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Copyright Law: Performance Rights in Musical Compositions and Videocassette Recordings

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COPYRIGHT LAW: PERFORMANCE RIGHTS IN MUSICAL COMPOSITIONS AND VIDEOCASSETTE RECORDINGS

SUMMARY

Under American law, copyright is a property interest which vests the public performance rights in copyrighted works with the copyright owner, except under certain very limited circumstances. The duration of copyright for works created after January 1, 1978 is usually the remainder of the author's life, plus an additional fifty years. Statutes and caselaw have provided definitions and interpretations for the concepts of "public" and "performance." For the purposes of copyright law, the public performance of a work means the rendition or display of the copyrighted work, either directly or through a process--at a place open to the public, or where a number of persons outside of a family and its social circle are gathered. This report examines the public performance rights of the copyright owners of musical compositions and videocassette recordings.

Congressional action involving performance rights in the 100th and in the 101st Congresses has focused on providing an exception to copyright law so as to permit the display of videocassettes to patients of nursing homes or other health care facilities without the permission of the copyright owners.

Public performance societies or licensing organizations, ASCAP, BMI, and others, represent the property rights of the copyright owners over the public performance of their works. These organizations serve as clearinghouses and provide licenses or permission to individuals who wish to perform, play, or display copyrighted works in public places. Public performance of copyrighted works without the permission of the copyright owner may lead to infringement actions brought by the copyright owner.

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INTRODUCTION

Under American law, copyright is a property interest which protects the creativity and the ownership rights of the author.[1] As a part of this property interest, the copyright holder[2] owns and controls the public performance rights of the copyrighted work, except under certain very limited circumstances. The duration of copyright for works created on or after January 1, 1978 is the balance of the author's life, plus an additional fifty years after the author's death.[3] For the purposes of copyright law, the public performance of a work means the rendition or display of the copyrighted work--either directly or through a process--at a place open to the public, or where a number of persons outside of a family and its social acquaintances are gathered.[4] Licensing organizations[5] have developed which represent the interests of the copyright owner and which "license," or authorize, the public performance of copyrighted works.

Situations involving small business or semi-public places often raise questions regarding the use or "performance" of copyrighted musical compositions and/or videocassettes. This report is limited to an examination of the public performance rights involving copyrighted musical compositions and videocassettes. The copyright statutes and their legislative history provide some guidance for the determination of whether a public performance has occurred. In addition, caselaw has clarified and applied the statutory definitions and assists in the determination of whether a small business, such as a dance studio, is conducting a "public performance" of copyrighted music.

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[1] 17 U.S.C. §§ 101, 102, 106 (1982).

[2] The copyright owner or holder may not be the author of the work; the author may have relinquished his/her ownership rights to another person.

[3] 17 U.S.C. §§ 301 *et. seq.* (1982).

[4] 17 U.S.C. § 101 (1982). Extensive caselaw has examined and interpreted the meanings of "public" and "performance."

[5] *E.g.*, ASCAP, BMI, etc. *See Infra*, discussion.

This report examines the statutory framework of copyright law and its legislative history with respect to the performance rights of the copyright owners of musical compositions and videocassette recordings; it also analyzes the judicial interpretations which have clarified the scope and meaning of performance rights, describes the licensing organizations that control the use of copyrighted works, and summarizes recent Congressional action concerning videocassette recordings and performance rights.

COPYRIGHT LAW AND PUBLIC PERFORMANCE-- STATUTES AND LEGISLATIVE HISTORY

Copyright owners were first granted control over the public performance of their dramatic compositions in 1856[6] and this control was extended to musical compositions in 1897.[7] The 1897 statute was seldom enforced, as the copyright owners believed that the public performances of their works would stimulate the sales of sheet music, a major source of revenue for the copyright owners at that time.[8] A 1909 major copyright law revision provided that the copyright owners had the exclusive control over the public performance of their works and contained a significant requirement that the "public performance" had to be "for profit"--i.e., an admission-charging situation.[9] The effect of the "for-profit" requirement exempted certain public performances of copyrighted works which were not done with a profit incentive. This law remained nearly unchanged until the major copyright law revisions in 1976.[10]

Current American copyright law, substantially updated and revised in 1976,[11] provides that copyright protection exists in a variety of works which can be perceived or communicated directly or with the use of a machine or a device.[12] Copyrightable materials include literary works, musical works and the accompanying music; pantomimes and choreographic works; pictorial,

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[6] Act of Aug. 18, 1856, ch. 169, 11 Stat. 138-139 (1856).

[7] Act of Jan. 6, 1897, ch. 4, 29 Stat. 481 (1897).

[8] 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, 477 (1987)(cited to afterwards as "Shipley").

[9] Act of Mar. 4, 1909, ch. 320, 35 Stat. 1075 (1909).

[10] For a discussion of public performance cases decided under the 1909 legislation, see, Shipley, at 477-483.

[11] Pub.L. 94-553, Oct. 19, 1976, 90 Stat. 2541; codified at 17 U.S.C. §§ 101 *et seq.* (1982).

[12] 17 U.S.C. § 102 (1982).

graphic, and sculptural works; motion pictures and other audiovisual works; and sound recordings.[13] Except for certain specific exceptions discussed below,[14] the owner of the copyright in a work has the exclusive right to authorize the public performance of that copyrighted work. This report focuses on the performance of videocassettes and musical works. Statutory law does not specifically discuss the playing or viewing of copyrighted videocassettes, although caselaw does. The owner of the copyright of each musical work has the exclusive right to authorize the public performance of that work. However, the *sound recordings of musical works* do not include a public performance right.[15] Hence, the copyright owner of a recorded song, such as the composer or the music publisher, is entitled to be compensated for the public performances of the work; whereas, the copyright owner of the *sound recording*, such as a record company, is not entitled to compensation. Nearly every user--aside from the copyright owner--who publicly performs music must obtain a license from the copyright owner or be held liable for copyright infringement. Generally, the user is obligated to locate the copyright owner and obtain permission to perform the work; or the user must contact the appropriate performing rights society to obtain a license to perform the work.[16]

Several statutory definitions provide the basic framework for the public performance rights of the copyright owner under current copyright law.

"*Exclusive Rights*"

§ 106. Exclusive rights in copyrighted works

> Subject to section 107 through 118, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

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[13] *Id.*, § 102 (1982).

[14] *See*, 17 U.S.C. §§ 110, 111 (1982).

[15] **§ 114. Scope of exclusive rights in sound recordings**

> (a) The exclusive rights of the owner of copyright in a sound recording are limited to the rights specified by clauses (1), (2), and (3) of section 106, and *do not include any right of performance under section 106(4).* 17 U.S.C. § 114 (1982)(emphasis added).

[16] Korman and Koenigsberg, *Performing Rights in Music and Performing Rights Societies*, 33 J. Copyright Soc. 332, 347-348 (1986)(cited to afterwards as "Korman").

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> (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, *to perform the copyrighted work publicly* (emphasis added);[17]

The right of public performance represents an important property interest for the copyright owner.[18] Licensing organizations, discussed below, represent the interests of the copyright owners and collect fees from the persons/businesses which perform the copyrighted work publicly.

"*Perform*"

The copyright statute specifically sets forth the definition of the term "perform":

> To "perform" a work means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible.[19]

The legislative history of this section clarifies the concept of "perform" by stating that this concept covers not only the "initial rendition or showing, but also any further act by which that rendition or showing is transmitted or communicated to the public."[20]

"*Public*"

To perform or display a work "publicly" means--

> (1) to perform or display it at a place open to the public or at any place where a substantial

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[17] 17 U.S.C. § 106(4)(1982).

[18] Korman, at 323-333.

[19] 17 U.S.C. § 101 (1982). In addition, this section also provides clarification for the definitions of "device or process." "A 'device,' 'machine,' or 'process' is one now known or later developed." (17 U.S.C. § 101 (1982)).

[20] H. Rep. No. 94-1476, 94th Cong., 2d Sess. 63-64 1976)(cited to afterwards as "H. Rep.").

> number of persons outside of a normal circle of a family and its social acquaintances is gathered; or
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> (2) to transmit or otherwise communicate a performance or display 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 or display receive it in the same place or in separate places and at the same time or at different times.[21]

The copyright statute provides definitions for two of the terms used in the above definition: display and transmit.

> To "display" a work means to show a copy of it, either directly or by means of a film, slide, television image, or any other device or process or, in the case of a motion picture or other audiovisual work, to show individual images nonsequentially.[22]
>
> To "transmit" a performance or display is to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent.[23]

The 1976 copyright law revision eliminated the requirement that public performances had to be made for profit. In addition, the legislation expanded the concept of "public" to exempt only genuinely private performances. The legislative history indicates that semi-public places such as clubs, dancing schools, factories, and other places are deemed to be public places for the purposes of copyright law:

> Under clause (1) of the definition of "publicly" in section 101, a performance or display is "public" if it takes place "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." One of the principal purposes of the definition was to make clear, that, contrary to the decision in *Metro-Goldwyn-Mayer Distribution Corp. v. Wyatt*, 21 C.O. Bull. 201 (D. Md. 1932), performances in "semipublic" places such as clubs, lodges, factories,

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[21] 17 U.S.C. § 101 (1982).

[22] *Id.*

[23] *Id.*

> summer camps, and schools are "public performances" subject to copyright control.[24]

Another way of analyzing what constitutes a "public performance" is to consider what is private or "home" for the purposes of statutory copyright law. Although current copyright law and regulations do not specifically define what constitutes a "home," inferences can be drawn from the statutory definition provided for the public performance of a work. The statute provides that the public display of a work is its display or performance at a place open to the public or where a substantial number of people "outside the normal circle of a family or its social acquaintances is gathered."[25] The accompanying legislative history of the 1976 copyright revision elaborated on this statutory definition as follows:

> The term "a family" in this context would include an individual living alone, so that a gathering confined to the individual's social acquaintances would normally be regarded as private. Routine meetings of businesses and governmental personnel would be excluded because they do not represent the gathering of a "substantial number of persons."[26]

Hence, from the legislative history, it would appear that the concept of a "home" for copyright law purposes is limited to the traditional concept of that term and that certain other "semi-public" situations are to be considered as "public" places for the purposes of copyright law.[27]

Exemption

The copyright statutes provide for certain limited exemptions from the exclusive rights of public performances and display which include: face-to-face teaching activities, instructional broadcasting, religious services, certain other nonprofit performances, public reception by single receiving apparatus, agricultural fairs, retail sales of copies or phonorecords, transmission to blind or deaf audiences of nondramatic literary works, and single transmission to

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[24] H. Rep. at 64.

[25] 17 U.S.C. § 101 (1982).

[26] H. Rep. at 64.

[27] Melville Nimmer, *Copyright Liability for Audio Home Recording: Dispelling the "Betamax Myth,"* 68 Va. L. Rev. 1505, 1518-1520 (1982).

blind audiences of dramatic literary works published at least ten years earlier.[28]

The most significant of these is provided by the so-called "single receiver" exception:

> **§ 110. Limitations on exclusive rights; Exemptions of certain performances and displays**
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> Notwithstanding the provisions of section 106, the following are not infringements of copyright:
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> * * * *
>
> (5) communication 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;[29]

The concept of a "transmission program" is defined by statute.

> A "transmission program" is 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.[30]

It appears from the statute that only the use of a radio or television of a type commonly used in a private home would qualify for the section 110(5) exemption. This interpretation is reinforced by clear language contained in the legislative history:

> 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 customer's enjoyment, but it would impose liability where the proprietor has a commercial "sound system" installed or converts a standard home

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[28] *See,* 17 U.S.C. § 110 (1982). *See,* Henn, *Copyright Primer* 184-200 (1979).

[29] 17 U.S.C. § 110(5)(1982).

[30] 17 U.S.C. § 101 (1982).

> receiving apparatus (by augmenting it with sophisticated or extensive amplification equipment) into the equivalent of a commercial sound system.[31]

From the language of the statute and the legislative history it would appear that the use of a record player/stereo system, a compact disc ("cd") player, or a tape recorder would not qualify for the exemption which appears to be limited to radio and television equipment. Also, it appears that the size, the number, and the complexity of the number of the speakers and receiving apparatus is of significance in the determination of whether a public performance is exempt. This is the view accepted by the Copyright Office.[32]

ANALYSIS

American copyright law provides the owner of copyrighted music and videocassettes with the public performance rights to those works. Situations are frequently encountered where questions exist as to whether a performance has occurred and whether such performance occurred in public. Questions involving public performance issues often occur within the context of small businesses and the use of copyrighted music or videocassettes. Caselaw has examined various factual situations and has applied statutory law and has provided interpretations.

Pre-1976 Caselaw

Under the 1909 Act, which was in effect until the 1976 copyright law revision, which went into effect in 1978, there were three elements needed in order to provide that a public performance of a copyrighted work had occurred: 1) whether the rendition was a performance; 2) whether the performance was a public performance; and 3) whether the public performance was done for profit.[33] Because the "for profit" requirement under pre-1976 caselaw was eliminated by the copyright revision, many of the older public performance cases are not of great relevance in analyzing current day public performance situations. The most current relevant case decided under the 1909 copyright legislation concerning public performance issues was *Twentieth Century Music Corp. v. Aiken*.[34] In *Aiken*, the defendant operated a small restaurant supplied with a radio connected to four speakers mounted on the

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[31] H. Rep. at 87 (emphasis added).

[32] See, letter from Dorothy Schrader, General Counsel, Copyright Office, to Hon. Elton Gallegly at 2-3 (Mar. 30, 1989).

[33] *See,* Shipley, at 477-483.

[34] 422 U.S. 151 (1975).

restaurant ceiling. The radio was played regularly for the enjoyment of the restaurant's employees and patrons. Certain of the plaintiff's copyrighted songs were played by the radio station under a broadcast license and were simultaneously received and transmitted at the restaurant. The district court found infringement and held for the plaintiff.[35] However, the Third Circuit reversed, finding that Aiken was a viewer/listener, rather than a broadcaster.[36] This finding was upheld by the Supreme Court[37] which determined that Aiken did not perform copyrighted works when he played music over the restaurant radio. The circumstantial setting in the *Aiken* case--a small business using a radio with four attached speakers--is still used by courts in determining the "outer limits" of the so-called "single receiver exception" to the copyright owner's performance rights.[38]

Post 1976 Caselaw

There are basically two lines of cases which involve performance rights: 1) the line of cases which explores the concepts of "public performance" and the issue of what is "public" and what is "home," and 2) the line of cases involving the section 110 exemption to public performance. In examining a particular situation involving the use of copyrighted works to determine whether the copyright owner's performance rights are involved, a two step model can be used: first, whether the situation involves a "public performance," and second, if the situation appears to fall within the public performance concept, then whether it would fall within the section 110 exemption. If it does not fall within the exemption, then it would probably be considered to be a public performance for the purposes of copyright law and its performance would require the permission of the copyright owner.

"Public" or "Home" Use

Courts have been called upon to examine various situations regarding the use of copyrighted materials and have had to determine whether the area of the viewing or performance of the copyrighted work was a "home" or was a "public" place. One series of cases has examined the concept of public performance involving the use of videocassette recorders. In *Paramount*

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[35] 356 F. Supp. 271 (W.D. Pa. 1973).

[36] *Twentieth Century Music Corp. v. Aiken*, 500 F.2d 127 (3rd Cir. 1974).

[37] *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151 (1975).

[38] *See infra*, discussion. *See*, Marcovitch, *On Aiken, Performance and the 110(5) Exemption: Is There a Gap in the Court's Thinking?*, 11 West. St. U. L. Rev. 129 (1983).

Pictures Corp. v. Sullivan, the district court examined the situation of a restaurant's showing copyrighted videocassettes of motion pictures without receiving permission from the copyright owners for a "public performance."[39] The court held that the showing of videocassettes in a restaurant was a public performance under copyright law. Subsequent cases have determined that the exhibition for a fee of copyrighted videocassettes in private rooms at video stores is considered to be a public performance.[40] The courts deemed that a public performance was held, even when members of a single family viewed video cassettes in a private room at the store.[41] These cases demonstrate that courts are cautious in categorizing various situations as a "home" for the purposes of copyright law. Rather, the courts determined that these viewings were public performances and hence were subject to the provisions of copyright law. Thus, the individuals who wished to show the copyrighted materials in public needed to secure the permission of the copyright owners.

Other recent cases have explored various situations to determine whether a public performance was involved. In *Hinton v. Mainlands of Tamarac*,[42] the court examined the situation where a condominium association held weekly dances in its clubhouse, which was owned by all of the condominium owners. The condominium association charged a small admission to cover the costs of the musicians. Representatives of the owners of the copyrighted music that was played at the dances brought an infringement action against the association and won.[43] In this case, the district court recognized, discussed, and characterized a so-called "family exception"[44] from copyright liability which the court derived from the "public performance" definition of section 101 of copyright law. In another situation involving a private club, which appears to be the initial judicial determination of this factual situation, *Ackee Music, Inc. v. Williams*,[45] the district court determined that a private club did not fit within the concept of a home and hence copyrighted materials performed or played there were subject to the public performance provisions of the

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[39] *Paramount Pictures Corp. v. Sullivan*, 546 F. Supp. 397 (D.C. Me. 1982).

[40] *Columbia Pictures Indus. v. Redd Horne, Inc.*, 568 F. Supp. 494 (W.D. Pa. 1983), *aff'd.*, 749 F.2d 154 (3rd Cir. 1984).

[41] *Columbia Pictures Industries, Inc. v. Aveco, Inc.*, 612 F. Supp 315, 319 (M.D.Pa. 1985, *aff'd.*, 800 F.2d 59 (3d Cir. 1986).

[42] 611 F. Supp. 494 (S.D.Fla. 1985).

[43] *Id.*, at 495-496.

[44] *Id.*, at 496.

[45] 650 F. Supp. 653 (D.Kan. 1986)

copyright laws.[46] The defense raised by the defendant was that his establishment was a private club under state laws and that the musical compositions were not publicly performed. The court cited to the legislative history of the copyright revision which specifically indicated that "semipublic" places such as clubs were considered to be public places for the purposes of copyright law. The court held that even though the establishment was a private club, for the purposes of copyright law it was deemed to be a public place:

> Although the establishment is classified as a private club under the laws of the state of Kansas, it is a "place where a substantial number of persons outside of a normal circle of a family and its social acquaintances" may gather. Regardless of the status of the establishment under local law, congressional intent controls the application of the substantive provisions of the Copyright Act.[47]

Hence, merely because the establishment was a "private club" did not exempt it from copyright laws. Although the court did not articulate the elements which made the club a public place, it examined the legislative history underlying the definition of "publicly" in section 101. The court quoted the statutory definition of a public performance occurring: "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."

The most recent judicial interpretation of public performance was in *Columbia Pictures v. Professional Real Estate Inv.*[48] The situation under scrutiny in this case involved a hotel renting movie videodiscs to its guests for viewing in each guestroom on a videodisc player. The plaintiffs claimed that the movies were performed "publicly" when the hotel guests viewed them in their own hotel rooms. The issue before the court was the precise meaning of the concept of "publicly."[49] The plaintiffs focused on the definition of public performance in 17 U.S.C. section 106(4), sometimes known as the "transmit" clause. Columbia argued that because the hotel permitted hotel guests to rent videodiscs for in-room viewing on hotel provided equipment, such action constituted a public performance. The court examined the factual situation in this case and compared it with the *Redd Horne* and *Aveco* situations and distinguished between them and the situation before the court.[50] In this case, the hotel was involved in providing living accommodations and general hotel

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[46] *Id.*

[47] *Id.*, at 656.

[48] 866 F.2d 278 (9th Cir. 1989).

[49] *Id.*, 280.

[50] *Id.*, at 281.

services which may incidentally include the rental of videodiscs to interested guests for viewing in guest rooms. The court found that, while the hotel may be open or accessible to the public, once a guest's hotel room was rented, it was not open to the public and was compared to the guest's home. The court reinforced its opinion by examining the relevant legislative history and examining the congressional intent involving the concept of public performance. The court also held that the hotel could not be construed as "transmitting" performances because of its rental of videodiscs and its providing viewing equipment to their guests.[51] Significantly, in its conclusion, the court stated its awareness of the technology changes, but determined that "it is for Congress, not for the courts, to update the Copyright Act if it wishes to protect the viewing of videodisc movies in guest rooms at La Mancha."[52]

The Section 110(5) Exemption

Several cases have examined the playing of copyrighted music in business places and whether the section 110 exemption would come into play. The determinative case in this judicial development is *Sailor Music v. Gap Stores, Inc.*[53] In this case, the court examined the section 110(5) exemption and considered its applicability to the factual situation at hand. The Gap Stores, a chain of clothing stores transmitted radio music programs throughout its stores through radio receivers connected to loudspeakers recessed in the ceilings of its stores. The store involved in the instant case had four speakers recessed behind wire grilles in the store's ceiling and the size of the store was 2769 square feet. In analyzing the situation, the court relied on the legislative history, which in turn quoted the *Aiken* case,[54] and determined that the factual situation involved in *Aiken* was the "outer limit" of the exemption.[55] In this case, the court determined that the Gap store exceeded the "outer limit" of the section 110 exemption and was engaged in the public performance of copyrighted works without the permission of the copyright holders.

The decision in the *Gap* case has served as the basis for several related decisions involving business places and the broadcasting of copyrighted musical

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[51] *Id.*, at 281-282.

[52] *Id.*, at 282.

[53] 668 F.2d 84 (2d Cir. 1981).

[54] *Aiken* involved a public area of 620 square feet and a radio receiver connected to four speakers in the shop's ceiling.

[55] 688 F.2d 84, 86 (2d Cir. 1981), quoting from H. Rep. No. 1476, 94th Cong., 2d Sess. 87 (1976).

works. In *Broadcast Music, Inc. v. United States Shoe Corp.*[56] the defendant operated a chain of retail stores where regular radio broadcasts were played to the public through the use of a single radio receiver connected to four or more speakers mounted on the store ceiling. Copyrighted music was played through this system. The plaintiff, Broadcast Music, Inc., ("BMI") is a music licensing agency which represents the interests of the copyright holders. BMI sought injunctive relief for the unauthorized public performance of copyrighted music. The defendant argued that it fit within the section 110(5) exemption because the music it played was transmitted over a single receiving apparatus of a kind "commonly used in private homes" and in effect permitted under the section 110(5) exemption.[57] The court again considered the *Aiken* situation as the "outer limit" for the exemption provided by section 110(5). The court found that the defendant stores exceeded this limit, as each store had a commercial monaural system with widely separated speakers of a type not commonly used in private homes, and the size and nature of the operation justified the use of a commercial music system.[58] The court also rejected the argument that the statute was vague and hence void.

Other cases have followed a similar line of judicial reasoning. The fact that a commercial sound system was used to transmit music into public areas from the office of the business was deemed to be sufficient to satisfy the definition of the term "transmit" used in the 1976 Copyright Act in *Rodgers v. Eighty Four Lumber Co.*[59] The defendant maintained that its performances were exempt under the section 110(5) exemption because of the noise levels in the stores. The defendant argued that 1) the use of the music was to muffle industrial noise and not as a performance, and 2) the receiving apparatus was not altered for the purpose of improving the quality of the performance for individual members of the public using these areas or to attract the public to its stores. The court found that these arguments were irrelevant regarding the section 110(5) exemption.[60] Relying on the *Aiken* size parameters and the *Gap* precedent, the court determined that the defendant's sound system was more like a commercial sound system rather than like a single receiving apparatus typically used in a private home and hence was not covered by the section 110(5) exemption.

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[56] 678 F.2d 819 (9th Cir. 1982).

[57] *Id.*, at 817.

[58] *Id.*

[59] 617 F. Supp. 1021 (D.C.Pa. 1985).

[60] *Id.*, at 1023.

Another recent case[61] involved a nightclub where a radio receiver was installed by concealed wire to eight speakers throughout the business. In addition, on occasion musicians played music for tips on the premises. After being contacted numerous times by the music licensing organization ASCAP, and after unsuccessful attempts by ASCAP to have the proprietor secure a license for the public performance of music, ASCAP took legal action against the proprietor.[62] The district court determined that this situation was clearly outside the section 110(5) exemption for small businesses. In reaching this conclusion, the district court articulated three basic requirements for the section 110(5) exemption, which were subsequently restated by the appellate court: 1) the receiving apparatus must be of a kind commonly used in private homes; 2) the performances must not be further transmitted to the public; and 3) the business must be a small commercial establishment.[63] Because of the factual situation involved in the business--a nightclub with eight speakers and occasional live musical performers--the court determined that the business under question did not fit within the commercial exemption available for small businesses which used receiving equipment commonly found in the home.

Application of Public Performance Principles

Various situations recur which involve questions of public performance and the related issue of securing permission to perform copyrighted works. Several factual situations are briefly examined to determine whether permission should be secured for the public performance of copyrighted materials. It appears that there is not existing caselaw which absolutely controls the resolution of the following factual situations.

One situation could involve a dance or an exercise class which meets in a small room. A charge is imposed for the instruction and typically audio cassettes, records, or a combination of these are played to the dance/exercise class. While this situation might fit the *Aiken* exception by having a small commercial establishment, the audio equipment does not fit within the section 110(b)(5) exemption. Thus, the use of a cassette player, a cd player, a stereo, or a combination of these devices removes the situation from the statutory exception, and this situation would probably be deemed to be a public performance. Hence, permission from the copyright owners would need to be secured for the use of the music--either directly from the creators of the music or through the licensing organizations.

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[61] *International Korwin Corp. v. Kowalczyk*, 855 F.2d 375 (7th Cir. 1988).

[62] *International Korwin Corp. v. Kowalczyk*, 665 F. Supp. 652 (N.D.Ill. 1987).

[63] *Id.*, at 657-658. *See*, 855 F.2d 375, at 378 (7th Cir. 1988).

Another situation could involve a "neighborhood bar" where a radio is played, using fewer than four speakers, and a television is sometimes played. This situation would appear to fit within the *Aiken* criteria and would be the small commercial establishment that the exception was designed to meet. Thus, the equipment is of a type typical to household use, there are fewer than four speakers, and the commercial space is not large. Here, the equipment is limited to a radio and a television which are common to household use.

Still another situation might concern a college dance held in a dormitory recreation room where no admission is charged. Music is provided by a student's stereo system and the guests bring their own records. At first glance, this might be argued to fall within the "home" exception, but it would probably be deemed to be a "public performance."[64] The statute and the legislative history are clear that semi-public places such as dormitories, summer camps, and related areas are deemed to be public places for the purposes of copyright law and would require the permission of the copyright owner to perform the music.

A final circumstance might involve the use of a videocassette recorder in a hospice for the terminally ill. Volunteers bring prerecorded videocassettes and play them for the residents. This, like the previous situation involves the use of copyrighted materials in a semi-public place. Although it could be argued that the hospice is a "home," for the purposes of copyright law, on the basis of the legislative history which classified semi-public places as "public" places, it would probably be deemed to be a public place and hence the playing of the videocassettes would probably be deemed a public performance. Hence, permission would be needed to lawfully play videocassettes in this situation. Legislation has been introduced in both the 100th and in the 101st Congresses to provide a "nursing home" type exception for the use of copyrighted materials.[65]

Summary

Considering these cases and the court's reasoning in them, certain observations can be made. First, it appears that the courts have been very sparing in considering certain performances to be non-public, i.e., "home" performances and hence exempt from performance rights. Likewise, the courts seem to have been reluctant to apply the section 110 exemption to various situations. The courts have continued to use the *Aiken* case factual situation as the outer limit for the statutory exemption--a small business with four speakers of a kind found in a private home as the furthest extent that a business could use and still be considered within the section 110(5) exemption.

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[64] *See*, footnote 31.

[65] *See*, discussion, *infra*.

It appears that courts have been willing to find infringement and impose damages when businesses play copyrighted music, even if the primary purpose of the music is to drown out industrial noises. In the 1987 *Korwin* case, the court articulated three basic requirements for the section 110(5) exemption to apply: 1) the receiving apparatus must be of a type commonly used in private homes; 2) the performances must not be further transmitted to the public; and 3) the business must be a small commercial establishment.

CONGRESSIONAL ACTION

Through the past several Congresses, bills have been introduced which have addressed certain aspects of public performance, home use of recording equipment, and related issues. However, bills have not been introduced which address public performance issues of copyrighted musical compositions. The public performance issues which Congress has considered deal with the unlicensed showing of videos in health care facilities. In the 99th Congress, one bill was introduced which addressed the home recording use of videocassette recorders (VCRS). H.R. 384[66] proposed to amend copyright law so as specifically to exclude from liability for infringement of copyright any individual who records copyrighted works on a VCR if the recording is made for a private use and not used for a commercial purpose. While the bill never emerged from committee consideration, the significance of such legislation was that, if it had been enacted, it would have placed in statutory language a type of home recording use exception to copyright law.[67] Although the *Sony* case dealt with a specific aspect of home VCR recording, it left many unanswered questions.

Two bills were introduced in the 100th Congress which dealt with VCR use and public performance issues. H.R. 2429, the "Patients' Viewing Rights Act,"[68] proposed to amend copyright law so as to permit the unauthorized performance of audiovisual works for patients in health care facilities.[69] The bill specifically defined the term "health care facility" and required that there be no commercial advantage from such performance. The bill did not emerge from committee. Another bill, S. 2881, which also did not emerge from committee, would have provided an exception for copyright law for the

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[66] H.R. 384, 99th Cong., 1st Sess. (1985).

[67] The exception was judicially created in the landmark case of *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

[68] H.R. 2429, 100th Cong., 1st Sess. (1987).

[69] The coverage of the bill appeared not to be limited exclusively to VCR use.

performance or display of a work on a VCR if such a performance occurred in a "hospital, hospice, nursing home, or other group home providing health or health-related care...." The bill further provided that no direct charge would be made for this performance. This bill was distinguished from H.R. 2429 in that S. 2881 applied only to VCR use and the House bill could apply to other recording/playing devices.

To date in the 101st Congress, three bills have been introduced. S. 716[70] would amend copyright law so as to permit the unlicensed showing of videos under very specific conditions. Section 110 of title 17 would be amended by adding a new paragraph dealing with displays or performances provided by means of a VCR and a television set commonly used in private homes. The conditions attached to such exception require that the performance occur in a hospital, nursing home, or other home providing health or health-related care and services to individuals on a regular basis; that no charge is made to see or hear the performance; and that the performance is not further transmitted to the public. Companion bills, S. 1557[71] and H.R. 3158[72] make provision for health care facilities. These bills would also amend section 110 of title 17. The only significant difference between these two companion bills and S. 716 is that the companion bills require that the health care institution provide long-term health or health-related care and services to individuals on a regular basis and that the institution serve as a temporary or a permanent home for such individuals. At the present time none of these bills has emerged from committee.

THE DEVELOPMENT AND OPERATION OF THE PERFORMING RIGHTS SOCIETIES

As previously mentioned, the copyright law gives the copyright owners the exclusive right to the public performance of their works. Musical works are included as part of this performance right. However, sound recordings are not. Hence, the copyright owner of a recorded musical composition, i.e., the composer or the publisher, is entitled to be compensated for public performances; but the copyright owner of the sound recording, such as a recording company is not entitled to compensation.[73] Nearly every other user of the copyrighted music is required to secure a license from the copyright owner, or be liable for infringement.[74] Hence the user of the copyrighted

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[70] S. 716, 101st Cong., 1st Sess. (1989).

[71] S. 1557, 101st Cong., 1st Sess. (1989).

[72] H.R. 3158, 101st Cong., 1st Sess. (1989).

[73] *See*, 17 U.S.C. § 114 (1982). *See*, discussion at 3.

[74] *See*, 17 U.S.C §§ 502, *et. seq.* (1982).

material must secure the permission of the copyright proprietor or contact the performing rights organization to obtain a license.[75]

The performing rights organizations developed as a medium to make the licensing of music easier and more economical for the thousands of commercial users of music.[76] Using "blanket license," a comprehensive license which covers all of the musical works in the licensing agency's repertory, the users of copyrighted music are able to perform the copyrighted music without having to negotiate a separate license with each copyright owner, or without having to maintain performance logs to account for each public performance of copyrighted works. Three performing rights societies currently exist within the United States today. They are not chartered, authorized, or required by federal law or regulation. However, the copyright statute does provide a definition of the performing rights societies.

> (3) A "performing rights society" is an association or corporation that licenses the public performance of nondramatic musical works on behalf of the copyrightowners, such as the American Society of Composers, Authors and Publishers, Broadcast Music, Inc., and SESAC, Inc.[77]

The three music licensing organizations currently operating in the United States are the American Society of Composers, Authors and Publishers ("ASCAP"), Broadcast Music, Inc. ("BMI"), and the Society of European State Authors and Composers ("SESAC"). The Motion Picture Licensing Corporation ("MPLC") is a licensing organization which has developed to authorize the licensing of videocassette recordings. A more detailed discussion of these licensing organizations appears in the Appendix to this report.

CONCLUSION

Copyright law vests public performance rights in copyrighted works with the copyright owner. Statutes and caselaw have provided definitions and meaning to the concepts of "public" and "performance." The public performance of a work means the rendition or display of the copyrighted work, either directly or through a process--at a place open to the public, or where a number of persons outside of a family and its social circle are

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[75] Korman, at 347-348.

[76] *The ASCAP License: It Works For You*, pamphlet published by ASCAP (undated); *BMI and the Broadcaster: Bringing Music to America*, pamphlet published by BMI, 1988.

[77] 17 U.S.C. § 116(e)(1)(1982).

gathered. A related issue is what constitutes a "home" for the purposes of copyright law. There are certain very specific exceptions to the copyright owner's public performance rights. One of these involves the transmission of a broadcast in a public place. This exemption has been narrowly construed by the courts and applies in only very specific instances.

Congressional action in the 100th and in the 101st Congresses has focused on providing an exception to the copyright law to allow the display of videocassettes to patients of nursing homes or other health care facilities without the permission of the copyright owner.

Public performance societies, or licensing societies--ASCAP, BMI, SESAC, and others--represent the rights of the copyright owners over the public performance of their works and provide licenses or permission to individuals who wish to perform, play, or display copyrighted works in public places. Public display of copyrighted works without the permission of the copyright owner may lead to infringement actions brought by the owner.

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APPENDIX

THE PERFORMING RIGHTS SOCIETIES

The performing rights organizations provide a mechanism to "license" or authorize the public performance of copyrighted musical works and videocassette recordings. As specific questions arise regarding a specific organization, this appendix provides a summary of the performing rights organizations currently operating in the United States.

ASCAP

The American Society of Composers, Authors and Publishers, "ASCAP," was founded in New York in 1914 by a group of composers, lyricists, and music publishers led by composer Victor Herbert. Its initial goal was to start licensing and collecting for public performances of their works. It currently has about 40,000 members, representing such professions as composers, lyricists, and music publishers.[1] ASCAP is owned and operated by its members and operates as a clearinghouse in performance rights through issuing bulk licenses to licensees. Currently, permission to perform the ASCAP members' compositions can be obtained directly from the member or from ASCAP, which licenses on behalf of the member. Usually, an ASCAP license gives the right to perform all of the works in the ASCAP repertory, the work of all of the members.

ASCAP functions as a membership association. It collects license fees for members, deducts operating costs, and pays the remainder to the members.[2] ASCAP does not own copyrights or publish music, or license recording rights. Rather, ASCAP acquires from its members their non-dramatic performing rights to their works. ASCAP maintains contacts with foreign nations and licenses copyrighted works in those countries. As ASCAP has agreements with many foreign licensing societies, an ASCAP license permits licensees to perform members' works along with numerous foreign writers and publishers.[3]

When music users fail to apply for an ASCAP license and perform ASCAP protected music, ASCAP advises the user of the need for a license and

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[1] Nimmer, 2 *Nimmer on Copyright* § 8.19 (1988)(cited to afterward as "Nimmer"). *See, ASCAP: The ASCAP License: It Works for You*, brochure from ASCAP (1988)(cited to afterwards as "ASCAP brochure").

[2] Korman, at 353-354.

[3] *Id.*

the applicable license fee. Generally, business establishments secure licenses, rather than face possible infringement actions. In the event of a user's not securing a license, ASCAP may bring a copyright infringement action against the user. ASCAP sets its rates at similar levels for comparable commercial establishments.

BMI

Another licensing organization, Broadcast Music, Inc. ("BMI") was formed in 1940 when a group of approximately 600 broadcasters boycotted ASCAP music and formed their own performing rights organization.[4] BMI advocates an "open door" policy, inviting all music writers to join, especially those in the fields of country and soul music. It is considered to be the world's largest music licensing organization, in terms of the numbers of members or affiliates.[5] Like ASCAP, BMI is a nonprofit organization and the licensing fees that BMI receives, less operating expenses and reserves, are distributed to affiliated songwriters and music publishers.[6] BMI operates in much the same manner as ASCAP and serves similar functions.

SESAC

The third licensing organization, SESAC, Inc., was formerly known as the Society of European State Authors and Composers. SESAC, Inc. is a privately owned, profit-making organization which licenses a smaller, more specialized collection of music compared with the collections licensed by ASCAP or BMI.[7] Originally, SESAC's repertory comprised primarily American and European classical music, along with religious and country music. However, today its repertory includes all categories of music.[8]

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[4] Nimmer, at § 8.19. *BMI and the Broadcaster: Bringing Music to America*, BMI brochure, 1988.

[5] *BMI, Your Bridge To The World's Greatest Music: A Guide to Music Licensing*, BMI pamphlet, 1987.

[6] Goldstein, *For the Record: Questions & Answers on the Performance of Copyrighted Music*, BMI brochure 1 (1987).

[7] *Id.* Nimmer, at § 8.19

[8] *SESAC: Information for Prospective Writers and Publishers*, an undated pamphlet published by SESAC.

Discussion

Today, ASCAP and BMI collect over 95% of all the American performing rights royalties, with SESAC, Inc., collecting the 5% remaining.[9] However, as ASCAP and BMI represent different clientele--composers, publishers, and lyricists belong to one or the other of the licensing organizations, not both--a commercial establishment must be licensed by both ASCAP and BMI in order to avoid wholesale copyright infringement. Usually, an ASCAP or BMI license provides that upon the payment of the annual licensing fee, the licensee is permitted to make an unlimited number of nondramatic performances of all the licensing organization's music without the licensee's having to keep any records as to the actual music that is being used.

Should a music user refuse to take a license from either BMI or ASCAP, the music used will be "logged" or monitored, to record reliable, accessible, and admissible evidence to document that infringing performances were held.[10] An infringing music user may be sued in federal court and be subjected to substantial liability in the form of statutory damages.[11] ASCAP and BMI are aggressive in the copyright policing/monitoring activity and the copyright enforcement procedures give additional incentives for music users to become licensed, rather than allowing unlicensed infringing performances to occur. It is through this licensing system that most songwriters earn the major portion of their income from performance royalties.[12]

Videocassette Licensing

As this report also examines the public performance of videocassette recordings, it is useful to examine the licensing organization which has been formed to represent the interests of motion picture studios for the viewing of videocassettes, the Motion Picture Licensing Corporation ("MPLC"). MPLC is an independent copyright licensing service exclusively authorized by major Hollywood motion picture studios to grant "umbrella licenses" to various institution and organizations for public performances of videocassettes and videodiscs.[13] MPLC issues a blanket license, which they have designated

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[9] BMI brochure, at 2.

[10] Korman, at 362.

[11] 17 U.S.C. § 504(c)(1982).

[12] Korman, at 332.

[13] Motion Picture Licensing Corporation, *Do You Want to Show Home Videocassettes?*, 2 (1988).

"umbrella licenses," to various groups, organizations, and institutions which wish to use videocassettes in a public situation. The MPLC umbrella license permits an institution to have unlimited exhibitions or displays within its facilities of all authorized home videocassette titles of the studios which MPLC represents. The MPLC license is for a one year period and is payable at a single annual fee. The licenses are renewable.[14] MPLC negotiates an annual license fee "specifically tailored to reflect the unique characteristics of your organization."[15] Licensing is required for the public display of videocassettes or videodiscs, even if the organization has purchased or rented the cassette or the disc. Even though the cassette is owned, the mere ownership of the cassette does not carry with it the right to exhibit.

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[14] *Id.*

[15] *Id.*, at 3.

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