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# THE SECTION 110(5) EXEMPTION FOR RADIO PLAY IN COMMERCIAL ESTABLISHMENTS: A NARROWLY CONSTRUED MUSIC COPYRIGHT HAVEN

by Robert Thorne\*

*If the rights under the copyright [law] are infringed only by a performance where money is taken at the door, they are very imperfectly protected.<sup>1</sup>*

Justice Oliver Wendell Holmes

## INTRODUCTION

The federal circuit courts in *Sailor Music v. Gap Stores, Inc.*<sup>2</sup> and *Broadcast Music, Inc. v. United States Shoe Corp.*<sup>3</sup> recently tuned in to section 110(5) of the Copyright Act<sup>4</sup> which, under certain circumstances, provides for royalty-free radio play of copyrighted musical compositions in commercial establishments.<sup>5</sup>

Radio broadcasting stations must obtain licenses from and pay royalties to owners of the copyrighted musical compositions they

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1. *Herbert v. Shanley Co.*, 242 U.S. 591, 594-95 (1917).

2. 688 F.2d 84 (2d Cir. 1981), cert. denied, 102 S. Ct. 2012 (1982).

3. 678 F.2d 816 (9th Cir. 1982).

4. 17 U.S.C. §§ 101 *et seq.* (1976) (effective January 1, 1978) [hereinafter referred to as the Act]. The Act superseded 17 U.S.C. §§ 1 *et seq.* (1970) (originally enacted as Act of March 4, 1909 ch. 320, 35 Stat. 1075) [hereinafter referred to as the 1909 Act].

5. This article focuses on commercial reception of radio broadcast music. Reception for private use has always been beyond the reach of copyright law. See generally *infra* note 50. For instance, it is undisputed that "the owner of a private radio receiving set who in his own home invites friends to hear a musical composition which is being broadcast would not be liable for infringement. For, even if this be deemed a performance, it is neither public nor for profit." *Buck v. Jewell-La Salle Realty Co.*, 283 U.S. 191, 196 (1931). On a more fundamental level, the Supreme Court even found occasion to assure the public that "[n]o license is required . . . to sing a copyrighted lyric in the shower." *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 155 (1975). (emphasis added).

broadcast.<sup>6</sup> Section 110(5) provides, however, that commercial establishments *receiving* the radio broadcasts are exempt from the licensing and royalty requirements if they use a "single radio receiver of a kind commonly used in private homes," no direct charge is made to hear the transmission and the transmission is not further transmitted to the public.<sup>7</sup> Such "performances" do not fall within the scope of section 106(4) of the Act which recognizes the exclusive rights of copyright owners to publicly perform or authorize the public performance of their musical

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6. It is well settled that a broadcast of a copyrighted musical composition by a commercial radio station constitutes a public performance. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 158-59 (1975); *Associated Music Publishers, Inc. v. Debs Memorial Radio Fund*, 141 F.2d 852 (2d Cir. 1944); *cf. Chappell & Co., Ltd. v. Associated Radio Co. of Australia, Ltd.*, Vict. L.R. 350 (1925); *Messenger v. British Broadcasting Co., Ltd.*, 2 K.B. 543 (1927), *rev'd on other grounds*, 1 K.B. 660 (1928), *aff'd* A.C. 151 (1929); *Jerome H. Remick & Co. v. General Electric Co.*, 16 F.2d 829 (S.D.N.Y. 1926); *Jerome H. Remick & Co. v. American Automobile Accessories Co.*, 5 F.2d 411 (6th Cir. 1925); *see generally* Caldwell, *The Broadcasting of Copyrighted Works*, 1 J.AIR L. 584 (1930).

In one of the earliest cases so holding, the Court of Appeals for the Sixth Circuit explained:

While the fact that the radio was not developed at the time the Copyright Act . . . was enacted may raise some question as to whether it properly comes within the purview of the statute, it is not by that fact alone excluded from the statute. In other words, the statute may be applied to new situations not anticipated by Congress, if, fairly construed, such situations come within its intent and meaning . . . . While statutes should not be stretched to apply to new situations not fairly within their scope they should not be so narrowly construed as to permit their evasion because of changing habits due to new inventions and discoveries.

\* \* \*

A performance, in our judgment, is no less public because the listeners are unable to communicate with one another, or are not assembled within an inclosure, or gathered together in some open stadium or park or other public place. Nor can a performance, in our judgment, be deemed private because each listener may enjoy it alone in the privacy of his home. Radio broadcasting is intended to, and does, reach a very much larger number of the public at the moment of rendition than any other medium of performance. The artist is consciously addressing a great, though unseen and widely scattered, audience, and is therefore participating in a public performance.

*Jerome H. Remick & Co. v. American Automobile Co.*, 5 F.2d 411, 411-12 (6th Cir. 1925), *quoted in* *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 158-59 (1975).

The unlicensed radio broadcaster runs the risk of liability for infringing the copyright owner's exclusive right to publicly perform the copyrighted musical composition. For the statutory definition of "public performance," *see infra* note 8.

7. Section 110 of the Act provides in relevant part:

Notwithstanding the provisions of § 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 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 . . . .

compositions.<sup>8</sup>

A broad spectrum of irreconcilable decisional authority<sup>9</sup> preceded the enactment of section 110(5).<sup>10</sup> The United States Supreme Court's failure to steer a straight course in this field of law led Congress to enact this limited<sup>11</sup> exemption for radio play in commercial establishments. The House Committee sponsoring 110(5) expressly considered *Twentieth Century Music Corp. v. Aiken*,<sup>12</sup> a 1975 decision of the

8. Section 106 of the Act provides in relevant part:

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

\* \* \*

(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).

Section 101 of the Act defines "public performance" as follows:

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 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 or display of the work to a place specified in 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.

The 1909 Act provided at section 1 in relevant part:

Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:

(3) To perform the copyrighted work publicly for profit if it be a musical composition; . . .

"When this statutory provision was enacted in 1909, its purpose was to prohibit unauthorized performances of copyrighted musical compositions in such places as concert halls, theaters, restaurants, and cabarets." *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 157 (1975), citing H.R. REP. NO. 2222, 60th Cong., 2d Sess. (1909).

9. For other commentaries on § 110(5)'s judicial antecedents, see Korman, *Performance Rights in Music Under Sections 110 and 118 of the 1976 Copyright Act*, 22 N.Y.L. SCH. L. REV. 521 (1977); 2 M. NIMMER, NIMMER ON COPYRIGHT, § 8.18 (1980); Note, *When is a Performance Not a Performance?—Twentieth Century Music Corp. v. Aiken and Its CATV Precedents*, 25 BUFFALO L. REV. 607 (1976); Note, *Narrowing the Scope of the Copyright Act: Twentieth Century Music Corp. v. Aiken*, 1975 UTAH L. REV. 752 (1975); Note, *Twentieth Century Music Corp. v. Aiken—Infringement Liability of a Restaurant Owner for Reception of Radio Broadcast for the Enjoyment of His Customers*, 30 OKLA. L. REV. 201 (1977); Note, *Exclusive Right to Perform Copyrighted Worker Publicly for Profit not Infringed by Radio Entertainment of Restaurant Patrons*, *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151 (1975), 80 DICK. L. REV. 328 (1975); Note, *The Meaning of 'Performance' Under the Copyright Act*, *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151 (1975), 7 U. TOL. L. REV. 705 (1976); Note, *Proprietor of Commercial Establishment Does Not Perform Copyrighted Music when He Amplifies a Licensed Radio Broadcast through Radio Receiver and Loudspeakers—Twentieth Century Music Corp. v. Aiken*, 500 F.2d 127 (3d Cir. 1974), cert. granted, 419 U.S. 1067 (1974), 63 GEO. L.J. 1001 (1975).

10. See generally *infra* note 101.

11. See generally *infra* notes 110 and 118 and accompanying text.

12. 422 U.S. 151 (1975).

Supreme Court in which a fast-food restaurateur who used a radio receiver with four ceiling speakers for the benefit of his employees and customers was found not to have performed the copyrighted music he received and therefore was not an infringer.<sup>13</sup> The Committee concluded that the facts in *Aiken* represent the "outer limit" of the section 110(5) exemption.<sup>14</sup>

Considering the articulate legislative history of section 110(5), it came as no surprise that the courts in *Sailor Music* and *U.S. Shoe Corp.* narrowly construed that music copyright haven. After all, in both cases the infringing retail stores exceeded the "outer limit" expressed in *Aiken*, as those establishments were substantially larger and had more elaborate sound systems.<sup>15</sup> Section 110(5) was the necessary antidote to the ills of its judicial antecedents. The narrow construction of section 110(5) has helped to define its parameters, characterizing it as a *de minimis* exemption and thereby affording songwriters the financial reward they deserve for the product of their creative efforts.

This article will examine the judicial antecedents of section 110(5) and will discuss its legislative history, its provisions and the courts' recent analyses in *Sailor Music* and *U.S. Shoe Corp.*

## THE JUDICIAL ANTECEDENTS

### *The Concept of "Performance" in its Infancy*

Justice Holmes observed in 1917 that "[i]f the rights under the copyright [law] are infringed only by a performance where money is taken at the door, they are very imperfectly protected."<sup>16</sup> This observation was at the root of the Supreme Court's decision in *Herbert v. Shanley Co.*<sup>17</sup> There, the Court held that the live rendition of a copyrighted composition by an orchestra in a hotel dining room, even without

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13. The House Committee articulately evaluated *Aiken* in proposing legislation that, in a slightly different form, became section 110(5) of the Act. See H.R. REP. NO. 1476, 94th Cong., 1st Sess. (1975), at 87.

14. See *infra* note 118 and accompanying text.

15. The fast-food restaurant in *Aiken* was 1,055 square feet, with only 620 square feet open to the public; in contrast, one of the infringing retail clothing stores in *Sailor Music* was 2,769 square feet. *Sailor Music v. Gap Stores, Inc.*, 668 F.2d 84, 86 (2d Cir. 1981), cert. denied, 102 S. Ct. 2012 (1982). Of the three infringing retail clothing stores in *U.S. Shoe Corp.*, two occupied approximately 5,000 square feet and the other was approximately 9,000 square feet. Appellee's Brief, at 16, *Broadcast Music, Inc. v. U.S. Shoe Corp.*, 678 F.2d 816 (9th Cir. 1982). As for the sound systems used in the defendant establishments in *Aiken*, *Sailor Music* and *U.S. Shoe Corp.*, see *infra* notes 126, 133 and 135, respectively, and accompanying text.

16. *Herbert v. Shanley Co.*, 242 U.S. 591, 594-95 (1917).

17. *Id.* at 591.

charge for admission to hear it, was a public performance for profit within the meaning of the 1909 Act.<sup>18</sup> Therefore, the unlicensed hotel had infringed the copyright owner's exclusive right to perform the composition publicly for profit.

In delivering the opinion of the Court, and showing marked deference to copyright proprietorship,<sup>19</sup> Justice Holmes further explained:

Performances not different in kind from those of the defendant could be given that might compete with and even destroy the success of the monopoly that the law intends the plaintiffs to have. 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 pub-

18. *Id.* at 594-95.

19. In expressing his concern that copyright owners be remunerated and their monopoly protected, Justice Holmes did not mention the competing, theoretically paramount interests of the listening public. It bears repeating that almost 200 years ago, Lord Mansfield warned in *Sayre v. Moore*, quoted in a footnote to *Cary v. Longman*, 1 East 358, 362 n.(b), 102 Eng. Rep. 138, 140 n.(b) (1801):

[W]e must take care to guard against two extremes equally prejudicial; the one, that men of ability, who have employed their time for the service of the community may not be deprived of their just merits, and the reward of their ingenuity and labor; other, that the world may not be deprived of improvements, nor the progress of the arts be retarded.

More recently, the American judiciary has recognized the competing interests the copyright law must accommodate. In *Aiken*, the Court observed:

The limited scope of the copyright holder's statutory monopoly, like the limited copyright duration required by the Constitution, reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts..

422 U.S. at 156.

These competing interests theoretically have been accommodated by a prioritization, with the public's interest in access being preferred to the interests of the copyright owner and his assignee to be remunerated and to control their markets. This writer has observed:

The primary purpose of the copyright law is to ensure that authors' works are accessible to the public; the secondary purpose is to remunerate authors by granting them enforceable, commercially exploitable rights which encourage creativity and public dissemination of the products of their creativity.

Thorne, *Compulsory Licensing: The Music Makers as Money Makers*, 5 L.A. Law. 14 (1982), reprinted in 1 ENT. & SPORTS LAW., Winter 1983, at 11 (1983) (footnote omitted). See *Twentieth Century Music Corp. v. Aiken*, 422 U.S. at 156; *Mazer v. Stein*, 247 U.S. 201, *reh'g denied*, 347 U.S. 949 (1954); *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932); see also H.R. REP. NO. 2222, 60th Cong., 2d Sess., 7 (1909).

The tendency of the courts would be to at least implicitly tip the scales decidedly in favor of one or the other of these competing interests to support and justify any given decision reached. For instance, in *Herbert v. Shanley Co.*, 242 U.S. 591 (1917), Justice Holmes exhibited a paramount concern for copyright owners; the Court decided in their favor. In contrast, in *Aiken*, 422 U.S. 151, the Court tipped the scales in favor of the listening public and emphasized that the *public's accessibility to the arts* is the primary object of the copyright law; the copyright owners in *Aiken* lost.

lic 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. It is true that the music is not the sole object, but neither is the food, which probably could be got cheaper elsewhere. The object is a repast in surroundings that to people having limited powers of conversation, or disliking the rival noise, give luxurious pleasure not to be had from eating a silent meal. If music did not pay, it would be given up. If it pays, it pays out of the public's pocket. Whether it pays or not, the purpose of employing it is profit, and that is enough.<sup>20</sup>

The Court of Appeals for the Sixth Circuit similarly noted in 1925 that "it is against a commercial as distinguished from a purely philanthropic public use of another's composition, that the [copyright law] is directed."<sup>21</sup>

Shortly thereafter, in *Buck v. Debaum*,<sup>22</sup> a district court chose not to extend *Herbert* to enjoin the radio play of a copyrighted musical composition in a cafe for the enjoyment of its patrons. The court conceded that under *Herbert* the use of the copyrighted music constituted public reception for profit but held that the cafe owner did not "perform" the music, and on that basis *Herbert* was distinguished. The decision turned on the fact that the broadcasting station was licensed and expressly authorized by the copyright owners to publicly perform the compositions.<sup>23</sup> The court rejected the copyright owners' contention that the licensed radio broadcast should be received with immunity only for private use and not by "those who install radio receiving sets in public places and who use them as an adjunct and auxiliary to their business."<sup>24</sup> Instead, said the court, by licensing the broadcast the copyright owners "impliedly sanctioned and consented to *any* 'pick up' out of the air that was possible in radio reception."<sup>25</sup>

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20. 242 U.S. at 594-95.

21. *Jerome H. Remick & Co. v. American Automobile Accessories Co.*, 5 F.2d 411, 412 (6th Cir. 1925).

22. 40 F.2d 734 (S.D. Cal. 1929).

23. "[I]t is the grant of such privilege or license by the owners of the copyright to the broadcasting station," the court asserted, "that is the determining factor that disables the complainants herein from enjoining or preventing the defendant from 'picking up' through this radio receiving set the 'Indian Love Call,' and imparting the same audibly to the patrons of his cafe." 40 F.2d at 735.

24. *Id.*

25. *Id.*

The court further explained its holding that the reception of a licensed broadcast, even for profit, is not a performance:

The performance in such case takes place in the studio of the broadcasting station, and the operator of the receiving set in effect does nothing more than one would do who opened a window and permitted the strains of music of a passing band to come within the inclosure in which he was located.<sup>26</sup>

After *Debaum*, it seemed that the only protection available to copyright owners interested in controlling and profiting from such use of their music was to refuse to grant performance licenses to broadcasting stations.<sup>27</sup>

### *The Doctrine of Multiple Performances Emerges—A Quantitative Test*

In 1931, the Supreme Court was called upon to decide *Buck v. Jewell-La Salle Realty Co.*,<sup>28</sup> a case involving public reception, in a hotel, of an *unlicensed* radio broadcast. The defendant hotel maintained a master radio receiver wired to each of its public and private rooms and repeatedly received broadcasts of a copyrighted public song owned by the plaintiffs. The dispositive facts were that the radio broadcasting station was unlicensed and the music received was rechanneled into additional areas throughout the hotel.

Justice Brandeis, writing for the Court, seemed to approve of but distinguished the district court's earlier holding in *Buck v. Debaum*. He remarked, although only in a footnote:

*If the copyrighted composition had been broadcast with . . . plaintiffs' consent, a license for its commercial reception and distribution by the hotel company might possibly have been implied. Compare Buck v. Debaum. But [the radio broadcasting station] was not licensed; and the position of the hotel company is not unlike that of one who publicly performs for profit by the use of an unlicensed phonograph record.*<sup>29</sup>

The fact that the radio broadcasting station in *Jewell-La Salle* was unlicensed, was perhaps not the only ground for distinguishing the case from *Buck v. Debaum*. The Court in *Jewell-La Salle* recognized that the defendant hotel employed a "distributing apparatus" to amplify the

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26. *Id.*

27. The court remarked that "[t]he owner of a copyrighted musical composition can fully protect himself against any unauthorized invasion of his property right by refusing to license the broadcasting station to perform his musical composition." *Id.* at 736.

28. 283 U.S. 191 (1931).

29. *Id.* at 199 n.5. (emphasis added).



broadcast program *throughout* the hotel and not simply in the room housing its radio receiver.<sup>30</sup> Justice Brandeis observed:

In addition, the ordinary receiving set, and the distributing apparatus here employed by the hotel company are equipped to amplify the broadcast program after it has been received. Such acts clearly are more than the use of mere mechanical acoustic devices for the better hearing of the original program.<sup>31</sup>

The cafe receiving the radio broadcast in *Debaum* did not channel the music into other rooms; there, the radio reception was intramural. Of course, the Court in *Jewell-La Salle* might have reached its result even absent this distinction, yet the distinction is no less apparent.

What is perhaps most striking about the Court's opinion in *Jewell-La Salle* is that the Court was unimpressed with the defendant's contention that there can be but *one* performance each time a copyrighted composition is aired.<sup>32</sup> "No reason is suggested," wrote Justice Brandeis, "why there may not be more than one liability."<sup>33</sup>

The doctrine of multiple performances was born.<sup>34</sup> What the defendant does to bring about the reception was to be determinative. The reception of the radio broadcast in *Jewell-La Salle*, with the rechanneling of the music throughout the hotel, was found to be more than "a mere audition of the original program."<sup>35</sup> The Court fancied the analogy of a radio receiver to a recording stylus:

The modulation of the radio waves in the transmitting apparatus, by the audible sound waves, is comparable to the manner in which the wax phonograph record is impressed by the same waves through the medium of a recording stylus. The transmitted radio waves require a receiving set for their detection and translation into audible sound waves, just as the record requires another mechanism for the reproduction of the recorded composition. In neither case is the original program heard; and, in the former, complicated electrical instrumentalities are necessary for adequate reception and distribution.

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30. *Id.* at 195.

31. *Id.* at 201.

32. *Id.* at 198.

33. *Id.* ~

34. The Court in *Jewell-La Salle* did not actually use the words "multiple performances," but the court clearly found there had been two performances. See generally 2 M. NIMMER, NIMMER ON COPYRIGHT, § 8.18[C][1], at 8-198-201 (1981).

35. 283 U.S. at 199-200.

*Reproduction in both cases amounts to a performance.*<sup>36</sup>

The defendant further argued that the hotel did not choose or intend to infringe as it "cannot render at will a performance of any composition, but must accept whatever program is transmitted during the broadcast period."<sup>37</sup> The Court simply reiterated the well-settled principle that "[i]ntention to infringe is not essential under the [copyright law]."<sup>38</sup> One who "tunes in on a radio broadcasting station," the Court warned, "necessarily assumes the risk that in doing so he may infringe the performing rights of another."<sup>39</sup>

### *A Shift to the Functional Test in the Cable Television Cases*

The issue regarding performance was not laid to rest in *Jewell-La Salle*. In 1968, the Supreme Court decided *Fortnightly Corp. v. United Artists Television Corp.*<sup>40</sup> This was an action for infringement of United Artists' copyrights in motion pictures by Fortnightly's community antenna television systems in Clarksburg and Fairmont, West Virginia. Due to the hilly terrain in those cities, most residents could not receive ordinary television broadcasts. The majority of the residents subscribed, for a charge, to Fortnightly's CATV service. The service simply enhanced local broadcast signals. United Artists unsuccessfully sued Fortnightly for copyright infringement. As a result of *Fortnightly*, under the 1909 Act, cable television operators were free from copyright liability.<sup>41</sup>

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36. *Id.* at 200-01. (emphasis added).

37. *Id.* at 198.

38. *Id.* (citations omitted).

39. *Id.* (citations omitted).

40. 392 U.S. 390 (1968).

41. *Fortnightly* has been preempted as of January 1, 1978 by section 111 of the Act which generally provides that an unauthorized retransmission of a television broadcast by a cable system constitutes copyright infringement unless the secondary transmitter obtains a compulsory license permitting such use and pays the required royalties. The compulsory license, by definition, is generally obtainable as a matter of right, even over the objection of the copyright owner.

The House Report accompanying the Act stated the following with respect to the enactment of § 111:

In general, the Committee believed that cable systems are commercial enterprises whose basic retransmission operations are based on the carriage of copyrighted material and that *copyright royalties should be paid by cable operators to the creators of such programs*. The Committee recognizes, however, that it would be impractical and unduly burdensome to require every cable system to negotiate with every copyright owner whose work was retransmitted by a cable system. Accordingly, the Committee had determined to maintain the basic principle of the Senate bill to establish a compulsory license for the retransmission of those over-the-air broadcast signals that a cable system is authorized to carry pursuant to the rules and regulations of the FCC.

The Court stated that the quantitative test formulated and adopted in *Jewell-La Salle* had no application in the television broadcasting field.<sup>42</sup> If "mere quantitative contribution" were the test, the Court warned *in terrorem*, "many people who make large contributions to television might find themselves liable for copyright infringement . . . ."<sup>43</sup> The Court instead focused on "the *function* that CATV plays in the total process of television broadcasting and reception."<sup>44</sup> The Court thus discarded the quantitative test and chose to apply its new functional test.

The essence of the Court's opinion was its professed dichotomy: "Broadcaster's perform. Viewers do not perform."<sup>45</sup> The Court added that "while both broadcaster and viewer play crucial roles in the total television process, a line is drawn between them."<sup>46</sup> Fortnightly was not functionally equivalent to a broadcaster, said the Court, as it only "enhances the viewer's capacity to receive the broadcaster's signals; . . . ." <sup>47</sup> In fact, "[b]roadcasters select the programs to be viewed; CATV

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H.R. REP. NO. 94-1476, to accompany S. 22, 94th Cong. 2d Sess., (1976), at 89. (emphasis added).

For a discussion of the method of the first distribution of § 111 cable royalties by the Copyright Royalty Tribunal, *see generally* Koppany, *A Methodology To Their Madness: The First Copyright Royalty Tribunal and Distribution of Cable Royalty Fees*, 15 BEV. HILLS B.A.J. 466 (1981). *See also* Meyer, *The Feat of Houdini or How the New Act Disentangles the CATV-Copyright Knot*, 22 N.Y.L. SCH. L. REV. 545 (1977); 2 M. NIMMER, *supra* note 34, at § 8.18[E], at 8-207-37; Note, *The Copyright Royalty Tribunal: Achieving Equilibrium between Cable and Copyright Interests*, 1 LOY. L.A. ENT. L.J. 147 (1981).

42. *Fortnightly*, 392 U.S. at 396-97.

43. *Id.* at 397.

44. *Id.* (emphasis added).

45. *Id.* at 398. (footnotes omitted).

46. *Id.* at 398-99.

47. The Court underscored the functional dissimilarity of CATV systems and broadcasters by quoting from *Intermountain Broadcasting & Television Corp. v. Idaho Microwave, Inc.*, 196 F. Supp. 315, 325 (S.D. Idaho 1961):

[Broadcasters] and [CATV systems] are not engaged in the same kind of business. They operate in different ways for different purposes.

[Broadcasters] are in the business of selling their broadcasting time and facilities to the sponsors to whom they look for their profits. They do not and cannot charge the public for their profits. They do not and cannot charge the public for their broadcasts which are beamed directly, indiscriminately and without charge through the air to any and all reception sets of the public as they may be equipped to receive them.

[CATV systems], on the other hand, have nothing to do with sponsors, program content or arrangement. They sell a community antenna service to a segment of the public for which [broadcasters'] programs were intended but which are unable, because of location or topographical condition, to receive them without rebroadcast or other relay service by community antennae. . . .

*Fortnightly*, 392 U.S. at 400 n.28.

systems carry, without editing, whatever programs they receive."<sup>48</sup> The CATV system considered in this framework was held *not* to have performed the motion pictures it received and made available to its subscribers.<sup>49</sup>

As to the aggrieved copyright owner in *Fortnightly*, the Court reiterated the fact that the copyright law does "not give a copyright holder control over all uses of his copyrighted work."<sup>50</sup>

Although the Court couched its decision in terms of the *function* of a CATV system, the Court in fact considered and even analyzed the "quantitative contribution" CATV systems make to the television broadcast-reception process.<sup>51</sup> The Court went so far as to distinguish *Jewell-La Salle*,<sup>52</sup> as it should have, for an important reason other than the obvious difference between radio and television. The Court implicitly recognized that the defendant hotel in *Jewell-La Salle*, by tuning in on the radio broadcast and channeling the music throughout the hotel, did all there was to be done in bringing the music to its guests, and a great deal at that.<sup>53</sup> In *Fortnightly*, the CATV service was more an intermediary; the subscriber's act in turning on the television set was still necessary to complete the chain in the broadcast-reception process. "Members of the public," the Court explained, "by means of television sets and antennas that they themselves provide, receive the broadcaster's signals and reconvert them into visible images and audible sounds of the program."<sup>54</sup> Arguably, the quantitative contribution of

48. *Id.* at 400.

49. *Id.* at 400-01 n.30. The Court took issue with the dissent, which objected to the majority opinion's failure to either adhere to *Jewell-La Salle* or overrule it; the Court responded:

It is said in dissent that, "Our major object . . . should be to do as little damage as possible to traditional copyright principles and to business relationships, until Congress legislates . . ." But existing "business relationships" would hardly be preserved by extending a questionable 35-year-old decision that in actual practice has not been applied outside its own factual context . . . so as retroactively to impose copyright infringement liability where it has never been acknowledged to exist before. . . .

*Id.* at 401 n.30. (emphasis added).

50. *Id.* at 393 and n.8, citing *Fawcett Publications v. Elliot Publishing Co.*, 46 F. Supp. 717 (S.D.N.Y. 1942); *Hayden v. Chalfant Press, Inc.*, 281 F.2d 543, 547-48 (9th Cir. 1960). The Court observed that "[t]he fundamental is that 'use' is not the same thing as 'infringement,' that use short of infringement is to be encouraged . . ." (quoting B. KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT at 57 (1967).)

51. For instance, the Court noted that "[t]he effective range of the broadcast is determined by the combined *contribution* of the equipment employed by the broadcaster and that supplied by the viewer." 392 U.S. at 398. (emphasis added).

52. *Id.* at 396 n.18.

53. *Id.*

54. *Id.* at 397-98.

the CATV system in *Fortnightly* was not as complete as that of the defendant hotel in *Jewell-La Salle*.

Justice Fortas, dissenting from the majority opinion, found no persuasive distinction between the quantitative contributions in *Jewell-La Salle* and in *Fortnightly*:

As I understand [*Jewell-La Salle*], the holding was that the use of mechanical equipment to extend a broadcast to a significantly wider public than the broadcast would otherwise enjoy constitutes a "performance" of the material originally broadcast. I believe this decision stands squarely in the path of the route which the majority today traverses. If a CATV system performs a function "little different from that served by the equipment generally furnished by a television viewer," and if that is to be the test, then it seems to me that a master radio set attached by wire to numerous other sets in various rooms of a hotel cannot be distinguished.<sup>55</sup>

Justice Fortas was equally unimpressed with the Court's "attempts to diminish the compelling authority of *Buck v. Jewell-La Salle*, by referring to a vague footnote in that opinion to the effect that the Court might not have found a 'performance' if the original broadcast, . . . had been authorized by the copyright holder—as it was not."<sup>56</sup> According to Justice Fortas, "the interpretation of the term 'perform' cannot logically turn on the question whether the material that is used is licensed or not licensed."<sup>57</sup> The television broadcasting stations in *Fortnightly* were licensed. Justice Fortas believed that this fact should not have stood in the way of a finding of "performance."

In conclusion, Justice Fortas urged that the Court's holding cannot logically be extended to protect CATV systems that *import* distant signals, rather than simply *enhance* impeded local signals.<sup>58</sup> He feared that such an extension of the Court's holding would unfairly upset the competitive balance between CATV systems and "local broadcasting stations which must pay, directly or indirectly, for copyright licenses. . . ."<sup>59</sup>

Six years later in *Teleprompter Corp. v. Columbia Broadcasting*

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55. *Id.* at 406 (Fortas, J., dissenting).

56. *Id.* at 406 n.5.

57. *Id.*

58. By importing distant signals, Justice Fortas explained, "the CATV *is* performing a function different from a simple antenna for, by hypothesis, the antenna could not pick up the signals of the distant licensed broadcaster and enable CATV patrons to receive them in their homes." *Id.* at 407.

59. *Id.* at 403-04.

*Systems, Inc.*,<sup>60</sup> the Supreme Court decided that such an extension of its holding in *Fortnightly* was warranted. The Court held that (under the 1909 Act) cable television operators who import distant signals are free from copyright liability.<sup>61</sup> The Court stated:

By importing signals that could not normally be received with current technology in the community it served, a CATV system does not for copyright purposes, alter the function it performs for its subscribers . . . . The reception and rechanneling of these signals for simultaneous viewing is *essentially a viewer function*, irrespective of the distance between the broadcasting station and the ultimate viewer.<sup>62</sup>

The copyright owners argued that by importing distant signals and rechanneling them into secondary markets, CATV systems would dilute the possibility of subsequent syndications through local television broadcasting stations because a program's appeal diminishes with each successive showing in any given market.<sup>63</sup> The Court was not persuaded. Justice Stewart, writing for the Court, observed "that dilution or dislocation of markets does not have the direct economic or copyright significance that this argument ascribes to it."<sup>64</sup> Justice Stewart explained that the copyright owners or their licensees are not paid directly by the viewers but indirectly by sponsors.<sup>65</sup> "[B]roadcasters whose reception ranges have been extended by means of 'distant' signal CATV rechanneling will merely have a different and larger viewing

60. 415 U.S. 394 (1974). In 1969, after *Fortnightly* but before *Teleprompter*, a district court in Washington held that although a cable system's retransmission did not amount to an infringing act, by reason of *Fortnightly*, the making of a videotape reproduction in preparation for its nonsimultaneous retransmission did infringe the copyright owner's right to reproduce its copyrighted material under the 1909 Act. *Walt Disney Prods. v. Alaska Television Network, Inc.*, 310 F. Supp. 1973 (W.D. Wash. 1969). See generally § 1(d) of the 1909 Act.

As for the statement by the court in *Walt Disney Prods.* that "[w]hether or not the dissemination constitutes a 'performance' as the word is used in section 1(d) of the 1909 Act is immaterial," Professor Nimmer finds it "difficult to see why the issue of whether dissemination constitutes 'performance' was immaterial." 2 M. NIMMER, *supra* note 34, at § 8.18[A], at 8-193 n.30.

61. *Teleprompter*, just as *Fortnightly*, has been preempted by section 111 of the Act, and copyright owners now are entitled to receive cable television royalties from compulsory licensees and others and may sue unlicensed users for copyright infringement. Professor Nimmer notes that "[t]he operative language of the compulsory license is broad enough to include local as well as distant signals." 2 M. NIMMER, *supra* note 34, at 8.18[E][9][b] n.261 (1981). See generally § 111(C)(1) of the Act.

62. 415 U.S. at 408. (emphasis added).

63. *Id.* at 410-11.

64. *Id.* at 411.

65. *Id.* at 411-12.

market.”<sup>66</sup> Consequently, the cost of sponsoring a program with a market augmented by distant signal rechanneling should increase, indirectly resulting in greater reward to copyright owners, which will compensate for any dilution of the syndication market.<sup>67</sup>

Justice Fortas had stepped down from the high Court before *Teleprompter*. His vacant seat was filled by Justice Blackmun who, dissenting in part, carried the torch Justice Fortas ignited in *Fortnightly*. But for *Fortnightly*, Justice Blackmun, too, would have relied on the unanimous decision in *Jewell-La Salle*.<sup>68</sup> Even “[w]ith *Fortnightly* on the books,” Justice Blackmun stated he “would confine it ‘to its precise facts and leave an extension or modification to the Congress.’”<sup>69</sup>

Justice Douglas also dissented, joined by Chief Justice Burger, and warned that “[t]he Court today makes an extraordinary excursion into the legislative field.”<sup>70</sup> Whatever one thinks of *Fortnightly*,” wrote Justice Douglas, “we should not take the next step necessary to give immunity to the present CATV organizations.”<sup>71</sup> The dissent was not convinced by the economic explanation offered by the majority of the Court. Instead, Justice Douglas took the position that:

Rechanneling by CATV of the pirated programs robs the copyright owner of his chance for monetary rewards through advertising rates on rebroadcasts in a distant area and gives those monetary rewards to the group that has pirated the program . . . . [T]he result reads the Copyright Act out of existence for CATV. That may or may not be desirable public policy. But it is a legislative decision that not even a rampant judicial activism should entertain.<sup>72</sup>

### *The Functional Test Applied in the Radio Reception Context*

In 1975, the Supreme Court again applied its functional test in *Twentieth Century Music Corp. v. Aiken*.<sup>73</sup> The Court held that a performance had not occurred where a small fast-food restaurant used a single home-type receiving apparatus with four ceiling speakers. The

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66. *Id.* at 412-13.

67. *Id.* at 413. Justice Stewart, writing for the Court, apologized for any economic disruption *Teleprompter* might cause, and urged Congress to intervene. Congress chose to intervene by enacting section 111 of the Act. See generally *supra* notes 41 and 61.

68. *Id.* at 415. (Blackmun, J., dissenting in part).

69. *Id.*

70. *Id.* at 416. (Douglas, J. dissenting, joined by Burger, C.J.).

71. *Id.*

72. *Id.* at 419. (emphasis added).

73. 422 U.S. 151 (1974).

Court attempted to reconcile its decision with *Jewell-La Salle*, *Fortnightly* and *Teleprompter*.<sup>74</sup>

The Court distinguished *Jewell-La Salle* on the ground that, there, the radio broadcasting station was unlicensed, whereas in the instant case the broadcaster was licensed.<sup>75</sup> As for *Fortnightly* and *Teleprompter*, the Court reiterated the functional test it applied in those two cases and found that the restaurateur was functionally the equivalent of a listener.<sup>76</sup> "Certainly those who listen do not perform, and therefore do not infringe," the Court observed.<sup>77</sup>

The *Aiken* Court interestingly chose not to expressly overrule *Jewell-La Salle* and instead assumed "for present purposes that the *Jewell-La Salle* decision retains authoritative force in a factual situation like that in which it arose."<sup>78</sup> The factual situation the *Aiken* Court seemed to refer to, was that the radio station in *Jewell-La Salle* was unlicensed.<sup>79</sup> Recall that in *Jewell-La Salle*, Justice Brandeis recognized that "[i]f the copyrighted composition had been broadcast . . . with plaintiffs' consent, a license for its commercial reception might possibly have been implied."<sup>80</sup> Justice Brandeis had based this proposition on the earlier *Buck v. Debaum* decision. There, the district court found that by licensing the radio station, the plaintiffs "impliedly sanctioned and consented to any 'pick up' out of the air that was possible in radio reception."<sup>81</sup> Nevertheless, *Jewell-La Salle* and *Aiken* cannot be reconciled by this distinction.

Station WKJK-FM in Pittsburgh, to which Aiken's set was tuned,

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74. Judge Weis' opinion at the district court level in *Aiken* interestingly begins: "Whether this is a 'Jewell' of a case for the plaintiffs or a 'Fortnightly' event for the defendant is the question to be resolved. . . ." *Twentieth Century Music Corp. v. Aiken*, 356 F. Supp. 271, 274 (W.D. Pa. 1973). The district court concluded that it was a 'Jewell' of a case. The Supreme Court disagreed.

75. 422 U.S. at 160-61.

76. *Id.* at 161-62. Quoting from the *Aiken* court of appeals opinion, which was approved here, the Supreme Court reasoned:

"If Fortnightly, with its elaborate CATV plant and Teleprompter with its even more sophisticated and extended technological and programming facilities were not 'performing,' then logic dictates that no 'performance' resulted when the restaurateur merely activated his restaurant radio."

(quoting *Twentieth Century Music Corp. v. Aiken*, 500 F.2d 127, 137 (3rd Cir. 1974)). The Court seems to have applied, at least in part, a "quantitative contribution" analysis, despite its insistence that its decision turned solely on a functional analysis.

77. *Id.* at 159 (quoting *Jerome H. Remick & Co. v. General Electric Co.*, 16 F.2d 829 (S.D.N.Y. 1926)).

78. *Id.* at 160. (footnote omitted).

79. See generally *Id.* at 160-61.

80. See *supra* note 29 and accompanying text. (emphasis added).

81. See *supra* note 25 and accompanying text.



was licensed by ASCAP<sup>82</sup> to transmit radio broadcasts of its members' compositions.<sup>83</sup> Yet the license granted to WKJK-FM, similar to other such licenses granted since the decision in *Buck v. Debaum*, contained restrictive language expressly negating any implied authorization protecting secondary uses of the licensed broadcasts.<sup>84</sup> Although a restrictive clause of this type would negate only an implied-in-fact license, there is no authority that the courts are willing to find a license implied-in-law, such that a restrictive clause in a license agreement would be ineffective. The *Aiken* Court clearly did not reach the question whether a license for secondary transmission can be implied-in-law.<sup>85</sup> Such restrictive clauses would seem to effectively foreclose any argument that the secondary use of a licensed broadcast is authorized by the

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82. ASCAP (American Society of Composers, Authors and Publishers), BMI (Broadcast Music, Inc.) and SESAC, Inc. (Society of European Stage Authors and Performers, Inc.) are "performing rights societies" which on behalf of their respective members issue nonexclusive blanket licenses to, and collect royalties from, those authorized to perform publicly the members' nondramatic musical compositions. See § 116(c)(2) of the Act. For a discussion of the criteria for determining whether a work is nondramatic, see Gonzales, *Compulsory Licensing of Sound Recordings under the New Copyright Act*, 1 S.C. ENT. L.J. 7-10 (1977); 3 M. NIMMER, *supra* note 34, at § 10.10[E]. For a discussion of ASCAP, see *K-91, Inc. v. Gershwin Publishing Corp.*, 372 F.2d 1 (9th Cir. 1967).

The blanket licensing practice of the performing rights societies in connection with television broadcasts of their respective members' musical compositions has recently run afoul of the antitrust laws. See *Buffalo Broadcasting Co., Inc. v. American Society of Composers, Authors and Publishers*, 546 F. Supp. 274 (S.D.N.Y. 1982), *appeal docketed*, No. 83-7058 (2d Cir. 1983). A thorough analysis of *Buffalo Broadcasting* and its extensive ramifications is found in Sobel, *The Music Business and the Sherman Act: An Analysis of the "Economic Realities" of Blanket Licensing*, 3 LOY. L.A. ENT. L.J. 1 (1983) (in this volume).

83. 422 U.S. at 152 (footnote omitted).

84. The Court reproduced the "customary" language of ASCAP's license agreement with the Pittsburgh radio broadcasting station:

Nothing herein contained shall be construed as authorizing LICENSEE [WKFJ-FM] to grant to others any right to reproduce or perform publicly for profit by any means, method or process whatsoever, any of the musical compositions licensed hereunder or as authorizing any receiver of any radio broadcast to perform publicly or reproduce the same for profit, by any means, method or process whatsoever.

*Id.* at 153, n.1.

By including restrictive clauses of this type in license agreements, ASCAP and the other performing rights societies sought to circumvent the implied license doctrine formulated and applied in *Buck v. DeBaum*, 40 F.2d 734 (S.D. Cal. 1929). See generally *supra* notes 23 and 25 and accompanying text.

85. In fact, the district court in *Society of European Stage Authors and Composers, Inc. v. New York Hotel Statler Co.*, 19 F. Supp. 1, 6 (S.D.N.Y. 1937), not only rejected the implied-in-law license theory but also concluded that a similar restrictive contractual provision gave commercial receivers of broadcast copyrighted music ample notice to foreclose a claim that they had an implied license. The court stated that copyright infringement depends not upon a broadcaster's rights but upon a receiver's acts. *Id.*

copyright owner.<sup>86</sup> The *Aiken* Court failed to address this point.<sup>87</sup>

Pursuant to this analysis, the secondary use of the broadcast music in both *Jewell-La Salle* and *Aiken* was unauthorized. However, the result in *Aiken* was not the same as that in *Jewell-La Salle*. The *Aiken* Court could have reconciled the decisions by applying its earlier quantitative test. *Jewell-La Salle* could have been distinguished on the ground that there the music received was channeled throughout the hotel, and thus the secondary use involved a significantly greater "quantitative contribution" than that in *Aiken*, where there was mere intramural radio play enjoyed by far fewer persons. The Court ignored this distinction, however, as well as the fact that *Aiken* was not authorized to publicly perform the plaintiffs' copyrighted music.

The Supreme Court in *Aiken* also ignored its earlier observation in *Jewell-La Salle* that "[n]o reason is suggested why there may not be more than one liability."<sup>88</sup> Instead, the *Aiken* Court concluded:

[T]o hold that all in *Aiken's* position "performed" these musical compositions would be to authorize the sale of an untold number of licenses for what is basically a single public rendition of a copyrighted work. *The exaction of such multiple tribute would go far beyond what is required for the economic protection of copyright owners, . . .*<sup>89</sup>

In addition, the Court believed it would be inequitable to impose infringement liability on *Aiken* as he "would have no sure way of protecting himself from liability for copyright infringement except by keeping his radio set turned off."<sup>90</sup> Here, again, the Supreme Court earlier addressed this problem when, in *Jewell-La Salle*, Justice Brandeis warned that one who "tunes in on a radio broadcasting station . . . necessarily assumes the risk that in doing so he may infringe the performing rights of another."<sup>91</sup>

The *Aiken* Court nevertheless declined to overrule *Jewell-La Salle*, or at least more articulately distinguish it, and acknowledged that *Aiken* represents, as it does, a judicial compromise exempting a small com-

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86. See *infra* note 96 and accompanying text.

87. The *Aiken* Court made no reference to *New York Hotel Statler Co.*, which would have stood in the Court's way had the Court chose to find a license implied-in-law.

88. 283 U.S. at 198.

89. 422 U.S. at 162-63. (footnote omitted). The Court added that "such multiple tribute . . . would be wholly at odds with the balanced congressional purpose behind the Act." *Id.* at 163-64. See *generally supra* note 19.

90. *Id.* at 162.

91. 283 U.S. at 198-99. (citations omitted).

mercial establishment employing a single home-type receiving apparatus with a simple speaker system for intramural radio play.

Justice Blackmun concurred in the result reached by the *Aiken* Court but would have limited *Teleprompter* and *Fortnightly* "to the particular industry that spawned them" rather than extending those decisions into radio broadcasting and "effectively" overruling *Jewell-La Salle*.<sup>92</sup> As a matter of form, Justice Blackmun could not "understand why the Court is so reluctant to do directly what it obviously is doing indirectly, namely, to overrule *Jewell-La Salle*."<sup>93</sup> "I think we should be realistic and forthright," wrote Justice Blackmun, "and, if *Jewell-La Salle* is in the way, overrule it."<sup>94</sup>

In Chief Justice Burger's dissent, joined by Justice Douglas, the previously noted irreconcilability of *Jewell-La Salle* and *Aiken* was recognized.<sup>95</sup> The Chief Justice emphasized that *Jewell-La Salle* "is squarely relevant here since the license at issue expressly negated any right on the part of the broadcaster to further license performances by those who commercially receive and distribute broadcast music."<sup>96</sup> In addition, the Chief Justice believed that *Fortnightly* and *Teleprompter* were not controlling because *Aiken* "was more than a 'passive beneficiary.'" <sup>97</sup> "He took the transmission and used that transmission for commercial entertainment and his own profit enterprise, through a multispeaker audio system specifically designed for his business purposes."<sup>98</sup> The Chief Justice reiterated the "unequivocal" holding in *Jewell-La Salle*, that persons such as *Aiken* necessarily assume the risk that by tuning in on a broadcasting station they may "infringe the performing rights of another."<sup>99</sup>

Perhaps most importantly, Chief Justice Burger urged congressional intervention to provide the necessary "architectural improvisation which only legislation can accomplish."<sup>100</sup>

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92. 422 U.S. at 166 (Blackmun, J., concurring).

93. *Id.*

94. *Id.* at 167.

95. *Id.* at 169 (Burger, C.J., dissenting, joined by Douglas, J.).

96. *Id.* (emphasis added).

97. *Id.*, quoting *Fortnightly Corp. v. United Artists Television Corp.*, 392 U.S. at 399.

98. *Id.* (footnote omitted).

99. *Id.* at 170, quoting *Buck v. Jewell-La Salle Realty Co.*, 283 U.S. at 199. (citation omitted).

100. *Id.*, quoting *Fortnightly*, 392 U.S. at 408 (Fortas, J., dissenting).

## SECTION 110(5) AND ITS LEGISLATIVE HISTORY

*Congressional Intervention in the Muddied Waters*

Congress attempted to intervene on at least eighteen occasions between the time *Jewell-La Salle* was decided and 1957, when efforts to revise the 1909 Act were just beginning; none of the bills was enacted.<sup>101</sup>

The pre-*Aiken* Senate bill<sup>102</sup> would have codified *Jewell-La Salle*. It would have exempted performances by means of radio play in commercial establishments where a single home-type receiving apparatus was used, no direct charge was made to see or hear the transmission and the transmission thus received was not further transmitted to the public.<sup>103</sup> The post-*Aiken* Senate Report explained:

[T]his exemption would not apply where broadcasts are transmitted by means of loudspeakers or similar devices in such establishments as bus terminals, supermarkets, factories . . . hotels, restaurants, and quick-service food shops of the type involved in *Twentieth Century Music Corp. v. Aiken*.<sup>104</sup>

The House Committee proposed a revision of the Senate bill such that liability would be imposed where "the performance or display is further transmitted beyond the place where the receiving apparatus is located."<sup>105</sup> The House Committee's proposed amendatory language would have been more in keeping with the particular facts in *Jewell-La Salle*, where the music was channeled throughout the hotel and therefore "beyond the place where the receiving apparatus is located." The House Report also stated that any use of commercial sound equipment, or conversion of a home-type receiver into its equivalent, would lead to copyright infringement liability.<sup>106</sup> The House Committee enumerated several considerations useful in determining the applicability of the

101. H.R. 12549, 71st Cong., 3d Sess. (1931); H.R. 10364, H.R. 10740, H.R. 10976, H.R. 11948, H.R. 12094, and H.R. 12425, 72d Cong., 2d Sess. (1932); S. 3047, 74th Cong., 1st Sess. (1935); S. 7, S. 2031, H.R. 2695, H.R. 3699, H.R. 5275, 75th Cong., 1st Sess. (1937); H.R. 8263 and H.R. 9665, 76th Cong., 2d Sess. (1940); H.R. 3454, 85th Cong., 1st Sess. (1957).

For an informative discussion of the legislative history of § 110(5), see Korman, *supra* note 9.

102. S. 22, 94th Cong., 1st Sess. (1975).

103. *Id.* at § 110(5).

104. 122 CONG. REC. 1546 (daily ed. Feb. 6, 1976).

105. S. 22, 94th Cong., 1st Sess. (1975) in the House of Representatives, § 110(5)(B). H.R. REP. NO. 1476, 94th Cong., 2d Sess. 8 (1976). The Senate bill as amended by the House is reprinted in H.R. REP. NO. 1476, 94th Cong., 1st Sess. (1975).

106. H.R. REP. NO. 1476, 94th Cong., 2d Sess. 87 (1976).

proposed rule to particular cases.<sup>107</sup>

A Conference Committee met to reconcile the House and Senate bills.<sup>108</sup> One commentator notes that the Conference Committee was aware not only of *Aiken* but also of the then-pending ASCAP litigation involving the commercial background music industry, and of Muzak's position that it was being injured by *Aiken*; the *Aiken* decision permitted potential subscribers to background music services to use music broadcast by radio stations instead, where no royalty payment was required.<sup>109</sup>

To accommodate the interests of commercial background music companies such as Muzak, and at the same time recognizing the desirability of a *de minimis*<sup>110</sup> exemption for small commercial establishments using a home-type receiving apparatus with a simple, intramural speaker system, the Conference Committee adopted the Senate version of section 110(5), which provided a more limited exemption than the House version. The House version would have imposed liability where music received was further transmitted "*beyond the place where the re-*

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107. See *infra* note 121 and accompanying text.

108. CONF. REP. NO. 1733, 94th Cong., 2d Sess. (1976).

109. Korman, *supra* note 9, at 533 (footnote omitted). During *Aiken*'s litigation, more than two hundred commercial background music operators, including Muzak and its franchisees, commenced a proceeding to reduce the license fees they were required to pay to copyright owners. *United States v. ASCAP*, 1973-2 Trade Cas. ¶ 95, 272 (S.D.N.Y. 1973). The background music operators argued that they should not be required to pay license fees at a greater percentage rate than that paid by radio stations. *Id.* at ¶ 95, 273. They also claimed they were suffering unfairly by competition with commercial establishments that enjoyed royalty-free radio. *Id.* The *Aiken* exemption theoretically resulted in a reduction in business for Muzak and other background music operators, as royalty-free radio play offered an economically preferable means of musical entertainment for customers and employees of commercial establishments.

Interestingly, the background music operators wanted *Aiken* to prevail, as he did, so that they could introduce additional evidence theoretically compelling a reduction in their license fees such that they could compete with royalty-free radio. Petitioner's brief at 10, *Twentieth Century Music Corp. v. Aiken*, 500 F.2d 127 (1974) *aff'd*, 422 U.S. 127 (1975). In fact, Muzak and other background music operators had been granted leave to argue *Aiken*'s cause as amici curiae in the district court. 356 F. Supp. 271, 273 (W.D. Pa. 1973). Muzak actually financed and handled *Aiken*'s successful appeal.

As for the outcome of the rate adjustment proceeding, the matter was resolved by consent *after* § 110(5) was enacted. The result was an *increase* of license fees payable by Muzak and similar music operators. The argument advanced by the background music operators—that they would suffer by the competitive edge enjoyed by royalty-free radio—was no longer persuasive, as only small commercial establishments such as *Aiken*'s now enjoy the exemption; other establishments must pay license fees for radio reception.

110. The House Report had stated that "[t]he basic rationale of [§ 110(5)] is that the secondary use of the transmission by turning on an ordinary receiver in public is *so remote and minimal* that no further liability should be imposed." H.R. REP. NO. 1476, 94th Cong., 2d Sess. 86 (1976). (emphasis added).

ceiving apparatus is located.”<sup>111</sup> The Senate version, however, which was adopted, is less discriminating and imposes liability in any case where the music received “is further transmitted to the public.”<sup>112</sup> A Senate Report suggests that there is a further transmission to the public, “where broadcasts are transmitted to substantial audiences by means of loudspeakers covering a wide area.”<sup>113</sup>

The Conference Report recognized that a small commercial establishment such as the one in *Aiken* which “merely augmented a home-type receiver” would be exempt but that establishments large enough to justify subscription to a commercial background service would be fully liable.<sup>114</sup> The Conference Committee emphasized the *size* of the commercial establishment and in doing so theoretically accommodated the interests of commercial background music services, by minimizing the competitive edge larger commercial establishments would otherwise enjoy by using royalty-free radio reception rather than background music services which charge a fee.<sup>115</sup>

### *The Reemergence and Codification of the Quantitative Test*

Both the House and Senate bills codified the quantitative test formulated and applied in *Jewell-La Salle*. The functional test applied in *Fortnightly*, *Teleprompter* and *Aiken* no longer has any application in the radio reception context. In fact, the House Report concluded that its bill “completely overturned” the basis for the *Aiken* decision. The Report states in relevant part:

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111. CONF. REP. NO. 1733, 94th Cong., 2d Sess. 74 (1976). (emphasis added). This language would have been consistent with *Jewell-La Salle* where the music received by the defendant hotel was transmitted throughout the hotel and therefore “beyond the place where the receiving apparatus is located.” Only intramural radio reception, as in *Herbert v. Shanley Co.*, would have been potentially exempt.

112. *Id.* (emphasis added).

113. S. REP. NO. 93-983, p. 130 (1974). Quoted in *Twentieth Century Music Corp. v. Aiken*, 422 U.S. at 169 n.3 (Burger, C.J., dissenting, joined by Douglas, J.).

114. CONF. REP. NO. 1733, 94th Cong., 2d Sess. 75 (1976):

With respect to 110(5), the conference substitute conforms to the language in the Senate bill. It is the intent of the conferees that a small commercial establishment of the type involved in *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151 (1975), which merely augmented a home-type receiver and which was not of sufficient size to justify, as a practical matter, subscription to a commercial background music service, would be exempt. However, where the public communication was by means of something other than a home-type receiving apparatus, or where the establishment actually makes a further transmission to the public, the exemption would not apply.

115. As of about 1980, Muzak’s monthly subscription fee for retail clothing stores was approximately \$30-\$45. Appellee’s brief at 19, *Broadcast Music, Inc. v. United States Shoe Corp.*, 678 F.2d 816 (9th Cir. 1982).

The majority of the Supreme Court in the *Aiken* case based its decision on a narrow construction of the word "perform" in the 1909 statute. This basis for the decision is completely overturned by the present bill and its broad definition of "perform" in section 101. The Conference Committee . . . accepts the traditional pre-*Aiken*, interpretation of the *Jewell-La Salle* decision, under which public communication by means other than a home receiving set, or further transmission of a broadcast to the public, is considered an infringing act.<sup>116</sup>

The House Report nevertheless approved the result in *Aiken* but found the factual situation there "to represent the outer limit of the exemption, . . ."<sup>117</sup> The Report explained:

Under the particular fact situation in the *Aiken* case, assuming a small commercial establishment and the use of a home receiver with four ordinary loudspeakers grouped within a relatively narrow circumference from the set, it is intended that the performances would be exempt under clause (5). However, *the Committee considers this fact situation to represent the outer limit of the exemption, and believes that the line should be drawn at that point.*<sup>118</sup>

*Jewell-La Salle's* functional test therefore lives on, though its impact has been tempered by legislative intervention, providing an exemption only under circumstances similar to that found in *Aiken*. Section 110(5) has been narrowly construed from its inception.

### *Section 110(5) of the 1976 Copyright Act*

The Act, which took effect on January 1, 1978, includes section 110(5), as well as other limitations on copyright owners' exclusive rights.<sup>119</sup> Section 110 provides in relevant part:

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116. H.R. REP. NO. 1476, 94th Cong., 1st Sess. at 87 (1975).

One pre-*Aiken* decision that followed the letter and spirit of *Jewell-La Salle* was *Society of European Stage Authors and Composers, Inc. v. New York Hotel Statler Co.*, 19 F. Supp. 1 (S.D.N.Y. 1937). See *supra* note 85.

117. *Id.*

118. *Id.* (emphasis added).

119. The exclusive rights of copyright owners are subject to the limitations provided in §§ 107-118 of the Act (e.g. §§ 107 (fair use); 111 (compulsory license for secondary transmissions); 115 (compulsory license for making and distributing phonorecords)).

For analyses of § 111, see note 41 *supra*. For analyses of § 115, see Berg, *Moral Rights and the Compulsory License for Phonorecords*, 46 BROOKLYN L. REV. 67, 1979; Gonzales, "Compulsory Licensing of Sound Recordings Under the New Act," 1 ENT. L.J. 7 (1977); Greenman, Jr. & Deutsch, *The Copyright Royalty Tribunal and the Statutory Mechanical Royalty: History and Prospect*, 1 CARDOZO ARTS & ENT. (1982); Henn, "The Compulsory License

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 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; . . .<sup>120</sup>

Section 110(5) recognizes that radio play in a commercial establishment constitutes a “performance” of the music thus received. The courts no longer must grapple with defining “performance” in this context. Instead, the province of the courts will be to further define the *scope* of the exemption. The exemption applies as long as a single home-type receiving apparatus is used, the transmission thus received is not further transmitted to the public and, of course, no direct charge is made to hear the music. Congress did offer some guidelines in addition to having emphasized that the factual situation in *Aiken* represents the “outer limit” of the exemption. The House Committee explained that some of the considerations include:

[T]he size, physical arrangement, and noise level of the areas within the establishment where the transmissions are made audible or visible, and the extent to which the receiving appa-

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*Provisions of the United States Copyright Law*, Copy. Office Study. No. 5, at 18; Manchester, *Legalized Piracy: The Compulsory Licensing of Phonorecords Under the Copyright Revision Act of 1976*, 19 IDEA 149 (19—); Meyers, *Sound Recordings Under the New Copyright Act*, 22 N.Y.L. SCH. L. REV. 573 (1977); Thorne, *Compulsory Licensing: The Music Makers as Money Makers*, 5 L.A. LAW. 11 (1982), reprinted in 3 ENT. & SPORTS LAW., Winter 1983, at 11; Note, *Compulsory Licensing of Musical Compositions For Phonorecords Under the Copyright Act of 1976*, 30 HASTINGS L.J. 683 (1979).

Another limitation on the exclusive rights of copyright owners is found in § 110(7)—the *record store exemption*. Section 110(7) exempts performances of nondramatic musical compositions by retail record stores and other commercial establishments where the purpose of the performance is to demonstrate the commercially exploited product and thereby promote sales. Section 110(7) exempts a:

[p]erformance of a nondramatic musical work by a vending establishment open to the public at large without any direct or indirect admission charge, where the sale purpose is to promote the retail sale of copies or phonorecords of the work, and the performance is not transmitted beyond the place where the establishment is located and is within the immediate area where the sale is occurring.

For a discussion of the legislative history and judicial antecedents of § 110(7), see Korman, *supra* note 9, at 534-36.

120. 17 U.S.C. § 110 (1976) (emphasis added).



ratus is altered or augmented for the purpose of improving the aural or visual quality of the performance for individual members of the public using those areas.<sup>121</sup>

However articulate this legislative history, there was an "obvious gap in the statute to be filled in by the courts."<sup>122</sup> For instance, would a commercial establishment using only four simply-mounted speakers for intramural radio play, enjoy the exemption if the size of the establishment minimally exceeded that of Aiken's fast-food restaurant? Appellate consideration of section 110(5) was just around the corner.

#### NARROW CONSTRUCTION OF THE SECTION 110(5) EXEMPTION

##### *Sailor Music v. Gap Stores, Inc.*

The United States Court of Appeals for the Second Circuit in *Sailor Music v. Gap Stores, Inc.*<sup>123</sup> provided the first reported decision interpreting section 110(5). The Gap stores comprise a chain of approximately 420 clothing stores. Radio play in each store is effected by means of a master receiver connected to loudspeakers recessed in cavities in the store's ceiling. The average size of all Gap stores is 3,500 square feet. In one of the infringing stores, the size of which is 2,769 square feet, radio play of the plaintiffs' musical composition was effected. The plaintiffs sued to enjoin the allegedly infringing radio play. The plaintiffs prevailed. The court of appeals affirmed.

The court of appeals recognized that section 106(4) of the Act "grants copyright owners the exclusive rights publicly to perform, or authorize the performance of, their copyrighted works," and that radio play falling within the scope of section 110(5) is exempt from section 106(4).<sup>124</sup> The court also recognized that Congress expressly considered the scope of section 110(5) by referring to *Aiken*.<sup>125</sup> Aiken's fast-food restaurant was only 1,055 square feet with a commercial area open to the public of only 620 square feet where radio programs were played by means of a single home-type receiving apparatus connected to four speakers simply mounted on the restaurant's ceiling; the court noted that the House Committee sponsoring the Act emphasized that the factual situation in *Aiken* represented the "outer limit" of the sec-

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121. H.R. REP. NO. 1476, 94th Cong., 1st Sess., 87 (1976).

122. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. at 169, n.3 (Burger, C.J., dissenting, joined by Douglas, J., construing similar definitional attempts by the Senate Committee on the Judiciary, S. REP. NO. 93-983 at 130 (1974)).

123. 668 F.2d 84.

124. *Id.* at 86. (footnote omitted).

125. *Id.*

tion 110(5) exemption.<sup>126</sup>

The court concluded that "the Gap store in the instant case exceeds this 'outer limit' as Judge Gagliardi properly held" in the district court.<sup>127</sup> The Gap store "is much larger than the shop in *Aiken*," the court added, "which . . . indicates that Congress did not intend it to be exempted from the mandates of the copyright laws pursuant to § 110(5)."<sup>128</sup>

The court also determined that the Gap store is "of sufficient size to justify, as a practical matter, a subscription to a commercial background music service," a factor which further suggests Congress did not intend that the Gap store would be exempt."<sup>129</sup> The court did not, however, offer any guidelines for determining just what *size* a commercial establishment must be to justify subscription to a background music service.

The decision in *Sailor Music* rested on three grounds. First, the Gap store was far larger than the fast-food restaurant in *Aiken*. Congress had pronounced that the size of a commercial establishment is at least partly determinative.<sup>130</sup> Second, the store was large enough, the court found, "to justify, as a practical matter, a subscription to a commercial background service," such as Muzak.<sup>131</sup> Third, although the court mentioned but did not analyze this fact, the receiving apparatus in the Gap store was more elaborate than the one in *Aiken*.<sup>132</sup> The master receiver in the Gap store was connected to speakers recessed behind wired grids in cavities in the store's ceiling;<sup>133</sup> it was not a simple home-type receiving apparatus.

*Broadcast Music, Inc. v. United States Shoe Corp.*

In *Broadcast Music, Inc. v. United States Shoe Corp.*,<sup>134</sup> decided one year after *Sailor Music*, the Ninth Circuit affirmed the district court's order granting the plaintiff's motion for summary judgment in a copyright infringement action against four retail apparel stores operating under the name of Casual Corner. Each of the stores used a single

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126. *Id.* (citation omitted).

127. *Id.*

128. *Id.*

129. *Id.* (citations omitted). See generally *supra* notes 114 & 115 and accompanying text.

130. See generally *supra* note 113 and accompanying text.

131. See *supra* note 129.

132. 668 F.2d at 85-86; see also *supra* note 15 and accompanying text.

133. 668 F.2d at 86.

134. 678 F.2d 816.

radio receiver connected to four or more "widely separated speakers"<sup>135</sup> mounted in the store's ceiling. The court of appeals did not disclose the fact that the speakers were *recessed* in cavities in the ceilings of each of the stores,<sup>136</sup> as they were in *Sailor Music*, nor did it disclose the square footage of the defendant stores, which was substantial.<sup>137</sup> The court concluded that the defendant stores exceeded the "outer limit" of the section 110(5) exemption because their sound systems were "a type not commonly used in private homes, . . ."<sup>138</sup> The court further stated that the size and nature of the defendant stores justified the use of a commercial background music system.<sup>139</sup> In so holding, the court expressly relied on *Sailor Music*, which involved nearly identical facts.

The decision in *U.S. Shoe Corp.* also had constitutional dimension. The defendant contended that section 110(5) was unconstitutionally void for vagueness in that its language provided no indicia for determining whether a given receiving apparatus is "of a kind commonly used in private homes." The court found no merit in this contention. "We believe that a person of ordinary intelligence," said the court, "can understand and apply the requirements of the Act."<sup>140</sup>

### CONCLUSION

Section 110(5) provides a limited music copyright haven. Commercial establishments within its reach are free to entertain their customers and employees with royalty-free radio play. Articulate legislative history did much to define the scope of the exemption, as did the decisions in *Sailor Music* and *U.S. Shoe Corp.* Nevertheless, the possibility of further judicial construction should not be ruled out.

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135. *Id.* at 817.

136. Appellee's Brief at 5, *Broadcast Music, Inc. v. U.S. Shoe Corp.*, 678 F.2d 816 (9th Cir. 1982).

137. *See supra* note 15.

138. 678 F.2d at 817.

139. *Id.*

140. *Id.*