used was unauthorized or licensed.[45] In a subsequent CATV case, *Teleprompter Corp. v. Columbia Broadcasting System*,[46] the Court also held that a cable system was not performing even though it did more than enhance its subscribers ability to receive local signals; it brought in distant signals not otherwise receivable by viewers in the area.[47] Without even mentioning *Jewell-LaSalle*, the Supreme Court said that this CATV system's operation was "essentially a viewer function, irrespective of the distance between the broadcasting station and the ultimate viewer."[48]

One year after the *Teleprompter* decision the Supreme Court applied the viewer/broadcaster dichotomy to a situation similar to *Jewll-LaSalle* except that the radio station's broadcast of copyrighted music was licensed. The defendant in *Twentieth Century Music v. Aiken*[49] operated a small fast-food restaurant equipped with a radio wired to four speakers mounted in the ceiling. He regularly tuned in a local station's broadcasts for the entertainment of his employees and customers. Several of the plaintiff's copyrighted songs were played by that station under a broadcast license and simultaneously received and retransmitted by Aiken. The plaintiff argued that the multiple performance doctrine of *Jewell-LaSalle* governed so that Aiken had in-

41. Korman, *supra* note 3, at 529. A cable system intercepts television broadcast signals, converts them to different frequencies and then transmits the signals to the homes of its customers.

42. United Artists Television, Inc. v. Fortnightly Corp., 255 F. Supp. 177 (S.D.N.Y. 1966), *aff'd*, 377 F.2d 872 (2d Cir. 1967), *rev'd*, 392 U.S. 390 (1968).

43. *Fortnightly*, 392 U.S. at 398-402. Although reception was poor, some subscribers could receive the signals without the CATV cables. *Id.* at 392.

44. *Id.* at 401 n.30 and 396 n.18.

45. *Id.* at 406 n.5.

46. 415 U.S. 394 (1974).

47. The Second Circuit found that this distinguished the CATV system in *Teleprompter* from the one in *Fortnightly*, so it held that the defendant system was on the broadcasting side of the line and thus performing. *Columbia Broadcasting System v. Teleprompter Corp.*, 476 F.2d 338 (2d Cir. 1973). The Supreme Court disagreed and reversed.

48. 415 U.S. at 408; A. LATMAN, *supra* note 12, at 188, Korman, *supra* note 3, at 529; Puffer, *supra* note 28, at 133-35.

49. 422 U.S. 151 (1975).

fringed by making unlicensed public performances for profit.[50] The district court ruled for the plaintiff[51] but the Third Circuit reversed.[52] The court of appeals agreed that *Jewell-LaSalle* was directly on point but said the old decision had been impliedly overruled by the Supreme Court's cable television decisions.[53] In essence, Aiken was not performing because he fell on the viewer/listener side of the line.[54] The Supreme Court affirmed, basing its analysis on the viewer/broadcaster dichotomy.[55] Aiken did not, therefore, perform copyrighted works by playing music over his restaurant's radio. *Jewell-LaSalle* was not explicitly overruled; rather, the Court expressly stated that it should be strictly limited to its facts.[56]

Jewell-LaSalle had become a decision with a very limited impact; a commercial establishment like Aiken's restaurant would be liable only if the initial broadcast it communicated to the public was unlicensed, an unlikely situation.[57] If the initial radio broadcast was licensed, then the establishment's proprietor was not "performing" when he turned on his radio for the entertainment of his patrons and employees. The demise of *Jewell-LaSalle* was, however, short-lived. Congress had been working on a comprehensive revision of the 1909 Act since the early 1960s[58] and the new Act, which passed in 1976,[59] addresses the *Aiken* situation and the *Jewell-LaSalle* multiple performance doctrine.[60] In addition, it has provisions dealing with a variety of other issues including: the transmission of copyrighted works by CATV systems; problems relating to the "for profit" limitation; and uncertainty about what is and is not a public performance.

PUBLIC PERFORMANCE UNDER THE 1976 ACT

Section 106 of the 1976 Act provides, subject to the limitations found in sections 107 to 118, that the owner of the copyright in "literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audio-visual works" has the exclusive right "to perform the copyrighted work publicly."[61] Several of the key terms in this broad grant are defined in section 101. A work is performed when it is recited, played, ren-

50. *Id.* at 152-53 and 157.
51. 356 F. Supp. 271 (W.D. Pa. 1973). *See* Puffer, *supra* note 28, at 136.
52. Twentieth Century Music Corp. v. Aiken, 500 F.2d 127 (3d Cir. 1974).
53. *Id.* at 135.
54. *Id.* at 137.
55. 422 U.S. 151, 157-60, 161, 164. *Fortnightly* and *Teleprompter* were dispositive. The Court also reasoned that to hold that Aiken was performing "would be both wholly unenforceable and highly inequitable." *Id.* at 162.
56. *Id.* at 160. Unlike the station whose broadcasts had been retransmitted by the defendant hotel in *Jewell-LaSalle*, the station in *Aiken* held an ASCAP license. That license expressly negated any implied license to persons picking up the broadcast, but the Court did not hold him liable for infringement. *Id.* at 159. He was not performing. Justice Blackmun's concurring opinion urged the Court to overrule *Jewell-LaSalle. Id.* at 167.
57. 2 M. NIMMER, *supra* note 2, § 8.18[A] at 8-194-95; Cash, *supra* note 31, at 139; A. LATMAN, *supra* note 12, at 189.
58. Cash, *supra* note 31, at 133 & nn.4 & 5.
59. Pub. L. No. 94-553, 90 Stat. 2541 (October 19, 1976). For the most part, the new Act went into effect on January 1, 1978. 17 U.S.C. § 302(a) (1982).
60. *See, e.g.*, 17 U.S.C. §§ 110(5), 111(a)(1) (1982).
61. 17 U.S.C. § 106(4) (1982).

dered, danced or acted "either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work," when its images are shown in any sequence or when its accompanying sounds are made audible.[62] For example, one performs a work under this definition when he plays a recording of a song on a phonograph or when he plays a tape of a movie on a VCR. A singer performs when he sings a song, and a broadcaster performs when it transmits a live performance or one embodied on a record or tape.

Moreover, the Act's definitions clarify the status of secondary transmissions and overturn the legal basis for the *Aiken, Fortnightly* and *Teleprompter* rulings.[63] The House Report explains:

> Under the definitions . . . the concepts of public performance and public display cover not only the initial rendition or showing, but also any further act by which that rendition or showing is . . . communicated to the public. Thus, for example: . . . any individual is performing whenever he or she plays a phonorecord embodying the performance or *communicates the performance by turning on a receiving set.*[64]

Thus, multiple performances of a work occur simultaneously whenever a radio broadcast is transmitted, tuned in and heard by its listeners.[65] Any act by which an initial performance is transmitted is a performance under the 1976 Act; a performance is transmitted when it is communicated "by any device or process whereby images or sounds are received beyond the place from which they are sent."[66] This conception of performance codifies the *Jewell-LaSalle* doctrine and abolishes the broadcaster function/viewer function dichotomy utilized by the Supreme Court in *Aiken* and the CATV cases.[67]

This does not mean, however, that turning on a radio or playing a stereo at home are subject to control by copyright owners. We can all sing copyrighted lyrics in the shower and around the house because this exclusive right is still limited to control over public performances.[68] To perform a work "publicly" means:

> (1) to perform . . . it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or
>
> (2) to transmit or otherwise communicate a performance . . . of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance . . . receive it in the same place or in separate places and at the same time or at different times.[69]

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62. 17 U.S.C. § 101 (1982) (definition of "perform").

63. H. Rep., *supra* note 6, at 63; S. Rep., *supra* note 39, at 59-60; Korman, *supra* note 3, at 531.

64. H. Rep., *supra* note 6, at 63 (emphasis added).

65. Comment, *supra* note 29, at 1073-75; H. Rep., *supra* note 6, at 63. The Act explicitly defines performance to include the reception of transmissions of broadcasts of musical works.

66. 17 U.S.C. § 101 (1982) (definition of transmit); H. Rep., *supra* note 6, at 63.

67. Korman, *supra* note 3, at 531.

68. Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 155 (1975); 17 U.S.C. §§ 106(4) and 101 (1982) (definition of "to perform publicly").

69. 17 U.S.C. § 101 (1982).

Congress intended that this definition help courts resolve problems they had determining what constituted a public performance under the 1909 Act.[70] When the definitions of "transmit," "perform" and "publicly" are considered together, it is clear that the public performance right covers not only the initial rendition of a work, but also any further acts by which the rendition is transmitted to the public.[71]

Another important change is the elimination of the general "for profit" requirement that was interpreted in the *Shanley* case.[72] Instead, section 106(4) of the 1976 Act states the performance right in broad terms and then provides specific exemptions for certain educational and nonprofit uses in subsequent sections.[73] Congress deleted the outright nonprofit exemption for musical and nondramatic literary works because the line between commercial and nonprofit organizations is difficult to draw and many nonprofit groups are able to pay for performance rights. In addition, Congress noted that performances were supplanting markets for printed copies of protected works and feared that a broad "not for profit" exemption would hurt authors and dry up their incentive to write.[74]

Subsections (1) through (4) of section 110 address many of the circumstances in which performances were generally regarded as exempt under the old "for profit" limitation.[75] Subsection (1) is the "classroom exemption;" it permits performances in the course of face-to-face teaching at nonprofit educational institutions.[76] Subsection (2) is an instructional broadcasting exemption that allows certain broadcasts of nondramatic literary and musical works by nonprofit educational institutions or governmental bodies as a regular part of systematic instructional activities.[77] Subsection (3) permits per-

70. 2 M. NIMMER, *supra* note 2, § 8.14[C] at 8-137. *See supra* notes 24-26 and accompanying text.

71. H. Rep., *supra* note 6, at 63-64; 2 M. NIMMER, *supra* note 2, § 8.14[A].

72. Herbert v. Shanley Co., 242 U.S. 591 (1917). *See also supra* notes 17-23 and accompanying text.

73. H. Rep., *supra* note 6, at 62, 81-84. *See, e.g.*, LaSalle Music Publishers, Inc. v. Highfill, 1986 Copyright L. Dec. (CCH), ¶ 25,863 (W.D. Mo. 1985) (plaintiff need not plead that defendant's unauthorized performance was for profit because the for profit requirement was eliminated. Instead, any exemption must be raised as an affirmative defense); Almo Music Corp. v. 77 East Adams Inc., 647 F. Supp. 123 (N.D. Ill. 1986); *cf.* MCA, Inc. v. Parks, 1986 Copyright L. Dec. (CCH), ¶ 25,968 (6th Cir. 1986) (old case law on how fees and charges should be characterized still relevant for interpreting jukebox exemption in section 116). *But see* Golden Touch Music Corp. v. Lichelle's, Inc., 2 U.S.P.Q.2d 1795 (W.D. Tex. 1987) (plaintiffs required to prove that their compositions were performed publicly for profit by defendants). Several of these exemptions for nonprofit and educational uses are codified at 17 U.S.C. §§ 110, 118 (1982). Studies were made in the early 1960s under the direction of the Copyright Office and one of these studies covered the "for profit" limitation. It noted that Congress had several options available to it including the one taken—the substitution of specific exemptions for the general "not for profit" limitation. Korman, *supra* note 3, at 524-25. *See also* Kernochan, *supra* note 7, at 355-56 (noting that the broad reach of section 106(4) is retracted by the exemptions in section 110 and expressing fears about further dilution of the right).

74. H. Rep., *supra* note 6, at 62-63. *See* Almo Music Corp. v. 77 East Adams, Inc., 647 F. Supp. 123, 125 (N.D.Ill. 1986).

75. The opening clause of section 110 states: "Notwithstanding the provisions of section 106, the following are not infringements of copyright." *Id. See also* H. Rep., *supra* note 6, at 81. Thus, performances that fall within any of section 110's subsections are not subject to control by the copyright owner. The wisdom of singling out creators to donate their works to educational, religious and fraternal groups has been questioned. Kernochan, *supra* note 7, at 357.

76. 17 U.S.C. 110(1) (1982); H. Rep., *supra* note 6, at 81-82.

77. 17 U.S.C. 110(2) (1982); H. Rep., *supra* note 6, at 82-84.

formances of nondramatic musical or literary works, or of dramatico-musical works of a religious nature, when they are made in the course of services at a place of worship.[78] Also, subsection (4) has a catchall exemption that allows performances of nondramatic literary and musical works where there is no purpose of direct or indirect commercial advantage.[79]

Section 110(4) overlaps with the other exemptions to some extent and is a complicated mix of requirements and limitations: (1) it does not exempt retransmission of broadcasted or transmitted performances; (2) there must be no payment of any kind to any performer, promoter, or organizer; and (3) there must be no direct or indirect admission charge; or (4) if an admission fee is charged in order to raise money, then the performance will be exempt if the proceeds, after deducting reasonable costs, are used exclusively for educational, religious or charitable purposes and if the copyright owner does not serve a written notice of objection to the performance of his work at the fund-raising event.[80] This unique veto provision in section 110(4)(B) enables copyright owners to object to making involuntary donations to the fund-raising activities of causes they oppose,[81] but the Act does not explicitly require the persons responsible for such events to notify the copyright owner of the contemplated performance.[82]

In addition to defining key terms and substituting several specific exemptions for the general "for profit" limitation, the 1976 Act also contains sections which deal with the subject matter of the *Jewell-LaSalle, Aiken* and CATV decisions. Transmissions by CATV systems are now treated as performances subject to control by copyright owners through a complex compulsory licensing scheme.[83] Thus, the 1976 Act "overrules" *Fortnightly* and *Teleprompter*.[84] Section 111(a)(1) addresses some of the activities of the defendant hotel in *Jewell-LaSalle*. The section exempts secondary transmissions embodying performances if: (1) the secondary transmission is *not* made by a cable system; (2) the transmission consists entirely of the management of a hotel or apartment house relaying an FCC licensed station's transmission signals within the local service area of that station; (3) the transmission is made to the private lodgings of the hotel's guests or the apartment's residents; and (4) there is no direct charge to see or hear the

78. 17 U.S.C. 110(3) (1982); H. Rep., *supra* note 6, at 84. This is the religious services exemption.

79. 17 U.S.C. 110(4) (1982); H. Rep. *supra* note 6, at 85. *See, e.g.*, Fourth Floor Music v. Highfill, 230 U.S.P.Q. 629 (W.D. Mo. 1986) (plaintiffs' works performed at defendant's Springfield Country Music Jamboree, a weekly event open to the public, and summary judgment was granted for the plaintiffs notwithstanding defendant's argument that he came within the 110(4) exemption because he never made a profit, he did not pay his band (they only received "gas money") and the admission charge was really a "donation"). *See generally* Korman, *supra* note 3, at 525-27.

80. 17 U.S.C. § 110(4) (1982); 2 M. NIMMER, *supra* note 2, § 8.15[E]; Korman, *supra* note 3, at 526-27.

81. H. Rep., *supra* note 6, at 86; 2 M. NIMMER, *supra* note 2, § 8.15[E] at 8-161.

82. 2 M. NIMMER, *supra* note 2, § 8.15[E] at 8-162. Nimmer said that the courts may imply an obligation to notify copyright owners on those wishing to claim the exemption, otherwise this veto right could be meaningless. *See also* Korman, *supra* note 3, at 527.

83. 17 U.S.C. § 111 (1982). *See, e.g.*, WGN Continental Broadcasting v. United Video, Inc., 693 F.2d 622 (7th Cir. 1982); Eastern Microwave v. Doubleday Sports, 1982 Copyright L. Dec. (CCH) ¶ 25,457 (2d Cir. 1982).

84. A. LATMAN, *supra* note 12, at 189, 195-199.

transmission.[85] Thus, radio transmissions to the private lodgings of a hotel's guests, as in *Jewell-LaSalle*, are now exempt while unauthorized transmissions to the establishment's public rooms remain infringing public performances.[86] In addition, the House Report's discussion of section 111(a)(1) states that placing ordinary televisions and radios in private hotel rooms does not infringe.[87]

Section 110(5) deals with the public reception and communication of radio and television broadcasts in small commercial establishments like the defendant's fast food restaurant in *Aiken*. It provides that the performance right is not infringed by the:

> [C]ommunication of a transmission embodying a performance or display of a work by the public reception of the transmission on a single receiving apparatus of a kind commonly used in private homes, unless—
>
> (A) a direct charge is made to see or hear the transmission; or
>
> (B) the transmission thus received is further transmitted to the public.[88]

Under this section it is acceptable for the corner tavern, a place like Papa Joe's, to place a standard television up behind the bar and tune into the Monday night football game, so long as the establishment does not charge patrons admission. Beyond that situation, however, things are not so clear. The tortuous legislative history of this troublesome and ambiguous limitation is important because it sheds some light on the intent of the drafters.[89]

A version of section 110(5) that the Senate passed in 1974 allowed the use of ordinary televisions and radios for the incidental entertainment of customers at small commercial and professional establishments like taverns, lunch counters, dry cleaners and doctors' offices.[90] *Aiken* was decided in 1975 and the committee report accompanying the Senate's 1976 bill stated that the exemption would not apply where broadcasts were transmitted over

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85. 17 U.S.C. § 111(a)(1) (1982). If the establishment cuts the advertising or doctors the signal in any way, then the exemption is lost. H. Rep., *supra* note 6, at 91. Secondary transmissions are the simultaneous retransmission of the signals of a primary transmission. . 17 U.S.C. § 111(f) (1982). A cable system is a facility that in whole or in part receives signals transmitted or programs broadcast by one or more licensed television broadcasters and makes secondary transmissions of such signals or programs by wires, cables, or other communications channels to subscribing members of the public who pay for such service. 17 U.S.C. § 111(f) (1982).

86. H. Rep., *supra* note 6, at 91; A. LATMAN, *supra* note 12, at 194. Section 111(a)(1) changes the result in *Society of European Stage Authors and Composers, Inc. v. New York Statler*, 19 F. Supp. 1 (S.D.N.Y. 1937), which had extended the *Jewell-LaSalle* decision to find infringement where the radio transmissions were made only to private hotel rooms and the occupant had to turn on the set and select the program he wished to hear.

87. H. Rep., *supra* note 6, at 91-92.

88. 17 U.S.C. § 110(5) (1982).

89. A. LATMAN, *supra* note 12, at 192-93. *See generally* Note, *Copyright Liability for Performances of Musical Works: Use of Background Radio Music in the Aftermath of* Twentieth Century Music Corp. v. Aiken, 43 WASH. & LEE L. REV. 245 (1986). It is relevant to observe that the Ad Hoc Working Group on U.S. adherence to the Berne Convention found that the exemptions in section 110 are substantially compatible with the Berne Convention's relevant provisions. Final Report of the Ad Hoc Working Group on U.S. Adherence to the Berne Convention, 10 COLUM. J.L. & ARTS 513, 521 (1986) [hereinafter Final Report of the Ad Hoc Working Group].

90. S. 1361, 93d Cong. (1974); S. Rep. No. 93-383, 93d Cong. 2d Sess. 130 (1974). The Senate's version of the new Act codified *Jewell-LaSalle* and overturned the legal basis for the determinations in the CATV cases that no performances were occurring. Korman, *supra* note 3, at 531.

loudspeakers in establishments like bus terminals, factories, department stores, hotels, and fast-food shops of the type involved in *Aiken*.[91] The House then proposed to amend subsection 110(5)(B) of the Senate bill to specify that the exemption would be lost if there was a further transmission "beyond the place where the receiving apparatus was located" instead of the Senate version's further transmission "to the public" language.[92] The House Report explained that the bill overturned the legal basis for *Aiken* but then added that the facts of *Aiken* presented the exemption's outer limit. The report also stated that an establishment's use of sophisticated or extensive amplification equipment could convert its standard receiver into the equivalent of a commercial sound system so that the exemption would not apply. Additionally it listed a number of factors to be considered in particular cases such as the size, physical arrangement, and noise levels of the areas where the transmissions are made audible or visible.[93]

The Conference Committee, which met to reconcile the differences between the bills, adopted the Senate's more limited version of the exemption but it also went along with the essence of House Report's statement of intent. Their report stated that an establishment like Aiken's, which merely augmented an ordinary home-type receiver, and was not large enough to justify subscribing to a commercial background music service, would be exempt. On the other hand, if an establishment made its public communication by more sophisticated equipment, or actually made a further transmission to the public, then the exemption would not apply.[94] Thus, Congress has put forward, in both the statute and its legislative history, a variety of factors to be evaluated in determining whether this exemption applies. Although a small establishment like Aiken's restaurant now performs when it turns on its radio, it should be exempt under 110(5). If, however, the store or restaurant is large enough to be a customer for a background music service like Muzak, then it is probably outside the exemption and it needs to obtain a license from ASCAP or BMI if it wants to continue to perform music broadcasted by any radio station.[95] Even though these are safe generalizations about how the exemption should be applied, section 110(5) has proved to be, as expected, a difficult provision for the courts to

91. 122 Cong. Rec. 1546 (daily ed. Feb. 6, 1976); Korman, *supra* note 3, at 532 n.55. The report was written after the *Aiken* decision. *Id.* at 531.

92. A. LATMAN, *supra* note 12, at 193; Korman, *supra* note 3, at 532.

93. H. Rep., *supra* note 6, at 87. The various factors listed are for the courts to consider in determining whether the exemption should apply in specific cases. *Id.*

94. Conf. Rep. No. 1733, 94th Cong., 2d Sess. 74-75 (1976) [hereinafter Conf. Comm. Rep.] A. LATMAN, *supra* note 12, at 193; Korman, *supra* note 3, at 533.

95. Korman, *supra* note 3, at 534. *See also* A. LATMAN, *supra* note 12, at 193. The report's reference to commercial background music services, like Muzak, stems from the fact that the Conference Committee was aware of pending litigation between ASCAP and the background music industry. Muzak's position was that it was being hurt by the result in *Aiken* which permitted its potential subscribers to freely use music broadcast by radio stations. Korman, *supra* note 3, at 529-30 and 533; 2 M. NIMMER, *supra* note 2, § 8.18[C] at 8-203. Muzak had, however, supported Aiken throughout the litigation because it thought that a decision adverse to ASCAP would help in obtaining the lower license fees it was seeking in litigation with ASCAP over reasonable fees. The statement in the Conference Committee Report presumably deprived Muzak of an argument against ASCAP that its fee should be reduced since it had to contend with a competitive free use of music by establishments with radios relying on 110(5). *Id.* at 8-204.

interpret and apply.[96]

THE COURTS AND PERFORMANCE RIGHTS UNDER THE 1976 ACT

Notwithstanding the intentions of Congress to clarify the scope of the performance right with the 1976 Act, interpretation problems remain.[97] The courts have grappled with several issues, including:[98] drawing the line between exempt private performances and public performances which are subject to control by copyright owners; determining when commercial establishments fit within the 110(5) exemption; and accommodating new technology with the 1976 Act's scheme.

What is Public and What is Private

The exclusive right granted in section 106(4) gives the copyright owner control over "public" performances of his work. In view of the Act's definitions, there is no doubt that the performance of any work at home before family members and invited guests is outside the scope of this right.[99] You can sing in the shower without fear of infringement.[100] One does not violate this right unless he or she performs the work at a place open to the public or "where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered."[101] Although the Act does not define "family," the legislative history states that the term includes an individual living alone and that a gathering confined to the person's social acquaintances would normally be regarded as private.[102] For example, an individual who subscribes to a pay television service for his home is not infringing the rights of HBO, the cable system, nor a motion picture company when he invites his friends over on a Saturday night to watch a movie carried by HBO. He is performing the movie when he turns on his set,[103] but the performance is private.

This "family" limitation on the scope of the performance right is not

96. *See* Kernochan, *supra* note 7, at 363-64; Note, *supra* note 89, at 254 (Congress gave the courts discretion but did not prioritize the factors); *infra* notes 177 to 229 and accompanying text. The 1976 Act contains several other limitations on the performance right which are not discussed in this Article. These limitations include 17 U.S.C. § 110(6), an exemption for certain performances of nondramatic musical works at state fairs and agricultural exhibitions; § 110(7), an exemption for performances of nondramatic musical works at record stores; sections 110(8) and (9) exempt certain television and radio performances for the blind, deaf and other handicapped persons; and § 110(10) exempts performances of nondramatic literary or musical works in the course of a social function organized by a nonprofit veterans or fraternal organization. Also, 17 U.S.C. § 118 sets up a compulsory licensing scheme for performances by public broadcasting and section 116 modifies the juke box exemption. *See generally* A. LATMAN, *supra* note 12, at 189-202; Kernochan, *supra* note 7, at 356-60; Korman, *supra* note 3, at 534-544.

97. *Cf.* 2 M. NIMMER, *supra* note 2, § 8.14[A] at 8-137.

98. The term "including" is used in the 1976 Act to be illustrative, not limitative. 17 U.S.C. § 101 (1982) (definition of "including" and "such as"). Similarly, this Article will not discuss all of the problems and issues which stem from the public performance right and the Act's many exemptions. The three related problems discussed herein are illustrative of many of the issues which are now before the courts.

99. H. Rep., *supra* note 6, at 64; 2 M. NIMMER, *supra* note 2, § 8.14[A] at 8-137.

100. Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 155 (1975).

101. 17 U.S.C. § 101; *see also supra* notes 67-70 and accompanying text.

102. H. Rep., *supra* note 6, at 64.

103. *Id.* at 63; *supra* notes 61-63 and accompanying text.

limited to performances at home. The Act explicitly exempts hotels and apartment houses in relaying ordinary, local radio and television broadcasts to the private rooms of their guests and residents so long as the transmission is not made by a cable system and there is no direct charge made to see or hear it.[104] The hotel's retransmission is exempt and the guest's performance is in the privacy of his room; a place which is not open to the public. In addition, the House Report states that "[n]o special exception is needed to make clear that the mere placing of an ordinary radio or television set in a private hotel room does not constitute an infringement."[105] The rationale for this statement presumes that the guest's performance is private, limited to that normal circle of a family and its social acquaintances, and it occurs in a private lodging that is not open to the public.[106]

Places Open to the Public

The scope of the private lodgings limitation on the performance right was litigated in *Columbia Pictures Industries v. Professional Real Estate Investors*.[107] The central question was whether a public performance occurred when guests at a resort viewed rented videodiscs in the privacy of their rooms.[108] The defendant's establishment consisted of 50 villas available in one, two or three bedroom floor plans. Each villa had its own kitchen, living room, bath, and patio, and some had private pools. The establishment installed videodisc players with the television sets in each unit. Guests could rent discs from a lawfully purchased inventory and watch the rented movies in their rooms at any time. Other than one disc player in the resort's gift shop for demonstration purposes, the establishment did not install players in the resort's common areas, and did not transmit movies by cable or other means.[109]

The plaintiffs, eight movie studios owning copyrights in some of the rented movies, claimed that the resort, including its private bedroom accom-

104. 17 U.S.C. § 111(a)(1) (1982). In addition, the programs replayed by the hotel must be of signals transmitted by a licensed broadcaster serving the area in which the hotel is located. *Id.* Such transmissions to a hotel's public areas, however, are not exempt. . H. Rep., *supra* note 6, at 91; 2 M. NIMMER, *supra* note 2, § 8.18[C][l] at 8-199. *See also supra* notes 83-85 and accompanying text.

105. H. Rep., *supra* note 6, at 91-92.

106. *Id.* at 91; 2 M. NIMMER, *supra* note 2 § 8.18[C][1] at 8-200-201. Hotel rooms have traditionally been considered private places. Guests at hotels have a reasonable expectation of privacy under the Fourth Amendment, Hoffa v. United States, 385 U.S. 293, 301 (1966), and under the common law a guest at a hotel has a right of privacy to the peaceful enjoyment of the accommodation. People v. Vaughn, 65 Cal. App. 2d Supp. 644, 150 P.2d 964, 967-68 (1944). Thus, although the hotel has furnished the means for performance, the guest's performance is treated like a noninfringing performance at home.

107. 228 U.S.P.Q. 743 (C.D. Cal. 1986).

108. *Id.*

109. *Id.* at 744-45. Thus, the guests played the discs on equipment supplied by the resort-defenant. The rental for each videodisc ranged from $5.00 to $7.50 and the fee was included on the guest's hotel bill. The defendants advertised the availability of the discs. If the resort had the televisions in the villas connected to a cable system or a satellite dish antenna, then the performances would have been public under the second clause of the Act's public performance definition and the section 111(a)(1) exemption would have been inapplicable. *Cf.* Entertainment and Sports Programming Network v. Edinburg Community Hotel, 623 F. Supp. 647, 653-54 (S.D. Tex. 1985). *See also infra* notes 227-235 and accompanying text.

modations, was open to the public under the copyright law and that showing a copyrighted movie on the video equipment constituted a public performance.[110] The court disagreed and concluded that viewing video movies in a hotel room is no different from viewing them at home. These were private uses, not public performances.[111] The viewing audience in each rental unit was limited to "a normal circle of a family and its social acquaintances" and although the resort itself was open to the public, the plaintiffs could not establish that these individual villas were places open to the public under the definition in the Copyright Act.[112] The court noted that hotel rooms are traditionally considered private places under several legal doctrines and are subject to fourth amendment protection. Hotel occupants expect and are entitled to privacy.[113] It said that the lodgers rent the rooms to obtain living accommodations, and in this respect they are no different from private homes. "[V]iewing movies in a hotel room would be an incidental form of entertainment, and is no different from viewing movies in a home . . . a private and not a public performance."[114] Accordingly, the court entered summary judgment for the defendants.

The court's analysis focused primarily on whether the resort's individual rental units were places open to the public. Although the House Report says that placing ordinary radios and televisions in hotel rooms does not infringe,[115] the court did not draw support from this legislative history. In view of this decision, and since VCRs are becoming fairly common in private homes, it is now appropriate to extrapolate from this statement in the House Report and suggest that the mere placing of ordinary television sets and standard VCRs in hotel rooms does not constitute an infringement.[116]

Although noninfringing private performances may be presented at places outside of the home,[117] the Act's definitions and the legislative history

110. 228 U.S.P.Q. 743-45. The court found that the resort was open to the public, but said the real issue was whether the rented rooms (villas) were places open to the public. *Id.* at 745.

111. *Id.* at 746.

112. *Id.* The plaintiffs had to establish this proposition in order to prevail.

113. *Id.*

114. *Id.* The court said that the defendants' right to rent the videodiscs for private use was not in issue since the first sale doctrine, 17 U.S.C. § 109(a) (1982), allows the owner of a lawfully made copy to sell or dispose of it by any means, including rental. *Professional Real Estate*, 228 U.S.P.Q. at 745; H. Rep. *supra* note 6, at 79. Thus, defendants could rent the discs for private performances by their guests without infringing the copyright owners' distribution rights. Some commentators argue, however, that the first sale doctrine does not permit video cassette rentals. Colby, *The First Sale Doctrine—The Defense that Never Was?*, 32 J. COPYRIGHT SOC'Y 77 (1984); 2 COPYRIGHT L.J. 66 (1986).

115. H. Rep., *supra* note 6, at 91-92.

116. This suggestion assumes that the hotel is free to rent the videodiscs it lawfully owns. *See supra* note 114. The result in *Professional Real Estate* is criticized at 2 COPYRIGHT L.J. 103 (1986). Unlike homes or dwelling units in apartment buildings and condominiums, hotels are open to the public. It is irrelevant whether people stay in hotel rooms to watch movies; patrons do not join clubs and lodges to watch movies, yet performances in those places are considered public. H. Rep., *supra* note 6, at 64. This criticism ignores the House Report's statement that no special exception is needed for having ordinary televisions and radios placed in hotel rooms. *Id.* at 91-92. A guest's use of such equipment is not an infringement. Connecting a VCR to that television set arguably should not make a significant difference since Congress intended to exempt incidental entertainment in a private setting.

117. Columbia Pictures Industries v. Professional Real Estate Investors, 228 U.S.P.Q. 743, 746 (C.D. Cal. 1986).

on the performance right show that this "family" or private lodgings exception is limited. Clearly, performances in places like hotel dining rooms, meeting halls, restaurants, theaters and ballrooms are public and subject to control by copyright owners.[118] In sharp contrast to the private room or suite rented by a guest at a hotel that was likened to a private home in the *Professional Real Estate Investors* opinion,[119] those places are open to the public. There are, however, trouble spots in between these examples of public and private places. The statute and the courts treat some performances in what seem to be private places as public.

In *Columbia Pictures Industries v. Redd Horne, Inc.*[120] the defendants operated stores which rented and sold videocassettes. The stores contained small private viewing rooms equipped with televisions in which a customer and several friends could watch a rented videotape.[121] A viewer selected the desired movie, paid the rental fees for the room and the movie, and proceeded to watch the film. Closing the door to the room activated a signal at the store's counter so that an employee would start the movie.[122] Anyone could use these in-store rentals[123] but viewing room access was restricted to the group of persons renting a particular tape. Strangers were not mixed in to fill rooms to capacity and no one was allowed to enter an occupied viewing room.[124]

Plaintiffs owned the copyrights in several of the movies "showcased" in the viewing rooms. They did not challenge defendants' possession of the tapes nor their practice of renting them for private performance at home.[125] Rather, they asserted that defendants' in-store showcasing operation infringed their exclusive rights of public performance.[126] The trial court noted that based on sections 106, 109 and 202 of the Act, the defendants' lawful possession of copies of plaintiffs' movies did not give them the right to perform those movies publicly; the plaintiffs retained that exclusive right.[127] Since the movies were being "performed," the central issue was simply whether the performances were public.[128]

The court said that the Act's definition of public performance plus the legislative history indicated that Congress' concern was with the composition of the viewing or listening audience.[129] It rejected the defendants' argu-

118. H. Rep., *supra* note 6, at 91.

119. *But see supra* note 116 (disagreement with the conclusion in Columbia Pictures Indus. v. Professional Real Estate Investors that private hotel rooms were *not* places open to the public).

120. 568 F. Supp. 494 (W.D. Pa. 1983), *aff'd*, 749 F.2d 154 (3d Cir. .1984).

121. *Id.* at 496. Some of the viewing rooms held up to four people but most held two. *Id.*

122. *Id.* at 496-97.

123. *Id.* at 497. Some of the renters were walk-ins.

124. Columbia Picture Industries v. Red Horne, Inc., 568 F. Supp. 494, 497 (W.D. Pa. 1983).

125. *Id.* at 494-97. Some commentators question whether the first sale doctrine permits the rental of video cassette tapes for home viewing. *See supra* note 114.

126. *Redd Horne*, 568 F. Supp. at 496.

127. *Id.* at 498. By selling the tapes the plaintiffs waived their exclusive right to control further distribution, 17 U.S.C. § 109(a) (1982), but they did not waive any of the other exclusive rights. Ownership of those rights is distinct from ownership of the material object, the video tape, in which the work is embodied. 17 U.S.C. § 202 (1982).

128. *Redd Horne*, 568 F. Supp. at 498-99. Based on the statute's definition of "perform" and the House Report, the court said there was no doubt that playing the tapes is a performance.

129. *Id.* at 500.

ment that their requirement of limiting the use of the viewing rooms to small groups of relatives or close friends made the performances private and agreed with the plaintiffs contention that the defendants' stores were places open to the public as well as places where a substantial number of persons outside of the normal circle of family and friends could gather.[130] It found that:

> [T]he composition of the audience at Maxwell's is of a public nature, and . . . showcasing the plaintiffs' copyrighted motion pictures results in repeated public performances which infringe the plaintiffs' copyrights. Our finding is based on the view that the viewing rooms at Maxwell's more closely resemble mini-movie theaters than living rooms away from home. . . . [T]he showcasing operation is not distinguishable in any significant manner from the exhibition of films at a conventional movie theater.[131]

The court also stated that the second clause in the Act's definition of public performance supported this conclusion since it makes the repeated playing of the same copy for different groups at different times a public performance.[132] In essence, the showcasing rooms at the stores were open to the public and over time a single videotape of a movie could be repeatedly played for different members of the public.[133] Accordingly, the court granted plaintiffs' motion for summary judgment and awarded injunctive relief.[134]

The Court of Appeals for the Third Circuit affirmed.[135] It said that whether a performance is "public" depends on whether it occurs at a place open to the public or at a place where a substantial number of persons outside of that normal circle of family and friends is gathered. If a place is public, then the size and composition of the audience are irrelevant, but if the place is not open to the public, then those factors are determinative.[136] The court did not examine those factors because the lower court correctly

130. *Id.* at 500. Congressional concern for the composition of the audience did not emasculate the plaintiffs' contention that an infringing performance could occur either at a place open to the public in a general sense, or in a place with restricted access—a semi-public place.

131. *Id.* Defendants' showcasing operation could not be distinguished from a conventionial movie theater because "[b]oth types of facilities are open to all members of the general public. Access to the actual viewing area of both theaters is limited to paying customers. Seating in both facilities is of a finite number and, at both facilities, the actual performance of the motion picture is handled by employees of the theater. We recognize that each performance at Maxwell's is limited in its potential audience size to a maximum of four viewers at any one time, however, we do not believe this limitation takes Maxwell's showcasing operation outside the ambit of the statutory definition of a public performance because the potential exists for a substantial portion of the public to attend such performances over a period of time."

132. *Id.* at 500-01 (quoting 17 U.S.C. § 101 (1982) (clause 2 of the definition of public performance) and 2 M. NIMMER, *supra* note 2, § 8.14[C]3, at 8-142)). *See also supra* note 69 and accompanying text.

133. According to the second clause of the definition, a work is performed publicly when it is transmitted or communicated to a place open to the public by any device, "whether the members of the public capable of receiving the performance . . . receive it in the same place or in separate places and at the same time or different times." 17 U.S.C. § 101 (1982). The *Redd Horne* scenario was anticipated by Professor Nimmer and he argued that the performances should be regarded as public. 2 M. NIMMER, *supra* note 2, § 8.14[C][3].

134. *Redd Horne*, 568 F. Supp. at 501-02. The court also dismissed defendants' counterclaim.

135. Columbia Pictures Industries v. Redd Horne, Inc., 749 F.2d 154 (3d Cir. 1984).

136. *Id.* at 158.

determined that defendants' stores were places open to the public.[137] In addition, the court said the fact that customers viewed the performances at different times and places did not alter the conclusion that the performances are public.[138] "Thus, the transmission of a performance to members of the public, even in private settings such as hotel rooms or [defendants'] viewing rooms, constitutes a public performance."[139]

A subsequent decision, *Columbia Pictures Industries v. Aveco, Inc.*,[140] applied *Redd Horne* to a business which rented its customers videocassettes and rooms equipped with couches, televisions and VCRs.[141] The major distinctions between the cases were that in *Aveco* the private viewing rooms held up to 25 persons and the customers, rather than employees, operated the VCRs placed in those rooms. Thus, unlike *Redd Horne*, in which the defendants never released the tapes used in the showcasing operation, the defendant in *Aveco* yielded control of the tapes to its customers.[142] The court determined, however, that these differences did not warrant a different result. The defendant's store was open to the public and Aveco authorized the performances by enabling its customers to rent the rooms.[143] Although the first sale doctrine enabled the defendant to rent cassettes for home viewing,[144] it did not shield the challenged practice. Rental for viewing in private rooms at a place which is open to the public is much different from rental for home viewing because a home "is not rented out in two hour shifts to afford separate groups of persons the opportunity to see a variety of motion pictures."[145] The law does not require the public place to be crowded with people and this business greatly increased the number of persons able to view plaintiffs' copyrighted works.[146]

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137. *Id.* at 159.

> The services provided by [the defendants] are essentially the same as a movie theatre, with the additional feature of privacy. The relevant "place" within the meaning of section 101 is each of [the defendants'] two stores, not each individual booth within each store. Simply because the cassettes can be viewed in private does not mitigate the essential fact that [the defendants' stores are] unquestionably open to the public.

Id.

138. *Id.* The court of appeals agreed with the trial court that this conclusion was supported by the second clause of the definition of public performance under 17 U.S.C. § 101, as well as by legislative history.

139. *Id.* at 159. The court cited the House Report at 64-65 to support this proposition but failed to note that 17 U.S.C. § 111(a)(1) affords a specific exemption for certain transmissions by a hotel to private rooms. *See supra* note 85 and accompanying text. The court also agreed with the lower court that the first sale doctrine did not shield the defendants. They did not rent, sell or otherwise dispose of the tapes in the showcasing operation. They were performing these works publicly—an infringement of a right retained by plaintiffs. *Id.* at 159-60; *see supra* notes 127-28 and accompanying text.

140. 612 F. Supp. 315 (M.D. Pa. 1985), *aff'd*, 800 F.2d 59 (3d Cir. 1986).

141. *Aveco*, 612 F. Supp. at 316.

142. *Id.* at 316, 318-19. The capacity of these viewing rooms arguably made them places open to the public.

143. 612 F. Supp. at 319. The court of appeals also noted, by analogy, that according to the Act's legislative history, a person who lawfully acquires a movie would be an infringer if he engaged in the business of renting it to others for unauthorized public performance. This rationale applied as well to *Aveco*. Columbia Pictures Industries v. Aveco, Inc., 800 F.2d 63 (3d Cir. 1986).

144. *Aveco*, 612 F. Supp. at 319. *But see supra* note 114 (some authorities question whether the doctrine includes a right to rent).

145. Plaintiffs' reply brief at 7, as quoted *id.* at 315, 320.

146. *Aveco*, 800 F.2d at 63. The court of appeals said that telephone booths, cabs and pay toilets

In contrast to *Redd Horne* and *Aveco*, the court in *Professional Real Estate Investors* did not find a public performance when paying guests at a hotel viewed rented videodiscs on equipment installed in their private rooms.[147] Although these situations seem indistinguishable, the different results are warranted. The court in *Professional Real Estate* explained that the only purpose of the viewing rooms in *Redd Horne* and *Aveco* was to watch movies, while a hotel room is a place to live away from home. Hotel rooms are not rented for the purpose of watching movies; the movie is merely an incidential form of entertainment, no different from watching a rented movie on your VCR at home.[148] Moreover, the Act's legislative history supports the result in *Professional Real Estate*. The House Report specifically states that no special exception is needed for placing ordinary televisions in hotel rooms.[149] A rented hotel room is not a place open to the public, while a video rental store is open to the public in the general sense.

Public Performance in "Private Places"

The Act specifies that a performance is public when it occurs at a place open to the public or "at *any* place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered."[150] Thus, performances in places like private clubs and lodges might be public depending on the size and composition of the audience.[151] It is, however, difficult to interpret and apply the definition's factors so as to decide where to draw the line. For example, the "family" limitation probably should exempt the performance of music at a "small" wedding reception held in the home of the bride's parents where the "audience" is limited to the bride's and groom's families and their invited guests.[152] It follows that if a wedding reception is held at a club, hotel or restaurant in a private room reserved for the occasion, it should still be exempt even though the hotel or restaurant itself is open to the public. It is a private party in a place that is

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are open to the public even though they are occupied by only one person at a time. They are 'available' to the public. *Id.*

147. *Professional Real Estate Investors*, 228 U.S.P.Q. 743 (C.D. Cal. 1986); *supra* notes 106-116 and accompanying text.

148. *Id.* at 746. *But see Aveco*, 800 F.2d at 63 (the court of appeals' statement that phone booths and pay toilets are open to the public).

149. H. Rep., *supra* note 6, at 91-92.

150. 17 U.S.C. § 101 (1982) (definition of "to perform publicly") (emphasis added).

151. *Cf.* Van Halen Music v. Edwin T. Palmer, 626 F. Supp. 1163 (W.D. Ark. 1986) (operators of private, nonprofit club with 1600 members infringed performance rights); Golden Touch Music Corp. v. Lichelle's, Inc., 2 U.S.P.Q.2d 1795 (W.D. Tex. 1987) (operators of bar allegedly renting only to private parties infringed performance rights because members of the general public were allowed admission); Mallven Music v. 2001 VIP of Lexington, Inc., 230 U.S.P.Q. 543 (E.D. Ky. 1986) (president of club at which copyrighted songs were performed without license held jointly liable with club); Cass County Music Co. v. Vineyard Country Golf Corp., 605 F. Supp. 1536 (D. Mass. 1985) (defendant liable for the unauthorized public performances of plaintiffs' songs at the lounge of its Colonial Inn even though the guitarist who performed the songs was not employed by the defendant). *See also* Columbia Pictures Industries, Inc. v. Redd Horne, Inc., 749 F.2d 154, 158 (3d Cir. 1984); H. Rep., *supra* note 6, at 64; 2 M. NIMMER § 8.14[C][1] at 8-138-40.

152. *Cf.* Hinton v. Mainlands of Tamarac, 228 U.S.P.Q. 379, 381 (S.D. Fla. 1985) (Condominium association's playing of copyrighted music at a dance in its clubhouse is not exempt when dances are open to public and a $3 "donation" is charged).

not open to the public at the time the reception is held, and the gathering is limited to the normal circle of a family and their friends.[153] It is doubtful that Congress intended to subject such "small events" to copyright control merely because the host decided to rent a private room in a public place for the reception instead of holding it at home.

Private places and nonpublic performance are not limited to private homes, but does the exemption apply when a private reception is attended by several hundred people? The specific terms of the Act's definitions do not afford a clear answer. It refers alternatively to performances at places "open to the public" and at places where a "substantial number of persons" outside of that "normal circle" are gathered.[154] Most wedding receptions are not open to the public in the sense that they are not in public places nor may everyone attend them. Some are, however, attended by hundreds of invited guests, many of whom might be outside of that "normal circle" in the opinions of the owners of copyright in the works performed at the reception. The several decisions under the 1909 Act which dealt with performances before substantial groups in private clubs and lodges were equivocal in their responses to this issue.[155] In response to these cases the 1976 Act's definition clearly makes the size and composition of the audience pertinent,[156] plus the legislative history states that "[o]ne of the principal purposes of the definition was to make clear that, contrary to the decision in *Metro-Goldwyn-Mayer Distributing Corp. v. Wyatt*, . . . performances in 'semipublic' places such as clubs, lodges, factories, summer camps and schools are 'public performances' subject to copyright control."[157]

Thus, if a substantial number of persons outside of the normal circle are able to attend a performance, then it will be deemed public even though the place is not open to the general public and restrictions are imposed on attendance.[158] Unfortunately, neither the Act nor its legislative history indicates whether a gathering of 200 persons, such as a wedding reception for the happy couple's families and their invited guests, is substantial enough so as to make any performances for that audience public and subject to control by copyright owners regardless of where the reception is held. Likewise, the cases interpreting and applying the 1909 Act yield little insight since the majority focus on whether the private group or private establishment holding the challenged performance placed effective restrictions on attendance by the general public.[159]

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153. *Id.; cf.* H. Rep., *supra* note 6, at 91.

154. 17 U.S.C. § 101 (1982) (definition of "to perform publicly").

155. *See supra* notes 24-26 and accompanying text.

156. The definition of public performance in 17 U.S.C. § 101 refers to a "substantial number of persons." *See* Columbia Pictures, Indus. v. Redd Horne, Inc., 749 F.2d 154, 158 (3d Cir. 1984); 2 M. NIMMER, *supra* note 2, § 8.14(C)1.

157. H. Rep., *supra* note 6, at 64. *See, e.g.*, Van Halen Music v. Palmer, 626 F. Supp. 1163 (W.D. Ark. 1986) (infringing performances at private club with 1600 members).

158. *Cf.* Columbia Pictures, Inc. v. Redd Horne, Inc., 749 F.2d 154, 158 (3d Cir. 1984) (legislative history indicates that the definition of perform "publicly" was expanded to include places accessible to a significant number of people, although not open to the public at large; the size and composition of the audience are thus determinative as to whether there is an infringing performance in a non-public place); 2 M. NIMMER, *supra* note 2, § 8.14[C][1] at 8-139.

159. *See* cases cited *supra* notes 24-26. Although several of the clubs in these cases had memberships in excess of 1000, a court found the 200 to 300 member Tremont Club, which imposed no

The 1976 Act's lack of precision on what constitutes a substantial number of persons is shown by conflicting state attorney general opinions dealing with the same issue: whether it is permissible to show rented videocassettes once per month to inmates at a correctional facility without paying license fees or obtaining the copyright owners' consent. The California Attorney General concluded that these showings were infringing public performances and that the fair use defense was not satisfied.[160] In contrast, the Louisiana Attorney General advised the Department of Corrections that these showings were permissible under the fair use doctrine because they did not pose a threat to an author's incentive to create and would not have "even a minimal effect on the video cassette rental market."[161] The opinion also addressed the "public performance" issue:

> A correctional facility is not open to the general public. It is not even a quasi-public gathering similar to a club in that viewers are in prison involuntarily. A business meeting of 20 to 30 people is expressly excluded from the ambit of "public performance' because it is not a gathering of a 'substantial number of persons' outside the normal circle of a family, . . . Therefore, it is our conclusion that an occasional showing to 20-30 incarcerated persons would not constitute a 'public performance' and would be permissible.[162]

The House Report's commentary explicitly exempts performances at routine meetings of businesses and governmental personnel "because they do not represent the gathering of a 'substantial number of persons.' "[163] It does not, however, define the term "substantial" nor does it contain any numbers for reference. It seems reasonable for the Louisiana Attorney General to conclude that a group of 20 to 30 prisoners is not substantial. But it is problematic whether the same conclusion should be made about a gathering of 200 to 300 prisoners, or a group of 50 to 60 agency chairpersons and department heads attending a meeting where a work is performed. Those gatherings are not open to the general public but a copyright owner could reasonably argue that those audiences are substantial enough to take any performances outside of the exemption and render them "public" for copyright purposes.

The definition's lack of precision is also illustrated by *Hinton v. Main-*

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effective restrictions on attendance, liable for copyright infringement. *Cf.* Golden Touch Music Corp. v. Lichelle's, Inc., 2 U.S.P.Q.2d 1795 (W.D. Tex. 1987) (bar rented to private parties held to be open to the public because evidence showed that members of the general public were allowed admission).

160. Opinion of the California Attorney General, 1982 Copyright L. Dec. (CCH) ¶ 25368 (Feb. 5, 1982).

161. Opinion of the Louisiana Attorney General, No. 84-436 (Jan. 10, 1985), 29 PAT. TRADEMARK & COPYRIGHT J. (BNA) No. 720, at 480-81 (March 7, 1985).

162. *Id.* at 481. In contrast, the California opinion stated that although a prison is not open to the public and the gathering is for involuntary participants only, the situation still presents a gathering of a substantial number of persons outside of the normal circle of a family and its social acquaintances. 1982 COPYRIGHT L. DEC. (CCH) ¶ 25,368 at 17,099-17,100 (1982). Although the exact size of the prison audience was not specified, a particular tape would be shown up to a few times within the prison system and then returned to a central repository for access by another institution. *Id.* at 17,097.

163. H. Rep., *supra* note 6, at 64.

lands of Tamarac[164] where the court had to determine whether or not the performance of copyrighted music at a dance held on private property was public and thus infringing. The defendant was the condominium association for a complex with 225 owner-residents. It held a dance at the clubhouse on its premises for the benefit of its members (the owner-residents) but there were no restrictions on attendance; members of the general public could drive to the clubhouse without receiving clearance and no signs excluded persons who were not guests of the owners. An admission charge (a suggested donation according to the association) was collected at the door and seven of the plaintiff's copyrighted songs were performed at the dance by an orchestra.[165]

The defendants argued that the performance was within the "family exception" since the clubhouse was privately owned by the residents and merely an extension of their living rooms.[166] The court did not completely reject this contention. It said the clubhouse "is like a parlor of yesteryear which happens to be held in common ownership by the condominium members, but available from time to time for individual use by any one of the member-owners."[167] It ruled for the copyrighted owner, however, because the dance was "open" to the general public. There was no impediment to anyone attending other than the fee which the court said was "purely and simply the price of admission."[168] Thus, the court did not have to define what constituted a substantial number of persons outside of that normal family circle[169] since the size and composition of the audience are irrelevant if the performance is at a place open to the public.[170]

Would the association's performance of copyrighted music fall within the "family" or "private performance" exception if attendance at the dance was restricted to the 225 owner-residents and their invited guests? That dance would not be open to the general public but a work is also performed publicly when it is performed at "any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered."[171] A party with live music for the benefit of the condominium association's 200 plus members and their guests is not a small event. Also,

164. 228 U.S.P.Q. 379 (S.D. Fla. 1985).

165. *Id.* at 380. Plaintiff moved for summary judgment and the sole issue was whether this presentation of music was a public performance.

166. *Id.* Each owner has a fee simple interest in the common areas like the clubhouse. The defendant also argued that the fact the "admission fee" was really a suggested donation made a difference. The court ignored the fact that the 1976 Act dropped the "for profit" limitation. *Id.* at 381. *See* LaSalle Music Publishers, Inc. v. Highfill, 1986 COPYRIGHT L. DEC. (CCH), ¶ 25,863 (W.D. Mo. 1985) (plaintiff need not plead that unauthorized performance was for profit); *Id.* at ¶ 25,963 (W.D. Mo. 1986) (final decision in same case—the fact the admission charge was called a donation was irrelevant); *supra* notes 72-74 and accompanying text.

167. 228 U.S.P.Q. at 381.

168. *Id.*

169. 228 U.S.P.Q. 379, 381. The court stated that it did not have to decide "whether a social function [like a dance or wedding] of the entire condominium or a major unit of it, is entitled to be treated as an extension of one owner's living room, or several owners' living rooms." *Id. See also* Golden Touch Music Corp. v. Lichelle's, Inc., 2 U.S.P.Q. 2d 1795 (W.D. Tex. 1987)(performance at bar rented to private parties held to be infringing because members of general public were allowed admission).

170. Columbia Pictures Indus. v. Redd Horne, Inc., 749 F.2d 154, 158 (3d Cir. 1984).

171. 17 U.S.C. § 101 (1982) (definition of "[t]o perform or display a work 'publicly' ").

the concept of the "normal circle of a family and its social acquaintances" cannot reasonably be stretched to include a dance for such a large group. Many of the owner-residents and their guests at such a dance might be acquainted, but the drafters of the Act probably did not intend to exempt performances before such a large and diverse audience. In addition, the drafters intended the definition to unambiguously mean that performances in semi-public places may be public and subject to control by copyright owners.[172]

Therefore, in view of the definition and its legislative history, both of which make the size and composition of the audience pertinent, the performance of copyrighted music at a dance held on private property for a condominium association's 200 owner-residents and their invited guests should be a public performance. Still, the definition's lack of precision on what makes a substantial number of persons and who is outside of that normal circle of family and friends, leaves a void in which the courts have to make decisions without much guidance from the legislative history and case law interpreting the 1909 Act. Congress probably did not intend to exempt the hypothetical dance at the condominium complex but it is unclear whether the scope of this exclusive right is meant to reach the performance of music at a private wedding reception with 100 invited guests.

The Aiken *Exemption and the Courts*

The section 110(5) exemption for the public reception of radio and television broadcasts in small commercial establishments generates a great deal of litigation, forcing the courts to interpret the terms of the exemption and to consider its tortuous legislative history. Generally, the courts have placed a great deal of weight on this legislative history, especially the commercial background music service factor and the several statements that the facts of *Aiken* set the exemption's outer limits.[173]

One of the first decisions to interpret section 110(5) was *Sailor Music v. Gap Stores, Inc.*[174] Gap Stores operates a chain of clothing stores. Plaintiffs sought to enjoin two Gap stores in New York City from transmitting radio broadcasts to their customers. Those two stores used receivers connected to several speakers recessed in their ceilings. The broadcasts were audible throughout the public areas of the stores.[175] The district court, relying heavily on the House Report, concluded that Congress did not intend to exempt establishments like The Gap.[176] Although there was a factual dispute over whether the defendant's broadcasting components were the kind commonly used in private homes, the court granted summary judgment for the plaintiffs because the elaborate sound systems used in these sizeable stores placed

172. H. Rep., *supra* note 6, at 64. *See, e.g.*, Van Halen Music v. Palmer, 626 F. Supp. 1163 (W.D. Ark. 1986) (infringing public performances at private nonprofit club with 1600 members).

173. *See supra* notes 87-96 and accompanying text; Kernochan, *supra* note 7, at 363-64 and 373 (noting that disputes continue regarding the scope of the *Aiken* exemption and supporting that with statistics from ASCAP).

174. 516 F. Supp. 923 (S.D.N.Y. 1981), *aff'd*, 668 F.2d 84 (2d Cir. 1981) (per curiam), *cert. denied*, 456 U.S. 945 (1982).

175. 516 F. Supp. at 923-24; Comment, *supra* note 29, at 1080-81 and n.115. The average Gap store has 3500 square feet; the two stores in question were 2769 and 6770 square feet respectively.

176. *Gap Stores*, 516 F. Supp. at 925.

the transmissions outside the exemption.[177] It found that the defendant's receiving apparatuses had been converted into the equivalent of commercial sound systems,[178] that the radio transmissions they received were further transmitted to the public,[179] and that the operations were of sufficient size to warrant a subscription to a commercial background music service.[180]

The Second Circuit affirmed[181] and its per curiam opinion emphasized that Congress intended Aiken's shop, with a standard radio connected to four ceiling speakers and 620 square feet of commercial area, to represent the exemption's outer limit. The defendant's stores were much larger than Aiken's restaurant.[182] Also, the circuit court agreed that the stores were large enough, as a practical matter, to justify subscribing to a commercial music service.[183] The Gap's argument that there had not been a "further transmission" failed and the court neglected to discuss the sophistication of the sound systems.[184]

Similar facts were presented in *Broadcast Music, Inc. v. United States Shoe Corp.*[185] The defendant is the parent company of the Casual Corner chain and the plaintiff, BMI, charged that three stores in California publicly performed seven of its compositions without authorization in 1978.[186] The stores in question were each equipped with a Bogen monaural receiver and Bogen speakers.[187] The district court ruled that the defendant's stores were not within the 110(5) exemption. The court reasoned that the stores were large establishments which could afford commercial background music systems, and they did not use receiving apparatus of a type commonly used in private homes.[188] The defendants argued on appeal that the 110(5) exemp-

177. *Id.* at 925. The exemption requires that the apparatus be "of a kind commonly used in private homes." 17 U.S.C. § 110(5) (1982).

178. *Gap Stores*, 516 F. Supp. at 925. The conversion occurred when the receiver was augmented with sophisticated amplification equipment. *Id.*

179. *Id.* The finding that there were further transmissions also took the stores outside of the exemption. *See* 17 U.S.C. § 110(5)(B) (1982).

180. *Gap Stores*, 516 F. Supp. at 925. The court compared the size of The Gap stores to Aiken's 620 square foot fast-food restaurant in making this finding. Although the defendant was not directly charging its customers for this entertainment, the district court held that it failed to satisfy the exemption because it made further transmissions of the radio broadcasts contrary to section 110(5)(B) and because of the sophistication of the sound systems.

181. Sailor Music v. Gap Stores, 668 F.2d 84 (2d Cir. 1981).

182. *Id.* at 86, *citing* H. Rep., *supra* note 6, at 87.

183. *Id.* at 86, *citing* the Conf. Comm. Rep., *supra* note 94, at 75.

184. Comment, *supra* note 29, 1081-82 and n.123. The Gap said there were no further transmissions of the broadcasts because it had not disseminated them to different places—different rooms—within their establishments. The speakers and receivers were all in one large room. The Gap relied on Bernstein v. Cal's, Inc., No. 79C17, slip op. (N.D. Ill., Aug. 27, 1980) (memorandum order on the denial of cross motions for summary judgment), in which the court held that there was no further transmission when radio transmissions received by a restaurant on a receiver in a back room were transmitted to the public over four speakers located in another room—the restaurant's 1000 square foot public area. Cash, *supra* note 31, at 145 & n.51. *See* Comment, *supra* note 29, at 1082-83. The case was set for trial on the "single receiving apparatus" factor but it has no subsequent history. *Id.* at 1083 n.132.

185. 211 U.S.P.Q. 43 (C.D. Cal. 1980), *aff'd*, 678 F.2d 816 (9th Cir. 1982).

186. 211 U.S.P.Q. at 44. BMI is a performing rights society like ASCAP. *See supra* note 19.

187. 211 U.S.P.Q. at 44.

188. *Id.* at 45. In granting summary judgment for BMI, the court also said that the speakers were not arranged within a narrow circumference from the receiver, thus implying a disqualifying further transmission. *Id.* The court did not, however, specify the sizes of the three stores when it concluded that they were not small commercial establishments. It also did not specify whether each

tion was impermissibly vague and denied equal protection,[189] but the Ninth Circuit Court of Appeals affirmed. It found no merit in Casual Corner's constitutional challenges[190] and said the exemption did not apply "because each store has a commercial monaural system, with widely separated speakers of the type not commonly used in private homes, and the size and nature of the operation justifies the use of a commercial background music system."[191]

Rodgers v. Eighty Four Lumber Company[192] also involved a nationwide chain charged with infringement for transmitting radio broadcasts over multiple speakers placed throughout its stores.[193] Each location had a public area in excess of 10,000 square feet and was equipped with a radio, amplifiers, microphone and up to eight interior and exterior speakers.[194] The court said that these stores were far larger than Aiken's restaurant and that their sizes justified a subscription to a commercial music service. Furthermore, their sound systems were not the kind commonly used in private homes.[195] In spite of these disqualifying factors, defendant argued that the stores came within the exemption because the music was transmitted to muffle significant industrial noise, not to attract the public.[196] The court rejected this argument, ruling that section 110(5) does not provide an exemption for transmissions made for the benefit of an infringer's employees. "[T]he purpose for which the music was used is irrelevant to the question of infringement . . . ."[197] Thus, the court had no trouble determining that defendant's operations far exceeded the exemption's outer limits.[198]

Regional retail chains also have run into problems with unlicensed public performances of radio broadcasts when their individual stores are significantly larger than George Aiken's shop. *Lamintations Music v. P&X Markets, Inc.*[199] involved a chain of grocery stores known as the "Flair Markets." The stores range in size from 10,000 to 14,500 square feet and are equipped with "Vocall" and "Radio Shack" receivers connected to six or

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store, as opposed to the parent company or the Casual Corner chain, could afford a subscription to a commercial background music service. Comment, *supra* note 29, at 1084 n.139.

189. Brief for Defendant-Appellant at 29-44, Broadcast Music, Inc. v. United States Shoe Corp., 678 F.2d 816 (9th Cir. 1982), *cited at* Comment, *supra* note 29, at 1084 nn.141 & 142.

190. Broadcast Music, Inc. v. U.S. Shoe Corp., 678 F.2d 817 (1982).

191. *Id.* at 817. In viewing of this finding, the court also might have concluded that there was a disqualifying further transmission under section 110(5)(B).

192. 617 F. Supp. 1021 (W.D. Pa. 1985).

193. *Id.* at 1022. Defendant had allegedly infringed at five stores located in New York, Illinois, Alabama, California and Texas.

194. *Id.* at 1023.

195. *Id.* Aiken's store had only 620 square feet open to the public while one of The Gap stores in *Sailor Music* had 2,769 square feet.

196. *Id.* at 1022. Defendant asserted that the noise level in its stores was significant in order to support its argument about the purpose of its use of the radio broadcasts.

197. 617 F. Supp. 1021, 1022.

198. *Id.* at 1023. The court also rejected defendant's argument that the provisions of the 1976 Act were beyond the Constitution's grant of power to Congress. *Id.* at 1023-24. In a subsequent opinion the court awarded the plaintiffs $122,500 in damages ($2500 per infringement) plus costs and attorneys' fees. Rogers v. Eighty Four Lumber Co., 623 F. Supp. 889 (W.D. Pa. 1985). The court said that ASCAP had notified Eighty Four that its broadcasts infringed and offered to license its use of their music at all 360 of the chain's stores for approximately $35,000 per year. The license was refused. *Id.* at 891.

199. 1985 Copyright L.D. (CCH) ¶ 25,790 (N.D. Cal. 1985).

more ceiling mounted speakers which are not arranged within a narrow circumference of the receivers.[200] The court invoked the statute and the legislative history in holding that the defendant's stores did not come within the exemption. Their receivers were not of a kind commonly used in private homes, the performances of plaintiffs' songs were further transmitted and the stores were large enough to warrant use of a commercial background music service.[201]

The results in *Rodgers* and *P&X Markets* follow logically from the decisions in *Sailor Music* and *United States Shoe* and, in general, these courts are consistent in their approaches to the application of section 110(5).[202] Each case involved a retail chain operating large stores equipped with receivers and several speakers which were arranged so that radio broadcasts could be heard throughout their premises. The courts turned to legislative history in each case and relied upon it for guidance in determining how to interpret and apply the exemption.[203] By doing so, and by focusing especially on the sizes of these stores,[204] the courts concluded that Congress did not intend to exempt them under 110(5).

One consequence of this heavy reliance on legislative history and congressional intent is a failure to focus on the plain meaning of the statute. The several opinions do not zero in on the exact language of the 110(5) exemption. Arguably, these courts can be faulted for using extrinsic factors to explain their conclusions and, as a result, the decisions appear subjective and arbitrary.[205] Such criticism is not warranted.

Section 110(5) does not explicitly mention the size of an establishment as being a critical factor in determining whether the exemption applies. It allows public reception and communication of a transmission embodying a performance "on a single receiving apparatus of a kind commonly used in private homes" so long as there is no direct charge to see or hear the transmission[206] and so long as it is not further communicated to the public. The

200. *Id.* at 19,556.

201. *Id.* at 19,556-57. Here again the court focused on the sizes of the areas where the transmissions are heard. Note, *supra* note 89, at 255. It is important to note that defendants' testimony confirmed that they employed a commercial music service at two of the markets. *Laminations Music*, 1985 Copyright L. Dec. at 19,556.

202. *Contra* Comment, *supra* note 29, at 1085-92; Note, *supra* note 89, at 250.

203. For instance, the sizes of the stores were emphasized. Specific square footages were noted in *P&X, Rodgers* and *Sailor Music*, while in *United States Shoe* the trial court said that the Casual Corner stores were not small commercial establishments, 211 U.S.P.Q. 43, 45, without specifying square footage. Several of the operations were compared to Aiken's restaurant which sets the exemption's outer limit. H. Rep., *supra* note 6, at 87. *Cf.* Conf. Comm. Rep. *supra* note 94, at 75. The courts also determined that each establishment was large enough for a subscription to a background music service. *Id.*

204. Size is relevant for the *Aiken* comparison and with respect to the issues of whether an establishment should subscribe to a commercial music service and whether the establishment is so large that it must augment its speakers to make broadcasts audible and thus make a disqualifying "further transmission." *See generally* H. Rep., *supra* note 6, at 87; Conf. Comm. Rep., *supra* note 94, at 75. *See also* Note, *supra* note 89, at 254-55.

205. *Cf.* Cash, *supra* note 31, at 148; Note, *supra* note 89, at 250 and 259.

206. The establishments in these cases did not charge their customers a fee to hear the secondary broadcasts. This disqualifying factor, the second requirement of the section 110(5) exemption, is an easy requirement to circumvent because indirect charges are not prohibited. Comment, *supra* note 29, at 1078. However, a "cover charge" might be treated as a direct charge. 2 M. NIMMER, *supra* note 2, § 8.18[C] at 8-202 n.75.

"further transmission" limitation impliedly makes an establishment's size relevant because sounds may not be audible in a large retail store or restaurant without augmenting the system in order to transmit the broadcast.[207] Although there is some uncertainty about what Congress intended with the "further transmitted to the public" language in section 110(5)(B),[208] the implicit relevance of an establishment's size in determining the exemption's applicability shows that these courts did not disregard the statute's plain meaning.

In addition, each of these courts did in fact rely on specific terms in the statute for disqualifying the defendant's stores. The Casual Corner stores in *United States Shoe* were not exempt because their sound systems were not the kind commonly found in private homes, but there was not an explicit ruling on the issue of further transmission.[209] The lower court in *Sailor Music* said that the equipment in The Gap stores could be considered standard home receiving sets that, in effect, had been converted into commercial sound systems; additionally, there were disqualifying further transmissions.[210] The defendant's lumber stores in *Rodgers* and the grocery stores in *P&X* were outside of the exemption on both grounds; they used receiving apparatuses not commonly found in private homes to make further transmissions to the public.[211] Moreover, legislative history is frequently examined in order to resolve issues of statutory interpretation. The United States Supreme Court itself has turned to the legislative history of the 1976 Act in several recent copyright decisions.[212]

In contrast to these four decisions involving chain stores, *Springsteen v.*

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207. *Cf.* Sailor Music v. The Gap Stores, Inc., 516 F. Supp. 923, 925 (20 Cir. 1981). This statutory factor, along with the exemption's requirement that the receiving apparatus be of a kind commonly used in private homes and the House Report's reference to the noise level of the establishment, also indicate that it is relevant for the courts to consider the quality of the reception within the establishment. Note, *supra* note 89, at 258.

208. To transmit a performance is defined in section 101 as "to communicate it by any device . . . whereby images or sounds are received beyond the place from which they are sent." 17 U.S.C. § 101 (1977). Therefore, the "further transmit" language in 110(5)(B) arguably means that an establishment will be disqualified *only if* it disseminates broadcasts from the place where the receiving apparatus is located to different places or rooms. In *Sailor Music*, where all the speakers and the receiver were in one large room, the defendant unsuccessfully used this argument to say that it had not made a further transmission. Comment, *supra* note 29, at 1080-81 & n.123. The *Sailor Music* court seems to be saying, in contrast, that a further transmission occurs whenever supplemental equipment enables the broadcast to be heard beyond the location of the receiver. *See* 516 F. Supp. at 925; H. Rep., *supra* note 6, at 87; 2 M. NIMMER, *supra* note 2, § 8.18[C] at 8-204.1; Comment, *supra* note 29, at 1088-89. Such a transmission enables a larger audience to hear the broadcast than would otherwise be possible.

209. *United States Shoe*, 678 F.2d 816, 817. However, findings in both the district and circuit courts imply this statutory basis for disqualification. The speakers were not arranged within a narrow circumference of the receiver, *United States Shoe*, 211 U.S.P.Q. at 45; and, the speakers were widely separated. *United States Shoe*, 678 F.2d at 817.

210. *Sailor Music*, 516 F. Supp. at 925. The court of appeals relied primarily on legislative history. The court found that the lower court correctly determined that the defendant infringed, and affirmed the decision. *Sailor Music*, 668 F.2d at 86.

211. *Sailor Music*, 617 F. Supp. at 1023 & 1022 n.1; 1985 Copyright L. Dec. (CCH) ¶ 25,790 at 19556.

212. *See, e.g.*, Sony Corp. of America v. University City Studios, 464 U.S. 417 (1984); Harper & Row, Publishers v. Nation Enterprises, 471 U.S. 539 (1985); Mills Music, Inc. v. Snyder, 469 U.S. 153 (1985).

Plaza Roller Dome, Inc.[213] is one of the few reported cases in which an establishment's public use of radio broadcasts was held to be exempt. The defendants operated a Putt-Putt miniature golf course which was equipped with a radio receiver wired to six speakers mounted on light poles spread over its 7,500 square feet of playing area. The system was unsophisticated, did not project well and the speakers could be heard without distortion only at close range. Moreover, the course was open for only six months per year and its average annual revenue was rarely over $6000.[214]

The court recognized that the defendants' operation was larger in square footage and number of speakers than the limits set by *Aiken*;[215] however, the court stated that the case was not open and shut because size and number of speakers are not, "standing alone, the sole or even predominant factors to consider in determining the applicability of the exemption."[216] It quoted from the House Report's list of factors to be evaluated in deciding whether a receiving apparatus has been converted into a commercial sound system[217] and said that arguments against the exemption's application weakened when those factors were applied to the defendants' miniature golf course. The system did not project well[218] and the noise level and audibility of the music transmitted by the equipment was not comparable to the systems in *Sailor Music* and *United States Shoe*,[219] where the quality of the transmissions work improved. Consequently, the court concluded that the course did not exceed the exemption's outer limits.[220] The court also found that since the defendants' miniature golf course had low revenues and was only open for six months per year,[221] it could not be reasonably considered a potential customer for a commercial background music service.[222]

Notwithstanding the ambiguity in the specific terms of section 110(5) and its troubled evolution through Congress, these five cases suggest that the exemption works fairly well; it can be interpreted and applied effectively in a

213. 602 F. Supp. 1113 (M.D.N.C. 1985). *See generally* Note, *supra* note 89, at 257-58.

214. *Springsteen*, 602 F. Supp. at 1114 and 1119 n.6. The plaintiffs did not dispute contentions concerning the defendants' unsophisticated sound system.

215. *Id.* at 1117. The court stated that the meaning of section 110(5)'s statutory language was far from clear before making this observation. *Id.* at 1115. It discussed the *Sailor Music* and *United States Shoe* decisions and quoted extensively from the legislative history. *Id.* at 1115-17.

216. *Id.* at 1117-18.

217. *Id.* at 1118 *quoting from* H. Rep. at 87. The court also noted that it was significant whether or not a sound system has been transformed into a commercial system because a transformed system would no longer be a kind commonly used in private homes. *Id.* at 1118 n.5.

218. 602 F. Supp. 113, 1118. ASCAP's own field representative made this observation.

219. *Id.* Plaintiffs admitted that the system were not comparable. The quality of the radio reception at the defendant establishment is a relevant consideration in determining the exemption's applicability. Note, *supra* note 89, at 258. *See also supra* note 204.

220. 602 F. Supp. at 1118.

221. *Id.* at 1118-19.

222. 602 F. Supp. at 1118-19 *citing* Korman, *supra* note 3, at 534. The court acknowledged that this Putt-Putt course is part of a larger operation which may be of sufficient size to justify such a subscription—the Plaza Roller Dome which included defendants' licensed roller rink—but the plaintiffs sought to treat it separately for purposes of licensing. *Id.* at 1119 & n.6. Also, the court did not explicitly discuss the "further transmission" basis for disqualification even though defendants arguably "further transmitted" the broadcasts from their receiver to the speakers around the golf course. However, the court's findings about the quality of the sound system, the legislative intent and the nature of the defendants' operation, are reasonable bases for its implicit finding of no further transmission.

variety of situations.[223] Its purpose is to exempt from copyright liability anyone who merely turns on in a public place, such as a small restaurant or retail establishment, an ordinary television or radio of the kind commonly sold to members of the public for private use. The rationale for this exemption is that this secondary public use of radio and television transmissions is so remote and minimal that no further liability should be imposed.[224] Admittedly, there is no guidance regarding the relative importance of the several factors noted in the statute and its legislative history and in particular cases it will be difficult to draw the line between establishments like Aiken's restaurant, which are meant to be exempt, and those places which fall outside of section 110(5), like The Gap and Casual Corner stores. Some decisions will seem subjective and arbitrary. Nevertheless, given the wide variety of establishments which use radios and televisions, from Mom & Pop grocery stores to big department stores, an exemption written in general terms, requiring interpretation and discretionary application on a case-by-case basis, is necessary. The statute, the legislative history and the developing case law provide reliable guides for determining whether or not the exemption should apply to a particular establishment.

The Aiken *Exemption, Television and New Technology*

The 110(5) exemption also applies to the public reception of television broadcasts. The exemption's "single receiving apparatus of a kind commonly used in private homes" requirement is surely satisfied by the standard, 19 inch color television sets found in public places like neighborhood taverns and the waiting rooms at doctor's offices or auto service centers.

In addition, television use is mentioned in the House Report which states that "[n]o special exception is needed to make clear that the mere placing of an ordinary . . . television set in a private hotel room does not constitute an infringement."[225] Also, section 111(a)(1) exempts secondary transmissions "consist[ing] entirely of the relaying, by the management of a hotel, . . . of [a television transmission] to the private lodgings of guests" provided several conditions are met. For example, the transmission cannot be made by a cable system and the transmitter may not impose a direct charge to see the transmission.[226] When, however, other broadcasting or viewing services are provided, the applicability of the Act's exemptions becomes uncertain. For example, will an establishment fall outside the exemption if its television reception is enhanced and expanded by use of a satellite dish?

In *ESPN v. Edinburg Community Hotel*[227] the private rooms at the defendants' hotel were equipped with televisions and the owner subscribed to

223. *But see* Note, *supra* note 89, at 259-62. The section 110(5) exemption is compatible with Article 11 *bis* (1)(iii) of the Berne Convention. *See* Final Report of the Ad Hoc Working Group, *supra* note 89, at 521 and 528-29.

224. H. Rep., *supra* note 6, at 86. *But see* Note, *supra* note 89, at 253.

225. H. Rep., *supra* note 6, at 91-2. On the other hand, unlicensed performances in public areas of hotels, such as in the dining rooms or meeting halls of the hotels, are prohibited. *Id.* at 91.

226. 17 U.S.C. § 111(a)(1); H. Rep., *supra* note 6, at 91. See also 2 M. NIMMER § 8.18[c][1].

227. 623 F. Supp. 647 (S.D. Tex. 1985). *See also* Home Box Office, Inc. v. Corinth Motel, Inc., 33 BNA P.T.C.J. 76 (N.D. Miss. 1986) (similar facts, same result).

Heritage Cablevision, the local cable service which lawfully distributed the programming of HBO and ESPN.[228] The defendant erected a satellite dish antenna and subsequently discontinued its cable service subscription because the antenna enabled the hotel to receive the same programming and broadcast the programming to guests' rooms. Because the defendants' retransmission was unlicensed, HBO, ESPN and Heritage sued for infringement.[229] The court said the Copyright Act establishes that transmissions of a work to the public for reception in different places are public performances. It also noted that the House Report explicitly stated that transmissions to occupants of hotel rooms constitute public performances.[230] Additionally, section 111(b) of the Copyright Act prohibits the unauthorized secondary transmission to the public of a primary transmission not made for reception by the public at large.[231] Thus, the court easily concluded that the hotel's unauthorized retransmission of the plaintiffs' signals was an infringement.[232] Further, the court found that the retransmission did not fall within the 110(5) single receiving apparatus exemption "[s]ince plaintiffs' transmissions can only be received by regular television sets equipped with special equipment not commonly used in a home. . . ."[233]

The court's determination that the 110(5) exemption was not applicable to the defendant's satellite dish reception system appears sound. Although the costs of satellite dish antennae have decreased, the device cannot reasonably be defined as "a single receiving apparatus of a kind commonly used in private homes." The current ratio of television sets to satellite dish antennae

228. *ESPN*, 623 F. Supp. at 649-50. Heritage's system, like other cable television services, acquires performance rights to copyrighted programming for distribution to its subscribers. ESPN and HBO also acquire performance and distribution rights to sports events, movies and other works and distribute their programming by transmitting signals to a satellite. They contract with cable system operators, like Heritage, to distribute the programming by means of cable, satellite reception or microwave. In turn, Heritage pays a license fee for the right to use the programming it receives by means of its earth station; it also pays copyright fees to the Copyright Royalty Tribunal. Such programming is for subscribers, not the general public. *Id.*

229. *Id.* at 650.

230. *Id.* at 652-53 (citing 17 U.S.C. § 101 (definition of public performance) and H. Rep. *supra* note 6, at 65). Previously, the court discussed the defendant's numerous violations of the Federal Communications Act. *Id.* at 650-52.

231. *Id.* at 653 (citing 17 U.S.C. § 111(b) and H. Rep., *supra* note 6, at 92). *See generally* WGN Continental Broadcasting Co. v. United Video, 693 F.2d 622 (7th Cir. 1982) (discussion of the Act's other provisions concerning cable television).

232. *ESPN*, 623 F. Supp. at 653. Plaintiffs' signals were primary transmission for a group limited to cable subscribers, not for the public at large. *Id.* Although a guest's performance of an HBO movie in the privacy of his hotel room is not a public performance, *see generally supra* notes 99-119 and accompanying text, the defendant's retransmission of HBO's programs to its rooms is a public performance because its equipment enables a limited segment of the public—its guests—to receive the HBO performance. It does not matter under the Act's definitionsn of "public" and "performance" that the group of potential viewers are not gathered in the same places. 17 U.S.C. § 101; H. Rep., *supra* note 6, at 64-65. The court, however, did not discuss the applicability of section 111(a)(1) which enables hotels to retransmit to their guests signals transmitted by stations licensd by the FCC or the House Report's exception for putting ordinary televisions in hotel rooms. H. Rep., *supra* note 6, at 91-92.

233. *ESPN*, 623 F. Supp. at 654. *See also* Home Box Office, Inc. v. Corinth Motel, Inc., 1 U.S.P.Q.2d 1732 (N.D. Miss. 1986) (same result on similar facts). Should more and more programmers decide to scramble their signals then more and more dish owners will want to buy a descrambler. That device might be regarded as another kind of special equipment. *See The Scrambling Issue: Who Owns the Signal?*, 51 CONSUMER REPORTS 616-17 (Sept. 1986).

is greater than 100 to 1.[234] Moreover, while the court did not rule on the additional factors in section 110(5) nor discuss its legislative history, it is reasonable to conclude that the defendant hotel was making a disqualifying "further transmission." Further, the hotel may be regarded as an establishment of sufficient size to subscribe to a commercial broadcast service, as evidenced by the fact that it had once subscribed to the local cable system.[235]

The *ESPN* decision appears to be inconsistent with *Columbia Pictures Industries, Inc. v. Professional Real Estate Investors, Inc.*[236] which held that a resort owner was not infringing public performance rights when it equipped the television sets in its private rooms with videodisc players and had videodisc movies available for guests to rent. They could watch the rented movies in the privacy of their rooms and, notwithstanding the *Redd Horne* and *Aveco* decisions, the court treated this use like the exempt home use of videodiscs: a private performance.[237]

The audiences in *ESPN* and *Professional Real Estate* are the same: hotel guests. In both cases these guests are able to view copyrighted works in the privacy of their lodgings: in *Professional Real Estate* by using the videodiscs player and in *ESPN* by turning on a television connected to the hotel's satellite dish antenna. Despite these similarities the courts reached different conclusions on the issue of whether there was an infringing public performance. The distinguishing factor is the *ESPN* involved a transmission while *Professional Real Estate* did not.

The second clause of the Act's definition of public performance concerns performances that occur in one place—such as a television studio—and are communicated or transmitted beyond that place where a substantial number of persons outside of that circle of family and friends is gathered. Further, the definition establishes that it makes no difference whether the public receives the broadcast in the same place or in different places, or at the same time or at different times.[238] A network broadcast is a public performance[239] as is a broadcast limited to a particular segment of the public; for instance, a broadcast to subscribers of a cable television service or to occupants of hotel rooms.[240] Thus, by intercepting and transmitting the plaintiffs' broadcasts to the hotel guests, the defendant in *ESPN* was per-

234. *See* National Football League v. McBee & Bruno's, 621 F. Supp. 880, 884 (E.D. Mo. 1985). *See generally A Look at Satellite TV*, 51 CONSUMER REPORTS 614-17 (Sept. 1986).

235. *ESPN*, 623 F. Supp. at 649. The report of the Conference Committee says that their intent was to exempt small commercial establishments of the type involved in *Aiken* which are "not of sufficient size to justify, as a practical matter, a subscription to a commercial background music service. . . ." Conf. Comm. Report, *supra* note 94, at 75. By analogy, if an establishment is large enough to subscribe to an available cable television provider, then it should be outside of the exemption when it puts up its own antenna and bypasses the local cable service.

236. 228 U.S.P.Q. 743 (C.D. Cal. 1986). *See supra* notes 107-14 and accompanying text.

237. *Professional Real Estate*, 228 U.S.P.Q. at 746. The court distinguished *Redd Horne* and *Aveco* by saying that the principal and sole purpose of the video viewing rooms was to watch movies, while the primary reason to rent a motel room is not to view movies. Watching movies in a motel room is incidental entertainment, no different from watching a movie at home. *Id. See also supra* notes 147-149 and accompanying text.

238. 17 U.S.C. § 101 (1982) (definition of perform publicly). *See also supra* notes 60-70 and accompanying text.

239. Such a broadcast is public regardless of where, when, how or by whom it is seen or heard. 2 M. NIMMER, *supra* note 2, § 8.14[C][2] & [3].

240. H. Rep., *supra* note 6, at 65. Members of the public—the registered guests at defendant's

forming plaintiffs' works publicly. Moreover, the hotel did not qualify for the exemption in section 111(a)(1) since its secondary transmissions were not limited to signals from licensed stations which served the area.[241] The court did not, however, say that a guest's hotel room was public.[242]

In contrast, *Professional Real Estate* concerned the first clause of the public performance definition which deals with performances in public and semi-public places. The court found that a hotel room is not a place open to the public and that playing a videodisc in that setting is akin to playing it at home: an exempt, private performance.[243] The differences between these cases are subtle but the contrasting results reflect the complicated interaction of the 1976 Act's definitions and its discrete exemptions as well as the impact of its legislative history. There is no doubt that Congress intended to overrule the broadcast function/viewer function analysis of performance rights that the Supreme Court utilized in the CATV cases and *Aiken*. Secondary transmissions—as in *ESPN*—are now treated as performances subject to copyright control.[244] On the other hand, Congress created a discrete, albeit limited, exemption for certain television and radio systems in hotels and apartment buildings,[245] it restricted the scope of the right to control of public performances. Although the *Professional Real Estate* decision is arguably a close one in view of the *Redd Horne* and *Aveco* cases,[246] it did not involve a secondary transmission. Further, it cannot be said with any assurance that the hotel's video rental service is contrary to legislative intent; the House Report states that placing an ordinary television in a hotel room does not infringe.[247] Admittedly, that report does not mention connecting a VCR or a videodisc player to ordinary televisions, but since viewing a movie on a

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hotel—were able to receive the broadcasts transmitted by the defendant's system at different places—their rooms—at the same time.

241. 17 U.S.C. § 111(a)(1). Arguably, the defendant was also disqualified from this exemption because the transmissions were made by its own cable system. Section 111(f) defines cable system. *See generally* H. Rep., *supra* note 6, at 91, 99; 2 M. NIMMER, *supra* note 2, §§ 8.18[C] & 8.18[E][1].

242. *But see* 2 Copyright J. No. 8, at 93 (April 1986, N. Boorstyn ed.). The comment on the *ESPN* decision says that a hotel room is public for purposes of receiving a transmission under clause (2) of the public performance definition, while under clause (1), a hotel room is not open to the public according to the *Professional Real Estate* decision. The *ESPN* court did not, however, hold that a hotel room is open to the public. Rather, it merely held that the defendant's conduct—the retransmission of plaintiffs' programming into its guests' rooms—constituted a public performance.

243. 228 U.S.P.Q. 743, 746. *But see* 2 M. NIMMER, *supra* note 2, § 8.14[C][3] at 8-143-144 & n.48.1 (discussing how clause (2) of the definition applies to the *Redd Horne* and *Aveco* facts). Arguably, this clause also applies, by analogy, to the facts of *Professional Real Estate*. That decision, however, distinguishes the show-casing operations.

244. *See supra* notes 60-66 and accompanying text.

245. 17 U.S.C. § 111(a)(1) (1977). *See also* H. Rep., *supra* note 6, at 91-92.

246. *See supra* notes 120-146 and accompanying text.

247. H. Rep., *supra* note 6, at 91-92. *But see* California Attorney General's Opinion, 1982 Copyright Law Decisions (CCH) ¶ 25,368 at 17107. The opinion correctly concludes that the section 110(5) exemption does not shield the showing of movies to prisoners by use of a VCR and videotapes. Its rationale—"the system would involve more than the ordinary and unembellished television receiver"—misses the point. Section 110(5) has no applicability to the prison's use of VCRs because the prison authorities were not "communicating a transmission embodying a performance." They were not receiving and transmitting radio and television broadcasts to the prisoners. Instead, they obtained video cassette tapes and exhibited them with VCRs and televisions. Section 110(5) applies only to the playing of a radio or television set in a store or public place, not to the playing of records, tapes, video cassette tapes or other prerecorded performances in a commercial establishment or a public place.

VCR at home does not infringe, similar viewing in the privacy of a hotel ought to be exempt as well.

Satellite dish antennae, televisions and the 110(5) exemption were also at issue in *National Football League v. McBee & Bruno's*.[248] The defendants operated several bars and restaurants located in the St. Louis area and within 75 miles of Busch Stadium, the home field for the St. Louis Cardinals of the National Football League. Each of these establishments was equipped with a dish antenna capable of receiving satellite transmissions.[249] This equipment enabled defendants to pick up the TV signals from the live broadcasts of the Cardinals' home games[250] which had been "blacked out" to viewers residing within a 75 mile radius of Busch Stadium pursuant to the NFL's contracts with the major networks.[251] The NFL and the Cardinals claimed that these restaurants had no authority to intercept the transmissions of the live telecasts of the blacked out games and then show the telecasts to their patrons. They alleged copyright infringement and violations of provisions of the Federal Communications Act.[252]

The defendants argued that their interception and showing of plaintiffs' downlink transmission (also called the clean feed because it does not contain commercials and commentary) did not infringe because that feed is neither fixed nor copyrighted; the protected work is the dirty feed. The court rejected this argument because it would permit easy circumvention of the copyright protection Congress intended to grant to all forms of live video and audio entertainment.[253]

The court then focused on the applicability of the 110(5) exemption. It acknowledged that a restaurant which utilized a standard television antenna to receive distant broadcasts came within the exemption because such equipment is commonly used by the public.[254] It concluded, however, that the use of a satellite dish antenna is much different. Dish systems are not commonly used in private homes because there are fewer than 1,000,000 of them

248. 621 F. Supp. 880 (E.D. Mo. 1985), *aff'd in part, rev'd in part*, 792 F.2d 726 (8th Cir. 1986).

249. 621 F. Supp. at 883. One of the defendants used an ordinary television antenna instead of its dish to pick up the broadcast from a station 100 miles away. *Id.* at 884.

250. The audio and visual signals of the live telecast of a football game are transmitted to an "earth station" outside the stadium. The earth station then transmits the program to a satellite (the uplink). A transponder on the satellite receives the signal and transmits it to a network control point in Long Island, New York (the downlink). This down signal contains no commercials and is called a "clean feed." The network receives the clean feed, inserts commercials and other program material, and then transmits it back to the satellite (a second uplink signal called a "dirty feed"). That dirty feed is then transmitted from the satellite and is received by the network's affiliated stations and broadcast pursuant to the NFL's contracts with the networks. The defendants' equipment enabled them to intercept and transmit either the clean feed or the dirty feed down-link signal. *Id.* at 883-84.

251. The NFL's 1982 agreement with the three major networks gave each network exclusive rights to televise certain games subject to several contractual limitations including the requirement that games which are not sold out not be broadcast live within the home club's territory. The home territory was defined as the area within 75 miles of the club's home playing site. Broadcasts of those unsold out games are to be "blacked out" within the defined territory. *Id.* at 883.

252. *Id.* at 882. The plaintiffs' telecast, consisting of video and audio commentary of the games and commercials, are copyrightable. *Id.* at 885 (citing 17 U.S.C. § 102). The NFL, on behalf of its members, and the Cardinals, own the copyrights of the telecasts intercepted by defendants. *Id.*

253. 621 F. Supp. at 886.

254. One of the defendant restaurants used a standard television antenna which enabled it to pick up a broadcast signal from a station in Cape Girardeau, a community 100 miles from St. Louis. This defendant did not intercept the clean feed from the satellite. *Id.* at 887.

in operation and many of those are used commercially while, in contrast, there are currently over 125,000,000 residential television sets in use. In addition, a dish system is far more expensive than most televisions.[255] Thus, the defendants were not exempt and the court granted a permanent injunction prohibiting them from intercepting and showing plaintiffs' programming, whether in the form of the clean or dirty feed transmission.[256]

The defendants maintained on appeal that the district court's ruling on the 110(5) exemption ignored their theory that it was "irrelevant" how "the signal was captured by the antenna outside the premises."[257] They argued that the key to the exemption was whether the establishment "uses commercial equipment to enhance the sound or visual quality of the performance as it is perceived inside the premises."[258] Since they had not done anything to amplify or improve the quality of the performances seen by their bar and restaurant customers, they should be exempt. The court rejected their interpretation of the exemption. It noted that amplification or enhancement of a performance was irrelevant where a receiver could not pick up a broadcast signal in the first place. Furthermore, the legislative history did not suggest that the part of the system receiving the signal should be considered separately from the part which displays. The court also said that the present case differed from the earlier section 110(5) cases which focused on enhancement because here the "plaintiffs intend that their work not be performed *at all* outside their aegis, making the fact of reception rather than just its quality the primary consideration."[259] Since the average patron watching a blacked out game at one of the defendant establishments did not have the ability to watch that same game at his home, then it could not be said that the defendants' dish systems are commonly used in private homes.[260] The court of appeals thus concluded that the trial court's ruling was not clearly erroneous.[261]

The determinations the courts made in the *ESPN* and the *NFL* cases concerning the application of the 110(5) exemption to satellite dish antennae were correct. The performances at defendants' establishments were infringements because their systems did not satisfy the exemption's first requirement: the use of "a single receiving apparatus of a kind commonly used in

255. A television set can be purchased for $100 or more whereas dish systems cost no less than $1500 and for desired reception, $3000 to $6000 or more. *Id.* The court also said that dishes have residential use when the home's location is such that reception through a standard antenna is poor. *Id.*

256. 621 F. Supp. at 891-92. The court also found violations of the Federal Communications Act. *Id.* at 888-90.

257. 792 F.2d 726, 730 (8th Cir. 1986).

258. *Id.* at 730.

259. *Id.* at 731 (citations deleted). The court first summarized the *Aiken* holding and then quoted from the House Report. *Id.* at 730.

260. *Id.* at 731.

261. *Id.* The court of appeals also agreed with the lower court's finding that the clean feed is a fixed work entitled to copyright protection and not an unfixed work, separate from the dirty feed. *Id.* at 732. In a case quite similar to *NFL*, a federal district court in Massachusetts held that tavern owners who exhibited programs from intercepted satellite signals did not deceive their patrons as to the source of the programs in violation of section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a). The court did, however, allow plaintiffs to file an amended complaint alleging copyright infringement. Quincy Cablesystems v. Sully's Bar, Inc., 33 BNA P.T.C.J. 293 (D. Mass. 1986).

private homes." The *ESPN* court made this finding with little explanation while the *NFL* court supported its conclusion with facts and figures. Further, Congress adopted section 110(5) as a limited exemption.[262] In view of its legislative history, especially the emphasis on the facts of *Aiken* setting the outer limit, the courts' decisions were reasonable.[263]

In the future, however, costs may drop and it might be that three or four homes in ten will use a dish antenna.[264] Although Congress has not defined "commonly used in private homes," a commercial establishment's argument that its use of a dish falls within the exemption becomes more persuasive as the ratio drops. If three or four homes out of ten receive free access to a wide variety of signals by use of satellite dishes, then why should not the neighborhood bar that has its ordinary television connected to a small, satellite dish antenna also receive and show that same variety of programming without any fear of copyright liability? Similar arguments may be made with respect to the kinds of sound systems used by the defendants in *Sailor Music, United States Shoe,* and *Eighty-Four Lumber.* Receiving apparatus technology has advanced rapidly so it is possible that sound systems which the courts currently consider "professional," may eventually be regarded as commonly used in private homes.[265] As a result of such developments, retail establishments might assert that they should fall within the 110(5) exemption and be free of ASCAP's or BMI's licensing authority. Arguably, technical advances in the kinds of receiving apparatuses readily available and affordable by most consumers could lead to abuses of the exemption; it would expand to permit many more performances than Congress intended, all to the detriment of copyright owners.[266]

Congress acknowledged this risk but apparently was not troubled by it.[267] Section 110(5) is not precisely drawn. The exemption's specific terms do not provide clear directions for deciding whether a receiving apparatus is a kind commonly used in private homes, and whether the transmission thus received is further transmitted to the public.[268] It "leaves some vague area of interpretation where courts" have to apply the exemption to particular fact situations.[269] The provision's legislative history, however, supplies the

262. Korman, *supra* note 3, at 534.

263. *See* H. Rep., *supra* note 6, at 87. The opinions in the *NFL* case did not go into any detail about the sizes of the several bars and restaurants which used dish antennae nor were there any comparisons made between those establishments and Aiken's fast food restaurant. The district court's willingness to exempt that one restaurant using a standard antenna, however, implies that the defendants operated small establishments which might have been exempt had they stuck to using standard equipment. Connecting a standard television to a satellite dish costing several thousand dollars is a far cry from tuning in the local stations on the television found in a restaurant's lounge or having a standard radio connected to four speakers as in *Aiken.*

264. *But see A Look at Satellite TV,* 51 CONSUMER REPORTS 614-17 (Sept. 1986).

265. Cash, *supra* note 31, at 146.

266. *Cf. id.* at 146 & n.53. *See also* Kernochan, *supra* note 7, at 356-57, 361 & 362. This author asserts that the public performance right has already been diluted substantially as a result of the Act's several exemptions, including section 110(5). He fears further erosion as a result of judicial interpretations of those exemptions and lobbying efforts to persuade Congress to expand some of them, particularly section 110(5).

267. Comment, *supra* note 29, at 1077 & nn.96-97.

268. *See* Cash, *supra* note 31, at 146-48 and 162; Comment, *supra* note 29, 1075-80.

269. 2 M. NIMMER, *supra* note 2, § 8.18[C] at 8-203 to 8-204; *See also* Kernochan, *supra* note 7, at 364.

necessary guides to interpretation so that the courts can resolve the tough cases like *Redd Horne, Professional Real Estate,* and *NFL v. McBee & Bruno's* and effectuate Congress' goals. The several factors contained in the committee reports which accompanied section 110(5) as it worked its way through Congress enable the courts to account for advancements in technology without expanding the scope of the exemption. Copyright owners will not lose control over the public performances of their works due to technological advancements.[270]

For example, cases with facts similar to those in *Sailor Music, United States Shoe, P&X* and *Eighty Four Lumber* still should be decided in favor of the copyright owners in the years to come, notwithstanding advances in receiver technology. Even though their equipment might have become comparable to what many people use in their homes, the commercial establishments involved in those cases also alter or augment their systems with extensive amplification equipment, so the broadcasts they receive can be heard clearly throughout their extensive premises. The House Report indicates that the exemption is not applicable if standard equipment is altered in such ways.[271] Further, these commercial establishments are larger than Aiken's chicken shack and of sufficient size to justify a subscription to a commercial background music service.[272] Congress did not intend for section 110(5) to exempt those commercial establishments. It permits the free use of radio and television broadcasts relayed to the public in small commercial establishments, but not much more.[273] Although the appropriateness of this necessary reliance on legislative history to ascertain what Congress intended can be questioned,[274] it is important to note that the United States Supreme Court has turned to different sections of these committee reports for guidance in deciding some recent cases arising under the Copyright Act of 1976.[275]

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270. It is important to note that Congress explained that a performance may be accomplished by "techniques and systems not yet in use or even invented." H. Rep., *supra* note 6, at 63. "Congress thus seems to have endeavored to ensure that, with respect to the scope of activities encompassed within the concept of performance, 'technological change' would not render the Act's 'literal terms ambiguous.'" A. LATMAN, R. GORMAN & J. GINSBURG, COPYRIGHT FOR THE EIGHTIES 396-97 (2d ed. 1985). *See, e.g.*, WGN Continental Broadcasting Co. v. United Video, 693 F.2d 622 (7th Cir. 1982). *But see* Kernochan, *supra* note 7, at 361 (noting an effort to have Congress expand the section 110(5) exemption).

271. H. Rep., *supra* note 6, at 87.

272. *Id.*; Conf. Comm. Rep., *supra* note 94, at 75.

273. *See* H. Rep., *supra* note 6, at 87; Korman, *supra* note 3, at 534; Comment, *supra* note 29, at 1098. There are several references in the legislative history to small and large establishments but the references never define the terms as specifically concerned with square footage (Aiken's shop had 620 square feet of public area), number of patrons (Aiken's shop had a capacity of 40, 500 F.2d at 128), or the establishment's revenues. Comment, *supra* note 29, at 1078 n.102. However, these references may imply that Congress wants the courts to consider size in both the square footage and revenues (income, profits) senses. Considering the number of patrons is redundant. Aiken's restaurant had only 620 square feet open to the public so it could not serve many people simultaneously while a hotel's coffee shop may have 2000 square feet and a capacity of 350. Moreover, a performance in a place open to the public, such as a retail store, is a public performance regardless of the actual size of the audience, the number of customers in the store. *See* H. Rep., *supra* note 6, at 64-65. Consequently, an establishment like the Gap or Casual Corner, with several thousand square feet, should not be able to argue that it is exempt because it never has more than 40 customers at one time.

274. *See* Cash, *supra* note 31, at 144 & n.48 and 148-58.

275. *See, e.g.*, Harper & Row, Publishers v. Nation Enterprises, 471 U.S. 539 (1985); Mills Mu-

THE PERFORMANCE RIGHT, THE PUBLIC AND PAPA JOE'S

Where does all of this leave Papa Joe's, our hypothetical campus hangout showing rented videocassette tapes of movies on a wide-screen television equipped with a VCR? His bar and grill is a place open to the public and he is performing the movies recorded on the tapes when he plays them for his customers. Thus, he is publicly performing the movie studios' copyrighted works without their authorization. Can Joe's operation fit within one of the Act's exemptions?

Section 110(5) exempts small commercial establishments, like Papa Joe's, whose proprietors merely bring onto their premises a standard television set and turn it on for their customers' enjoyment.[276] That is not, however, what Papa Joe's is doing. Section 110(5) applies only to the communication of a transmission that embodies the performance of a copyrighted work. Playing a videotape cassette on a VCR does not constitute such a transmission.[277] If Joe just turned on a regular television to show the broadcasts from a local station, then the exemption would apply.[278] Section 110(5) does not, however, apply to the playing of records, videotapes or other pre-recorded audio or video performances in a commercial establishment or other public place. Therefore, Papa Joe's cannot fit within section 110(5).

Since none of the other discrete exemptions in section 110 for certain educational, religious and nonprofit performances of copyrighted works offer Joe a safe harbor, it appears that he does not have a defense against the copyright owners and their threat of an infringement suit.[279] He should stop showing the videotape cassettes of the movies and entertain his customers with a regular television set. If he wants to use the wide-screen TV to communicate transmissions of local broadcasts, he should be made aware that some copyright owners might argue that such equipment takes him outside the 110(5) exemption because it is not the kind of receiving apparatus commonly used in private homes.[280]

These conclusions about what Papa Joe's cannot do may seem fairly

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sic, Inc. v. Snyder, 469 U.S. 153 (1985); Sony Corp. of America v. Universal City Studios, 464 U.S. 417 (1984).

276. H. Rep., *supra* note 6, at 87.

277. 2 M. NIMMER, *supra* note 2, § 8.18[C][2] at 8-202 n.71.1.

278. This assumes that his bar and grill is no larger than George Aiken's fast-food restaurant and that Joe is not charging his customers to watch the television shows.

279. Notwithstanding their rights, which seem fairly clear, the copyright owners—Paramount, Universal, MGM, etc.—have to first decide that it is worthwhile to enforce their rights against Papa Joe's and other establishments which show tapes of movies publicly. The costs of investigation, enforcement and monitoring such public uses of their works might be high. It is reasonable to assume that the owners would not incur these costs unless they perceived that they would be offset by stopping these unauthorized performances of their works. *Cf.* Cash, *supra* note 31, at 159-60; Kernochan, *supra* note 7, at 373 (much of ASCAP's litigation is with non-broadcast commercial users such as bars, restaurants and taverns).

280. As in *McBee & Bruno's* case, which involved the use of satellite dishes, this could perhaps be shown by comparing the costs of these "super" televisions with standard sets and by obtaining statistics on the number of such sets now in residential use. 621 F. Supp. at 884. The three major networks, NBC, CBS and ABC, and other non-subscription broadcasters might not object to this sort of public reception and transmission of their broadcasts, but the entities owning copyrights to some of the movies and other works of authorship thus transmitted might complain.

harsh and arbitrary to many lawyers and to most laymen. After all, since he can freely play an ordinary television or radio in his bar, he ought to be able to show movies with his VCR to the same audience. The basic rationale for the 110(5) exemption—"that the secondary use of the transmission by turning on an ordinary recever in public is so remote and minimal that no further liability should be imposed"[281]—seems to justify his use of the VCR to show the movies. Copyright owners are compensated by the broadcasters for the public performances of their works and, under 110(5), no further charges or fees are required from small commercial establishments which relay those performances to their customers. Similarly, the companies holding the copyrights on the movies shown by Joe are compensated in a variety of ways including royalties on the sales of the videocassette tapes of those movies. There seems to be no reason to impose any additional charges on people like Joe who rent these videocassette tapes from their lawful owners. The idea of renting or buying something and then having to pay an additional fee to use the object, is probably inimical to most people.[282] Further, his performances of movies at his bar are not hurting the copyright owners in any measurable way. In fact, he is increasing public access to the works, and some of his customers might decide to pay to see a particular movie at a theater or to obtain a videocassette tape to watch it at home.

These arguments for excusing Joe's operation have superficial appeal but they ignore a variety of factors as well as fundamental copyright policies. The several rights that constitute copyright are separate, distinct and severable. The grant of one does not waive the copyright holder's other rights.[283] Thus, a studio's inability to control the further sale or rental of videocassette copies of its protected movies does not mean it has also lost control over its other exclusive rights. Rather, it retains the exclusive right to perform its movies publicly despite the sale and subsequent rental of the videocassette copies.[284] Congress clearly provided a discrete exemption for small commercial establishments like Papa Joe's to freely provide standard televisions and radios for their customers' entertainment. It is equally clear, however, that this exemption has no application to records or videocassette tapes performed publicly in such establishments. The transmission of a radio or television broadcast in a small shop or restaurant to persons who could freely receive that broadcast at home differs greatly from showing them the tape of a movie for which they would otherwise have to pay to watch. This distinction is subtle and may appear arbitrary, but Papa Joe's should not be judged in isolation. The harm to copyright holders could be substantial if they can-

281. H. Rep., *supra* note 6, at 86.

282. *See* Kernochan, *supra* note 7, at 374-75. Purchasers of videodisc and videocassette movies have a right to rent them. Under the first sale doctrine, any person who purchases or obtains a legitimate copy of a work may "without the authority of the copyright owner . . . sell or otherwise dispose of the possession of that copy. . . ." 17 U.S.C. § 109(a) (1982). "[T]he person to whom the copy . . . is transferred is entitled to dispose of it by sale, rental or any other means." H. Rep., *supra* note 6, at 79. The law allows the copyright owner to collect a royalty when he first sells each copy of a work but any additional royalties on subsequent sales or rentals are not required under the copyright law. *But see supra* note 114.

283. *See* 2 M. NIMMER, *supra* note 2, § 8.01[A].

284. *See* Columbia Pictures Industries v. Aveco, Inc., 800 F.2d 59, 64 (3d Cir. 1986); Columbia Pictures Indus. v. Redd Horne, Inc., 568 F. Supp. 494, 498 (W.D. Pa. 1983).

not control public performances of their works as embodied on these videocassettes and if their performance in places like Pape Joe's becomes widespread.[285] These works are products of labor and creators are entitled to compensation for their efforts when those works are used.

The aim of copyright is to stimulate artistic creativity for the general public good.[286] "[T]he Framers [of the Constitution] intended copyright to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas."[287] Specifically, the 1976 Act does this by granting economic incentives in the form of the several exclusive rights in section 106, thus encouraging author and composer creativity.[288] Copyright is not, however, a complete monopoly[289] and these rights are subject to a number of limitations including those codified at sections 107 through 118. In essence, members of the general public can use copyrighted works in certain ways with no fear of infringement.[290] Congress' attempt to balance the conflicting interests of copyright owners and the public is reflected in the 1976 Act's several provisions which grant, define and limit the performance right.[291]

In particular, the legislative history of the 1976 Act's provisions on the performance right shows that Congress intended to expand the scope of this exclusive right and bolster copyright owners' control over public performances of their works. Congress made these changes in response to technological developments which substantially increased the number of ways by which works could be performed as well as the size of the potential audiences for those performances. The general not-for-profit limitation was eliminated in part because Congress recognized that performances were continuing to supplant markets for printed copies of copyrighted works. It feared that a broad, nonprofit exemption would hurt authors and perhaps diminish their incentive to create.[292] The definition of "public performance" clearly states that performances in semi-public places and to substantial groups of persons are subject to copyright control.[293] Similarly, control over "multiple performances," which had been lost as a result of the CATV and *Aiken* decisions,[294] was returned by the 1976 Act.[295] In response to widespread public use of radio and television broadcasts, Congress decided that copyright should extend to the public reception and retransmission of television and radio broadcasts of performances of protected works. It perceived that the continued and uncontrolled public use of broadcasts of perform-

285. *See generally* Kernochan, *supra* note 7, at 355-57, 361, 363-64.
286. *See* Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975).
287. Harper & Row, Publishers v. Nation Enterprises, 471 U.S. at 558.
288. 17 U.S.C. § 106. *See also* Mazer v. Stein, 347 U.S. 201, 219 (1954); 1 M. NIMMER, *supra* note 2, § 1.03.
289. *See* U.S. CONST., art. I, sec. 8, cl. 8. For instance, copyright has a limited duration, 17 U.S.C. § 302, and it does not protect ideas, 17 U.S.C. § 102(b) (1982).
290. For instance, the opening sentence of section 110 of the 1976 Act states: "Notwithstanding the provisions of section 106 [the grant of exclusive rights], the following are not infringements of copyright:" 17 U.S.C. § 110 (1982).
291. *See supra* notes 68-82 and accompanying text.
292. H. Rep., *supra* note 6, at 63.
293. H. Rep., *supra* note 6, at 64.
294. *See supra* notes 42-60 and accompanying text.
295. *See supra* notes 60-67 and accompanying text.

ances in commercial establishments might harm copyright owners and perhaps reduce their incentive to create.[296]

Congress did not, however, make this revitalized control over multiple performances absolute. Section 110(5), for example, recognizes the need for a limited exemption which permits some secondary transmissions of broadcasts in public places, but it is a fairly limited exemption that applies only to small establishments which meet its three requirements.[297] It is consistent with the general legislative objective of strengthening the copyright owners' control over public performances of their works and represents Congress' attempt to reach a balance in the 1976 Act between copyright owners and the public.[298] Although Joe's bar is a small establishment, his public performances do not fit within the exemption. The 1976 Act reaches a balance which tips against his performance of the tapes, and affords protection and incentives to copyright owners. After all, there is a right of performance that belongs to the creators of the works embodied in those tapes and that intangible right exists separate and apart from tapes themselves.[299] Paying those creators for the public performances of their works enables them to continue working and to create new works of authorship.[300]

296. Comment, *supra* note 29, at 1093 & 1094-95.

297. *See supra* notes 87-96 and accompanying text.

298. Comment, *supra* note 29, at 1092 and 1097-98; *cf.* Note, *supra* note 89, at 253.

299. 17 U.S.C. § 202 (1982).

300. *Cf.* Kernochan, *supra* note 7, at 375-76. Recently, bills have been introduced in Congress to amend the Copyright Act to make it consistent with the requirements of the Berne Convention. *See* COPYRIGHT LAW REPORT (CCH) No. 11 (August 21, 1987). It is important to note that it will not be necessary to amend section 110. The Final Report of the Ad Hoc Working Group on U.S. Adherence to the Berne convention states that "[t]he exemptions to the exclusive rights of public perfromance in section 110 of the U.S. Copyright Act are substantially compatible with the Berne Convention, particularly in light of the laws of the Berne States interpreting these obligations." Final Report of the Ad Hoc Working Group, *supra* note 89, at 9(521). Article 11 *bis* (1)(iii) grants authors the exclusive right to authorize the "public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds, or images, the broadcast of the work." A guide to the convention notes that the practice of communicating broadcasts to the public by loudspeakers and other devices in places like cafes, restaurants, shops and hotels is becoming very common. "The question is whether the license given by the author to the broadcasting station covers . . . all the use made of the broadcast, which may or may not be for commercial ends. The Convention's answer is 'no'." *Id.* at 16(528) (quoting from WIPO, Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act 1971) 103 (1978)). The Convention's provisions, assuring the author of an exclusive right to communicate to the public broadcasts of his work via loudspeakers, implies the use of apparatus much different from the ordinary home receiver. Thus, section 110(5) is compatible with the requirements of Article 11 *bis*. *Id.* at 17(529).