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Copyright Law: Recent Caselaw Developments in The "Single Receiving" Exemption

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COPYRIGHT LAW: RECENT CASELAW DEVELOPMENTS IN THE "SINGLE RECEIVING" EXEMPTION

SUMMARY

This report examines the "single receiving" exemption ("exemption") to the public performance rights of the copyright owners, whereby, under certain circumstances, a business may be able to play copyrighted works without the permission of the copyright owner. Traditionally, courts have seldom found the exemption applicable to particular business situations. In evaluating the applicability of the exemption, the courts have usually utilized the specific statutory guidelines along with criteria derived from the legislative history concerning the physical size of the business premises and the volume of commercial activity.

Two recent circuit court decisions have used alternative criteria to determine the applicability of the exemption. Rather than considering the legislative history and the "size" criteria, the courts looked directly and exclusively to the "face" of the statute and applied the strict statutory criteria. The courts tended to disregard the "size" aspect of the business, and instead focused on the type of equipment used in the businesses. They focused on whether the equipment was a type typically found in the home--"homestyle"--and whether a further transmission of the copyrighted work occurred. Both cases concluded that the equipment met the statutory criteria and that the businesses were eligible for the exemption, despite the fact that the businesses were larger than the instances cited in the legislative history.

The impact of these decisions is uncertain at this time. Future decisions involving application of the exemption may follow the traditional judicial model--using a combination of the statutory criteria and the legislative history; the courts may follow the "plain meaning" interpretation focusing on the equipment in use in the individual stores; or they may pursue another undetermined course of analysis. Congress may take legislative action to resolve the conflicting judicial standards; or, Congress may refrain from legislative action and allow the courts to resolve their conflicts without legislative intervention. Another option may be for the interested parties--the licensing organizations and the business community--to reach an accord outlining the application of the exemption.

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INTRODUCTION

American law provides that copyright is a property interest which protects the rights of the copyright owner.[1] A significant property right is the control of the public performance of the copyrighted work.[2] One very significant exemption from the copyright owner's public performance right is the "single receiving exemption," sometimes also known as the "small business exemption," the "§ 110(5) exemption," and/or the "homestyle exemption," whereby, under certain circumstances, a business may be able to play copyrighted works without the permission of the copyright owner.[3] Traditionally, American courts have applied this exemption in a restrictive manner, so as to be protective of the public performance rights of the copyright owner.[4]

However, two recent judicial decisions may presage a less restrictive interpretation and application of this exemption in certain circumstances. These interpretations are based upon an application of the specific statutory language--the "face" of the statute--without substantial weight being given to the underlying legislative history. These decisions appear to follow the "plain meaning" trend which the Supreme Court and the lower courts have increasingly favored in recent years.

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1 17 U.S.C. §§ 101, 102, 106 (1988).

2 *Id.* at § 106(4). Copyright owners may derive income from licensing the public performances of their copyrighted works. Licensing organizations--such as the American Society of Composers, Authors and Publishers ("ASCAP") and Broadcast Music, Inc. ("BMI")--represent the property interests of the copyright owners and issue licenses--usually known as "performing rights licenses"--in order to authorize the public performance of copyrighted works. These licensing organizations distribute the revenues derived from the performing rights licenses to the copyright owners. *See generally*, CRS Report No. 89-639A, *Copyright Law: Performance Rights in Musical Compositions and Videocassette Recordings*.

3 *Id.* at § 110(5).

4 *See* Shipley, *Copyright Law and Your Neighborhood Bar and Grill: Recent Developments in Performance Rights and the Section 110(5) Exemption*, 29 ARIZ. L. REV. 475 (1987).

THE "SINGLE RECEIVING" STATUTORY EXEMPTION

The most significant exemption from the exclusive rights of the copyright owner for the public performance and display of the copyrighted work is the "single receiving" exemption (referred to afterward in this report as "the exemption"). American copyright law was substantially amended in 1976 and this revision codified the exemption for the first time.[5] The statutory exemption was based upon the Supreme Court's decision in *Twentieth Century Music Corp. v. Aiken*,[6] which involved the defendant restaurant owner operating a radio connected to four ceiling-mounted speakers in a small lunchroom. The copyright owners claimed that the operation of such a system in such a business constituted a public performance and that the defendant was infringing their public performance rights. Reviewing the appellate court's ruling, the Supreme Court determined that Aiken did not perform the copyrighted works when he played the music over the restaurant radio, and hence, had not infringed the copyrighted works. The specific factual circumstances surrounding the *Aiken* decision--the size of the business and the type of equipment--has been used by many courts in their determination of the "outer limits" of the exemption to the copyright owner's performance rights. However, it should be noted that the specific language of the statute does not specify either the physical size of the business, or the amount of trade which a business may have, in order to qualify for the exemption.[7]

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

Notwithstanding the provisions of section 106, the following are not infringements of copyright:

* * * *

(5) communication of a transmission embodying a performance or display of a work by the public reception of a transmission on a single receiving apparatus of a kind commonly used in a private home, unless--

(A) direct charge is made to use or hear the transmission; or

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[5] Pub. L. 94-553, Title I, § 101, Oct. 19, 1976, 90 Stat. 2549, codified at 17 U.S.C. § 110. The copyright law revision became effective January 1, 1978.

[6] 422 U.S. 151 (1975). The district court had found infringement and had held for the plaintiff. (356 F.Supp. 271 (W.D.Pa. 1973)). However, on appeal, the Third Circuit reversed and found that Aiken was a viewer/listener, rather than a broadcaster. (522 F.2d 127 (3d Cir. 1974)). The Supreme Court upheld the decision of the Third Circuit.

[7] The Supreme Court held that there was *no* public performance in *Aiken*. In a somewhat different approach, the statute provides that certain public performances are exempted *from* copyright infringement. If *Aiken* were decided after the enactment of the exemption, a court would probably find that there *was* a public performance, but that it was covered by the exemption.

(B) the transmission thus received is further transmitted to the public;[8]

From an examination of the statute and its accompanying legislative history,[9] it appears that the concept of a "single receiving apparatus of a kind commonly used in private homes" was probably intended to be a radio or a television of a type typically found in use in a private home. The legislative history also made references to the *Aiken* case and to the small size of the commercial establishment involved in that decision.

JUDICIAL INTERPRETATION OF THE EXEMPTION

In determining whether the exemption is applicable to a certain business, the courts have looked to the statute which sets out the criteria for the equipment in use and which provides two further qualifications: 1) whether there is a charge imposed and/or 2) whether there is a further transmission of the performance. Most of the courts have also examined some of the "size" factors considered by the Supreme Court in *Aiken*, and which were discussed in the legislative history: 1) the physical size of the business and 2) the sales volume of the business.

Probably the most significant decision which followed this conventional line of judicial analysis was *Sailor Music v. Gap Stores, Inc.*.[10] The court closely scrutinized: the type of equipment, the size of the store (2769 square feet), and the volume of business. It concluded that the business exceeded the "outer limit" of the exemption and therefore, engaged in the unauthorized public performance of copyrighted works. This judicial analysis--used as an analytical model by the courts in subsequent cases--involved an application of the statute and the *Aiken* "size" criteria.

In the past few years, there have been several decisions concerning the exemption. Most of these holdings have followed the strict application of the *Aiken* principles--as expressed by the *Gap* court--and have supported the performance rights of the copyright owners. However, there has recently been a definite judicial divergence, which has evaluated the criteria for the application

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[8] 17 U.S.C. § 110 (1988). A "transmission program" is defined by the copyright statute as: "... a body of material that, as an aggregate, has been produced for the sole purpose of transmission to the public in sequence and as a unit." (17 U.S.C. § 101 (1988)).

[9] "Thus, the clause would exempt small commercial establishments whose proprietors merely bring onto their premises standard radio or television equipment and turn it on for their customers' enjoyment...." (H.Rep. No. 94-1476, 94th Cong., 2d Sess. 87 (1976)).

[10] 516 F.Supp. 923 (S.D.N.Y.), *aff'd* 668 F.2d 84 (2d Cir. 1981), *cert. denied,* 456 U.S. 945 (1982).

of the exemption somewhat differently, and which has resulted in two decisions which appear to broaden the application of the exemption. These two decisions--which appear to follow the "plain meaning" statutory interpretation theory--focused on the *specific statutory criteria* and placed minimal emphasis on the *Aiken* "size" criteria derived from the legislative history.

Recent Cases Following the Traditional Gap Reasoning

Most recent cases involving the application of the exemption have followed the *Gap* analytical model, with the application of the statutory and the "size" criteria. In *Merrill v. Bill Miller's Bar-B-Que Enterprises, Inc.*,[11] the court focused on three factors: 1) the equipment was not of a type usually found in the home; 2) the broadcast was "further transmitted;" and 3) the "size" of the business was large. The court concluded that the exemption did not apply.[12] Another court applied these criteria and placed particular emphasis on the "size" elements, by examining the restaurant's: 1) square footage; 2) patron capacity; and 3) revenues. Applying the statutory criteria and the "size" standards, the court determined that the exemption did not apply.[13]

Other recent cases have generally followed these models and have determined that the exemption was not applicable. Some of the issues involved in these cases were: whether public address horns mounted outside the business constituted a public performance; [14] whether a "loudspeaker system," not designed as a music transmitter, could be considered a means of public performance;[15] and whether the electronic delivery of movie video signals to hotel rooms constituted a retransmission.[16] In these cases the courts applied both the statutory criteria and the "size" criteria. The courts were protective of the public performance rights of the copyright owners. Finding that the unauthorized uses of the works were infringing uses, the courts awarded damages to the copyright owners.

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[11] 688 F.Supp. 1172 (W.D. Tex. 1988).

[12] A similar analysis was used and a similar holding was reached by the court in *Merrill v. Country Stores, Inc.*, 669 F.Supp. 1164 (D.N.H. 1987).

[13] *Hickory Grove Music v. Andrews*, 749 F.Supp. 1031 (D.Mont. 1990).

[14] *Broadcast Music, Inc. v. Jeep Sales & Service Co.*, 747 F.Supp. 1190 (E.D.Va. 1990). *See* 41 BNA PATENT, TRADEMARK & COPYRIGHT J. 109 (Nov. 29, 1990).

[15] *Crabshaw Music v. K-Bob's of El Paso, Inc.*, 744 F.Supp. 763 (W.D.Tex. 1990).

[16] *On Command Video v. Columbia Pictures*, 777 F.Supp. 787 (N.D. Cal. 1991). *See* 43 BNA PATENT, TRADEMARK & COPYRIGHT J. 136-137 (Dec. 12, 1991).

Recent Cases Departing from the Gap Reasoning and Analysis

Two recent cases have involved the unauthorized use of copyrighted musical works in "chain" stores--individual components of large operations. The courts considered both the statutory criteria and the *Aiken* standards and determined that the exemption *was* applicable. The significance of these decisions is that the courts determined that the *Aiken* "size" criterion was not relevant to the application of the exemption. Rather, the courts emphasized the specific language of the statute and in so doing, focused on the specific *type of equipment in use*. These cases warrant scrutiny, as they represent a departure from the courts' protective position toward the property interests of the copyright owners and the emphasis that the courts have traditionally placed on the "size" elements of the business establishments.

These two cases--which focus on the application of the strict statutory language, rather than on the legislative history--seem to be in accord with the "plain meaning" judicial trend. The primary legal treatise on statutory construction states that if the meaning of a statute is plain on its face, a court does not need to look further.[17] There appears to be a growing tendency for the Supreme Court to focus on the plain meaning of the statute, rather than to elicit meaning and intent from the legislative history.[18] For example, in the recent case of *Connecticut National Bank v. Germain*,[19] Justice Thomas declined to examine the legislative history of the statute, and based his decision squarely upon the plain meaning of the statute.[20] The two copyright cases cited to other "plain meaning" decisions, and it can be considered that these cases followed the path of this judicial trend.

Broadcast Music, Inc. v. Claire's Boutiques, Inc.[21] involved the application of the exemption to an *individual store* which was part of a large chain of stores.[22] Claire's Boutiques ("Claire's") chain comprised more than seven

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[17] 3 SUTHERLAND STAT. CONST. 681-682 (4th ed. 1986). It can be concluded, as did the courts in the following cases, that the statute, 17 U.S.C. § 110(5) can be read "from its face."

[18] *See Patterson v. McLean Credit Union*, 491 U.S. 164, 182-183 (1989); and *Blanchard v. Bergeron*, 489 U.S. 87, 91-93 (1989).

[19] 112 S.Ct. 1146 (1992).

[20] *See also Union Bank v. Wolas*, 112 S.Ct. 527 (1991); *Toibb v. Radloff*, 111 S.Ct. 2197 (1991).

[21] 754 F.Supp. 1324 (N.D. Ill. 1990, *aff'd* 949 F.2d 1482 (7th Cir. Ill. 1991), *cert. denied*, 112 S.Ct. 1995 (1992).

[22] In the *Gap* case which also involved a chain store operation, the court did not address the issue of whether the analysis for the application of the exemption should be directed to one particular store, or to the chain as a whole.

hundred stores (the average size of an individual store was over 800 square feet) and had net sales in 1990 of $168,674,000.[23] Each store was equipped with a radio receiver with two speakers and played radio music exclusively. The court had to determine whether its analysis should focus on each individual store, or on the corporation as a whole.[24] "Section 110(5) does not discuss how to treat chain stores such as Claire's."[25] The court examined the store and its equipment as an individual entity. In its analysis, the Seventh Circuit Court of Appeals examined the caselaw background and the legislative history underlying the exemption. The court then applied the statutory criteria for the exemption. It examined the receiver used in the store and concluded that it was similar to those used in private homes.[26] The court rejected the argument that the radio receiver transmitting the broadcasts to speakers constituted a "further transmission" of the broadcast. Turning to the "size" analysis, the court made a significant departure from copyright caselaw precedent. The court did not give weight to the size of the individual store, or of the chain, or to the collective size of the chain. "It is true that a holding that the financial strength of Claire's is irrelevant contradicts the language of several other cases."[27] Instead, the court looked to the "face" of the statute, rather than to the legislative history.

> Legislative history cannot be used to invent rules totally unrelated to the language of the statute. It is appropriate instead for the purpose of clarifying an ambiguous statute or, what is often the same thing, applying the statute to a situation not clearly foreseen by the drafters of the statute.[28]

In support of its interpretation, the court cited to another case which dealt with a strict application of the statutory language, without significant weight being given to the legislative history.[29] By dismissing the "size" criteria, the court focused its attention on the stereo equipment and its use in the individual store setting. As no charge was imposed to hear the transmission, the court did not address this issue. The court briefly examined the issue of whether the transmission was "further transmitted to the public." The court concluded that Claire's did not further transmit the copyrighted music, and determined that such a transmission: "must entail the use of some device or process that

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23 949 F.2d 1482 at 1484-85.

24 *Id* at 1486.

25 *Id.* at 1489.

26 *Id.* Most of the court's analysis centered upon an examination of the store's stereo equipment.

27 *Id.* at 1491-1492.

28 *Id.* at 1491.

29 *Id. In re Sinclair*, 870 F.2d 1340 (7th Cir. 1989).

expands the normal limits of the receiver's capabilities."[30] Upon the basis of this reasoning, the court concluded that most receiving systems that would "further transmit" the copyrighted works were probably not of the type commonly found in the home.[31]

In its conclusion, the court emphasized its examination of the equipment and its disregard for the "size" of the business.

> Congress, it seems, was not so much concerned with whether an establishment could afford a license but rather with whether the nature of the sound system was such that the performance it renders is more justly considered public in the common-sense, if not technical copyright, notion of that term.[32]

Decided by the Eighth Circuit less than a month after the ruling in *Claire's*, *Edison Bros. Stores, Inc. v. Broadcast Music, Inc.* ("*Edison Brothers*")[33] followed similar judicial reasoning. The court affirmed the decision of the lower court and characterized the exemption as the "homestyle exemption." Edison Brothers was a "chain" operation consisting of more than 2500 stores, most of which had a stereo receiver with two attached speakers which played radio broadcasts. Edison Brothers had strict company policies concerning the equipment and the music to be played on it.[34] The court turned to an examination of the exemption and its applicability to an individual store within a "chain" operation. Relying on the *Claire's* precedent, the court determined that the exemption was applicable to the individual store, rather than to the chain as a whole.

Likewise, the Eighth Circuit did not place great emphasis on the legislative history. As the court stated: "BMI is not asking us to use legislative history to assist in clarifying an ambiguous statute; we are being asked to use legislative history to rewrite the section 110(5) exemption to add new requirements."[35] The court looked directly at the precise language of the statute. "The statute focuses on the equipment being used, and so must we."[36] In reaching this

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30 949 F.2d 1482 at 1495.

31 *Id.*

32 *Id.* The Supreme Court declined to review the case. 112 S.Ct. 1942 (1992). 44 BNA PATENT, TRADEMARK & COPYRIGHT J. 63 (May 21, 1992).

33 760 F.Supp. 767 (E.D. Mo. 1991), *aff'd.* 954 F.2d 1419 (8th Cir. 1992), *cert. denied*, 112 S.Ct. 1995 (1992). *See* 42 BNA PATENT, TRADEMARK & COPYRIGHT J. 548 (April 25, 1991) for a discussion of the district court opinion.

34 954 F.2d 1419, 1420 (8th Cir. 1992).

35 *Id.* at 1422.

36 *Id.* at 1424.

determination, the court quoted from a recent Supreme Court "plain meaning" decision.[37] Thus, the court concluded that the focus of its scrutiny should be upon the equipment in use in each store. Applying the express statutory criteria, the court held that Edison Brothers qualified for the "homestyle exemption." The court did not consider the issue of "further transmission." The Supreme Court denied review of the Eighth Circuit's decision.[38]

ANALYSIS

The holdings in *Claire's* and in *Edison Brothers* raise various issues and may have a significant impact on the future application of the exemption.

Most significantly, it appears that the cases rejected the traditional analysis for the application of the exemption by declining to give weight to the "size" criteria in the legislative history. It appears that this judicial shift would be in line with the holdings of the Supreme Court and lower courts, which have focused exclusively upon the plain meaning of the statute. By interpreting the statutory exemption on its "face," the courts rejected the *Aiken* "size" criterion and appear to have significantly broadened the application of the exemption. Therefore, the exemption may be available to businesses, which under the traditional analysis, would be precluded from its application because of the "size" of their business operations. It seems likely that if *Claire's* and *Edison Brothers* had been analyzed under the traditional judicial model, the courts would have found that these businesses did not qualify for the exemption because of the "size" of their business operations. By comparison, if a court examined the much-cited *Gap* decision, discussed *supra*, using the "plain meaning" rule, the court would probably focus exclusively on the individual store's equipment, rather than upon the various "size" elements.

Will the "plain meaning" interpretation be followed by other circuits or will the traditional narrow application exemption be followed? At this time, caselaw is not determinative.[39]

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[37] *Id.* at 1422, quoting *Union Bank v. Wolas* 112 S.Ct. 527, 530 (1991). "Given the clarity of the statutory text, respondent's burden of persuading us that Congress intended to create or to preserve a special rule [not expressed in the statutory language] is exceptionally heavy."

[38] 112 S.Ct. 1995 (1992). *See* 44 BNA PATENT, TRADEMARK & COPYRIGHT J. 63 (May 21, 1992).

[39] Manual and database searches indicate that neither of these cases has been quoted in subsequent decisions. It appears that no recent judicial decisions have been made concerning the exemption. It may be conjectured that perhaps some performing rights organizations have temporarily deferred further litigation, in light of the "plain meaning" decisions which were adverse to their interests.

The issue of "homestyle" equipment raises certain questions. Should the court look to equipment that was used in the home in 1976 (at the time of the enactment of the exemption) and referred to in the legislative history as radio or television equipment?[40] Or should the court look to contemporary home uses of electronics--such as videocassette recorders, compact discs, etc.--and disregard the language of the legislative history which seems to indicate that the exemption is limited to radio and television equipment? The extant cases do not appear to address this issue. However, if a court followed the traditional analytical model, it would probably give weight to the legislative history and limit the equipment to conventional radio and television equipment. If a court applied the statute on its "face" and did not give weight to the legislative history, the court might find a more expansive scope for "homestyle" equipment which might include more sophisticated electronic technology. It seems likely that the courts will have to consider precisely what electronic technology contemporary society uses in its homes, as the "homestyle" technology becomes increasing complex. In order to determine which comprises "homestyle" equipment, a court may have to turn to expert testimony to determine what contemporary consumers are purchasing and using in their homes.

With the unsettled legal status of the application of the exemption, and with apparently different criteria being used by the various federal circuits, the issue of Congressional action has been raised. Congress may decide not to take legislative action in this situation and to allow the judicial process to take its independent course, with the courts grappling with the different criteria for the application of the exemption. The courts could interpret the statute on its "face," or could apply criteria derived from the legislative history. Congress might decide to take direct legislative action to clarify the criteria to be used in the application of the exemption, such as the "size" issue.

Another option which could be considered in order to resolve the controversy surrounding the application of the exemption might be an accommodation or an accord entered into by the licensing organizations and the business community. Such an agreement might clearly enumerate factors and criteria for the application of the exemption. An agreement of this sort would probably entail considerable and intense negotiation with both the licensing organizations and the business community compromising on various licensing, revenue, and performance issues.

By analogy, an accord concerning public performance and the issue of nursing home residents watching copyrighted videocassettes was reached. Legislation had been introduced in Congress on several occasions--but never enacted--to provide an exemption to allow nursing home residents to view copyrighted videocassettes without the payment of licensing fees. As an alternative to Congressional action, the major motion picture companies and the nursing homes agreed upon a proposal worked out by Robert W. Kastenmeier, then Chairman of the House Intellectual Property Subcommittee, that enabled the nursing home residents to watch films on videocassettes under the same

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[40] *See* note 9.

rules that applied to private home viewing.[41] Under the terms of this agreement, the nursing homes agreed to make a nominal contribution to a charitable organization in the name of the film's copyright owner (usually the film company). In return, a ten year license to show commercial video cassettes was granted to nursing homes, with the license running until January 1, 2001.[42]

It is possible that some accord between the licensing organizations and business representatives might be reached concerning the application of the exemption. For example, there could be an agreement which outlines precisely what a "small" business is, and under what exact circumstances the exemption would be applicable. As the licensing organizations are the moving parties in infringement actions, an accord involving them could greatly clarify the situation involving the application of the exemption, and possibly could reduce the volume of litigation and the accompanying legal expenses.

CONCLUSION

This report has examined the "single receiving" exemption ("exemption") to the public performance rights of the copyright owners. Traditionally, courts seldom found the exemption applicable to particular business situations. In evaluating the applicability of the exemption, the courts usually utilized the specific statutory criteria, along with additional guidelines derived from the *Aiken* case and the statute's legislative history which included various elements concerning the physical size of the business premises and the volume of commercial activity.

Two recent circuit court decisions have used alternative criteria to determine the applicability of the exemption. Instead of considering the legislative history and its *Aiken* criteria relating to the "size" of the business, these courts looked directly and exclusively to the "face" of the statute and applied the strict statutory criteria. In so doing, the courts have followed a trend in the Supreme Court in applying the "plain meaning" rule to determine the meaning of the statute directly from its "face." The courts tended to disregard the "size" aspect of the business, and instead focused on the type of equipment used in the businesses. They focused on whether the equipment was of a type typically found in the home--"homestyle"--and whether a further transmission of the copyrighted work occurred. Both cases concluded that the equipment met the statutory criteria and that the businesses were eligible for the exemption, despite the fact the individual stores were larger in square footage than the business in *Aiken*, had substantial revenues, and were part of large "chain" store operations.

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[41] 40 BNA PATENT, TRADEMARK & COPYRIGHT JOURNAL 309-310 (Aug. 9, 1990).

[42] *Id.*

The impact of these decisions is uncertain at this time. Future decisions involving application of the exemption may follow the traditional judicial model--using a combination of the statutory criteria and the legislative history; the courts may follow the "plain meaning" interpretation focusing on the equipment in use in the individual stores; or the courts may pursue another undetermined course of analysis. Congress may take legislative action to resolve the conflicting judicial standards; or, Congress may refrain from legislative action and allow the courts to resolve their conflicts without legislative intervention. Another option may be for the interested parties--the licensing organizations and the business community--to reach an accord outlining the application of the exemption.

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