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COPYRIGHT INFRINGEMENT: SMALL BOOTHS LEAD TO BIG TROUBLE FOR VIDEO STORES

Technological advancements and human ingenuity have always gone hand in hand. It is not surprising, then, that enterprising individuals have sought, and will continue to seek, to utilize new technologies in innovative ways to derive revenue from the exhibition of copyrighted materials. In *Columbia Pictures Industries, Inc. v. Redd Horne, Inc.*,[1] the Third Circuit held that exhibiting videocassettes of copyrighted films for a fee in private viewing booths constituted public performances which infringed on the copyright holders' exclusive rights.[2] The impact of such a decision cannot be treated lightly. This ruling informs all would-be entrepreneurs that they are not immune from liability for copyright infringement simply because the technologies are of recent origin or are being applied in innovative ways.[3] The existing statutory framework will protect the exclusive rights of a copyright holder.[4]

The copyright infringement issue in *Redd Horne* arose out of a showcasing or in-store rental concept. Maxwell's Video Showcase, Ltd. ("Maxwell's"), operated two facilities in Erie, Pennsylvania, where it rented and sold videocassette recorders, prerecorded videocassettes and blank cassettes. Each store contained a showroom area in the front, and a showcase or exhibition area in the rear. The front showrooms contained materials for sale and rent, as well as dispensing machines for popcorn and beverages. The rear showcase areas contained small, carpeted private booths where two to four patrons could view videocassettes on a nineteen-inch color television. There were a total of eighty-five booths in the two stores.

In order to use a viewing booth, the customers would select a videocassette of a film from Maxwell's catalogue. The fee charged would depend on the number of people in the viewing room and the time of day.[5]

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1. 749 F.2d 154 (3d Cir. 1984).

2. *Id.* at 162. The plaintiffs, motion picture producers, distributors and copyright holders of the motion pictures exhibited at Maxwell's consisted of the following companies: Columbia Pictures Industries, Inc., Embassy Pictures, Paramount Pictures Corp., Twentieth Century-Fox Film Corp., Universal City Studios, Inc., Walt Disney Productions and Warner Bros., Inc. The defendants were: Maxwell's Video Showcase, Ltd., Redd Horne, Inc. (Maxwell's advertising and public relations firm), Robert Zeny (the president and sole shareholder of Maxwell's), and Glenn W. Zeny (Robert's brother and president of Redd Horne, Inc.).

3. *Id.* at 157.

4. *See* 17 U.S.C. § 106 (1977), *reprinted infra* note 11.

5. The price was five dollars for one or two people before 6 p.m., and six dollars for two

The fee additionally entitled patrons to help themselves to popcorn and beverages. Closing the door to the room would signal a Maxwell employee to place a cassette of the film chosen by the viewer into a videocassette machine in the front of the store. The picture would then be shown in the patron's viewing room.

Any member of the public who wished to use Maxwell's facilities and services was welcome to do so. However, access to each room was limited to the individuals who rented it as a group. Strangers were never placed in a viewing room in order to fill the room to capacity.

Maxwell's advertised on Erie radio stations and in theater pages of local newspapers. Typically, each advertisement featured one or more motion pictures, and emphasized Maxwell's selection of films, low prices and free refreshments. However, these advertisements did not state that the motion pictures were videocassette tapes shown on television monitors. At the entrance of each Maxwell's facility, there were also advertisements which resembled movie posters. Additionally, movie posters were displayed in the front area of each store.

Columbia Pictures Industries ("Columbia") brought suit against the alleged copyright infringement resulting from Maxwell's in-store rental operation.[6] Columbia claimed that the exhibition of the videocassettes in the private booths constituted unauthorized public performances, violating its exclusive rights under the Copyright Act of 1976 ("Act").[7] Columbia moved for summary judgment and sought an injunction, to prevent Maxwell's from exhibiting the motion pictures.[8]

The United States District Court for the Western District of Pennsylvania granted summary judgment[9] in favor of Columbia, and dismissed Maxwell's various counterclaims.[10] The district court first found that a grant of distribution in a particular videotape of a movie did not act as a waiver of any other exclusive rights under the copyright law.[11] According to section 202 of the Act, one may own a copy of another's

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people after 6 p.m. At all times, there was a one dollar charge for the third and fourth persons. *Redd Horne*, 749 F.2d at 157.

6. Columbia Pictures Industries, Inc. v. Redd Horne, Inc., 568 F. Supp. 494, 495-96 (W.D. Pa. 1983).

7. 17 U.S.C. §§ 101 *et. seq.* (1977).

8. *Redd Horne*, 568 F. Supp. at 497.

9. *Id.* at 497.

10. *Id.* at 501-02. Maxwell's presented four counterclaims which stated that Columbia: (1) brought the action to drive Maxwell's out of the showcasing market and to reserve the market solely for itself; (2) used unlawful tying arrangements, violating antitrust laws; (3) maliciously interfered with Maxwell's business relationships; and (4) breached an implied contract of good faith and fair dealing. *Id.* at 501.

11. *Id.* at 498.

copyrighted work without acquiring any exclusive rights accompanying the copyrighted material.[12] Moreover, section 106 of the Act enumerates the exclusive rights owned by a copyright holder.[13] Since the rights granted by section 106 are separate and distinct, it followed that Columbia's sales of its copyrighted motion pictures resulted in a waiver of its exclusive rights to distribute those copies sold.[14] However, such sales did not waive any of Columbia's other exclusive rights enumerated in section 106.[15] Thus, Columbia retained its exclusive right to perform its motion pictures publicly, despite the sale of videocassette copies to Maxwell's.

The district court viewed Maxwell's showcasing operation as no different from the exhibition of films at a conventional movie theater. The court stated that the viewing rooms more closely resembled "mini-movie theaters than living rooms away from home."[16] Like a movie theater, Maxwell's was open to the general public and was limited to paying customers. Seating in both facilities was of a finite number and the actual performance of the motion pictures were handled by Maxwell's employees.[17] The district court thus found that Maxwell's audience was public in nature and that showcasing Columbia's copyrighted motion pictures resulted in repeated public performances which infringed Columbia's

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12. *Id.* (citing 17 U.S.C. § 202 (1977)). Section 202 of the Act states:

> Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied. Transfer of ownership of any material object, including the copy . . . in which the work is first fixed, does not of itself convey any rights in the copyrighted work embodied in the object; nor, in the absence of an agreement, does transfer of ownership of a copyright or any exclusive rights under a copyright convey property rights in any material object.

13. 17 U.S.C. § 106 (1977) states:

> Subject to sections 107 through 118, the owner of a copyright under this title has exclusive rights to do and to authorize the following:
> (1) to reproduce copyrighted work in copies or phonorecords;
> (2) to prepare derivative works based upon the copyrighted work;
> (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
> (4) in the case of literary, musical, dramatic and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and
> (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictoral, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted works publicly.

14. 17 U.S.C. § 109(a) (1977) provides: "(a) Notwithstanding the provisions of section 106(3), the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord." *See Redd Horne*, 568 F. Supp. at 498.

15. *Redd Horne*, 568 F. Supp. at 498. *See supra* note 11.

16. *Redd Horne*, 568 F. Supp. at 500.

17. *Id.*

copyrights.[18]

The district court determined that Maxwell's showcasing operation fell within the statutory definition of public performances found in section 101 of the Copyright Act.[19] Under the second clause of that definition, to perform a work publicly means:

> to transmit or otherwise communicate a performance . . . of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance . . . receive it in the same place or in separate places and at the same time or at different times.[20]

Although the viewing rooms seated only four patrons at any one time, the potential existed for a substantial portion of the public to attend such performances over an extended period of time. Accordingly, Maxwell's showcasing operation constituted infringing public performances.[21] The court, adopting Professor Nimmer's view of this portion of the definition,[22] held that since Maxwell's facilities each had only one copy of a given film title, the same copy must have been performed repeatedly, constituting public performances.[23] Finally, the district court concluded that this portion of the definition of public performance was intended to protect copyright owners from infringing performances such as those by Maxwell's showcasing operation.[24] Maxwell's appealed.

The Third Circuit affirmed the district court's granting of a summary judgment and injunctive relief in favor of Columbia.[25] The Third Circuit first noted that this was not a case of unauthorized taping or videocassette piracy, since Maxwell's legally obtained copies of the copy-

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18. *Id.*

19. *Id.*

20. *Id.* (citing 17 U.S.C. § 101 (1977)).

21. *Redd Horne*, 568 F. Supp. at 500.

22. *Id.* (citing 2 M. NIMMER, NIMMER ON COPYRIGHT § 8.14(C)(3) (1985)). Professor Nimmer cites a peepshow as an example where repeated performances of the same copy of the material, before only one person at a time, results in numerous performances seen by the public.

23. *Redd Horne*, 568 F. Supp. at 501.

24. *Id.* The District Court additionally dismissed Maxwell's counterclaims regarding antitrust violations and tying arrangements, stating that groups with common business and economic interests may jointly protect those interests from interference by competitors without violating antitrust laws. Moreover, the counterclaim for malicious interference with Maxwell's business relationships was also dismissed since no facts were presented to support that allegation. *Id.*

25. Columbia Pictures Industries, Inc. v. Redd Horne, Inc., 749 F.2d 154 (3d Cir. 1984). The Third Circuit additionally discussed issues not addressed by the district court. *See infra* note 58 for the Third Circuit's discussion of these issues.

righted motion pictures by purchasing them either from Columbia or its authorized distributors.[26] The court then recognized that it is the role of Congress, and not the courts, to formulate new principles of copyright law in response to technological innovations.[27] The court further stated that Maxwell's was not immune from infringement simply because the technologies were of recent origin or were being applied in innovative uses.[28] Although this case dealt with a novel application of relatively recent technological developments, it still could be readily analyzed and resolved within the statutory framework of the Copyright Act.[29]

Citing section 106 of the Act, which confers upon the copyright owner certain enumerated and exclusive rights,[30] the Third Circuit stated that it was undisputed that Maxwell's was licensed to exercise the right of distribution as governed by section 106(3),[31] since a motion picture copyright owner may dispose of a copy of his work, while retaining all underlying copyrights which are not expressly or impliedly disposed of with that copy.[32] However, the rights protected in section 106 are separate and distinct, and the granting of one does not waive any of the other exclusive rights. Thus, Columbia's sales of videocassette copies of its copyrighted motion pictures did not result in a waiver of any of the other exclusive rights enumerated in section 106, such as the exclusive right to perform its motion pictures publicly.[33]

The fundamental question addressed by the Third Circuit was whether Maxwell's showcasing operation constituted a public performance of Columbia's motion pictures. According to section 101, "[t]o perform a work means . . . , in the case of a motion picture or other audio visual work, to show its images in any sequence or to make the sounds accompanying it audible."[34] Accordingly, Maxwell's showcasing operation constituted a performance since the playing of the videocassettes resulted in a sequential showing of a motion picture's images and in making sounds accompanying it audible.[35]

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26. *Redd Horne*, 749 F.2d at 157.

27. *Id.* "Congress has the constitutional authority and the institutional ability to accommodate fully the varied permutations of competing interests that are inevitably implicated by such new technology." *Id.* (citing Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 431 (1984)).

28. *Redd Horne*, 749 F.2d at 157.

29. *Id.* at 157-58.

30. 17 U.S.C. § 106 (1977). *See supra* note 11.

31. 17 U.S.C. § 106(3) (1977).

32. *Redd Horne*, 749 F.2d at 158 (citing 17 U.S.C. § 202). *See supra* note 10.

33. *Redd Horne*, 749 F.2d at 158.

34. *Id.* (citing 17 U.S.C. § 101 (1977)).

35. *Redd Horne*, 749 F.2d at 158.

Addressing the question of whether Maxwell's showcasing operation constituted public performances, the court again cited section 101, stating that "[t]o perform [a work 'publicly' means to perform] . . . it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered."[36] This section's legislative history indicates that the second category, commonly referred to as a semipublic place (as determined by the audience's size and composition), was designed to expand the public performance concept by including those places that, although not open to the public at large, were nonetheless accessible to a significant number of people.[37] "Clearly, if the place is public, the size and composition of the audience is irrelevant."[38] The Third Circuit, however, found it unnecessary to examine the second part of the statutory definition because it agreed with the district court's conclusion that Maxwell's was indeed open to the public.[39] Reiterating the district court's finding that the showcasing operation was not distinguishable from the exhibition of films at a conventional movie theater,[40] the Third Circuit noted that the relevant place within the meaning of section 101 was each of Maxwell's two stores, and not each individual booth within each store.[41] The fact that the videocassettes could be viewed in private did not change the fact that Maxwell's was unquestionably open to the public.[42]

The Third Circuit's conclusion that Maxwell's activities constituted public performances is supported by subsection (2) of the statutory definition of public performance.[43] The House Report accompanying the

36. *Id.* (citing 17 U.S.C. § 101 (1977)).

37. H.R. REP. NO. 1476, 94th Cong., 2d Sess. 64, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5659, 5677-78. The House Report indicated that "[o]ne of the principal purposes of the definition was to make clear that, contrary to the decision in Metro-Goldwyn-Mayer Distrib. Corp. v. Wyatt, 21 C.O. BULL. 203 (D. Md. 1932), performances in 'semipublic' places such as clubs, lodges, factories, summer camps, and schools are 'public performances' subject to copyright control." *Id.*

38. *Redd Horne*, 749 F.2d at 158. This is illustrated by Professor Nimmer's peepshow example. *See supra* note 20. While only one person at a time attends the performance, the performance still occurs at a place open to the public. If the place is not public, however, the size and composition of the audience will be determinative.

39. *Redd Horne*, 749 F.2d at 159. The court noted that "[t]he statute is written in the disjunctive and thus [either category] of places can satisfy the definition of 'to perform a work publicly.' " *Id.* The fact that either category constitutes a public performance implies that in order for Maxwell's not to have publicly performed the plaintiffs' movies, Maxwell's cannot be a place open to the public and cannot be a place where a substantial number of persons outside of a normal family circle and its social acquaintances would gather.

40. *See supra* text accompanying note 14.

41. *Redd Horne*, 749 F.2d at 159.

42. *Id.*

43. 17 U.S.C. § 101(2) states, in pertinent part:

Act, which explained that "a performance made available by transmission to the public at large is 'public' even though recipients are not gathered in a single place,"[44] supports the court's conclusion. Thus, the transmission of a performance to members of the public, even in private settings such as Maxwell's viewing rooms, or hotel rooms, constitutes a public performance.[45] The fact that members of the public view the performances at different times does not alter the legal consequences.[46]

The court additionally looked to Professor Nimmer's examination of this definition, where he stated that "[i]f the same copy . . . of a given work is repeatedly played (i.e. performed) by different members of the public, albeit at different times, this constitutes a public performance."[47] Finally, the court noted that Professor Nimmer seemed to have envisioned the situation at Maxwell's when he wrote:

> One may anticipate the possibility of theaters in which patrons occupy separate screening rooms, for greater privacy, and in order not to have to await a given hour for commencement of a given film. These, too, should obviously be regarded as public performances within the underlying rationale of the Copyright Act.[48]

Although Maxwell's had only one copy of each film, the repeated showings of each copy to members of the public constituted public performances.[49]

The Third Circuit additionally rejected Maxwell's contention that its activities were protected by the first sale doctrine. The first sale doctrine is codified in section 109(a) of the Act,[50] and in essence is an extension of the principle that ownership of the material object is distinct from ownership of the copyrighted material.[51] "The first sale doctrine prevents the copyright owner from controlling the future transfer of a par-

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(2) to transmit or otherwise communicate a performance . . . of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance . . . receive it in the same place or in separate places and at the same time or at different times.

44. H.R. REP. NO. 1476, 94th Cong., 2d Sess. 64-65, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5659, 5678. The House Report further states that the same principles apply whenever the potential recipients represent a limited segment of the public, such as the occupants of hotel rooms.

45. *Redd Horne*, 749 F.2d at 159.

46. *Id.*

47. *Id.* (citing 2 M. NIMMER, § 8.14 (C)(3) at 8-142).

48. *Id.*

49. *Redd Horne*, 749 F.2d at 159.

50. *See supra* note 12.

51. *Redd Horne*, 749 F.2d at 159. *See* 17 U.S.C. § 202 (1977).

ticular copy once its material ownership has been transferred."[52] It does not, however, divest the owner of any of the other exclusive rights in the work (including the right to authorize public performances) conferred upon him or her by the other four subdivisions of section 106.[53] Conversely, lawful acquisition of a copy does not convey to the purchaser any of the rights reserved by the copyright owner.[54] Thus, although a purchaser of an authorized copy may rent that copy under section 109(a) without violating the copyright owner's right of distribution under section 106(3), he or she may not do so in ways that violate any of the exclusive rights enumerated in section 106.[55] Particularly, he or she may not rent the copy for use in an infringing public performance.[56]

In *Redd Horne*, only Columbia's distribution rights as to the transferred copies had been affected, and not its exclusive right to perform the work publicly.[57] Therefore, the transfer of the videocassettes to Maxwell's did not result in a forfeiture or waiver of all of Columbia's exclusive rights found in section 106.

Maxwell's first sale argument was merely another way of arguing that its activities were not public performances. For this argument to succeed, it would have been necessary to prove that the showcasing operation was, in actuality, truly an in-store rental.[58] The facts, however, showed otherwise. The showcasing operation was a significantly different transaction than renting a tape for home use. Maxwell's maintained physical control over the tapes, which were played by employees on Maxwell's machines. Those tapes never left the store by sale, rental, or any other means. According to the court, these facts clearly showed that Maxwell's showcasing operation was a public performance which constituted copyright infringement of Columbia's motion pictures.[59]

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52. *Redd Horne*, 749 F.2d at 159. "The first sale doctrine provides that where a copyright owner parts with title to a particular copy of his copyrighted work, he divests himself of his exclusive right to vend that particular copy. While the proprietor's other copyright rights . . . remain unimpaired, the exclusive right to vend the transferred copy rests with the vendee, who is not restricted by statute from further transfers of that copy. . . ." United States v. Wise, 550 F.2d 1180, 1187 (9th Cir.), *cert. denied*, 434 U.S. 929 (1977).

53. *Redd Horne*, 749 F.2d at 160.

54. *See also* Columbia Pictures Industries, Inc. v. Aveco, Inc., 612 F. Supp. 315, 319 (M.D. Pa. 1985). *See also* 17 U.S.C. § 202 (1977).

55. *Redd Horne*, 749 F.2d at 159-60.

56. *Aveco*, 612 F. Supp. at 319.

57. *Redd Horne*, 749 F.2d at 160.

58. *Id.* For this to be the case, Maxwell's would have to sell, rent, or otherwise dispose of the videocassettes.

59. *Id.* at 160. The remainder of the Third Circuit's decision discussed the liability of the co-defendants and their antitrust counterclaims against Columbia. Regarding co-infringer liability, the court found that there was sufficient evidence to hold Glenn W. Zeny and Redd

In analyzing the *Redd Horne* decision, it is important to recognize that this is a case of first impression—one with great implications. It is a case involving an innovative use of the relatively new technology of videocassette machines. Such devices have had an important impact on motion picture producers, distributors and copyright holders. The videocassette market has created an additional means of generating income from motion pictures. However, it has also resulted in several lawsuits against those who have taken advantage of the availability of videocassettes and have allegedly infringed on the copyright holders' exclusive rights.[60]

Prior to the age of videocassettes, it was relatively easy for motion picture copyright holders to enforce and protect their exclusive rights. There were two basic ways to obtain a copy of a copyrighted motion picture: legally, through a sale, license, gift or loan from the copyright holder;[61] or illegally, by theft or piracy.[62] However, videocassettes have changed this situation. A motion picture copyright owner can no longer trace copies of the copyrighted work. Today, anyone can own a copy of a copyrighted motion picture by purchasing it or by videotaping it off of a television transmission.[63] Moreover, the first sale doctrine allows one who owns a copy of a copyrighted motion picture to sell or rent that copy, so long as such sale or rental does not violate any of the copyright owner's exclusive rights.[64] Therefore, since there are virtually millions of legally obtained copies of copyrighted motion pictutes, it is extremely difficult to find everyone who uses copies for infringing purposes. Thus, the videocassette market, though economically beneficial to copyright owners, may have opened up a myriad of new problems in the area of copyright enforcement.

Finally, prior to videocassettes, copyright owners knew to whom they sold, loaned, or licensed copies of their motion pictures; almost anyone else with a copy was presumed to be an infringer.[65] It was therefore

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Horne, Inc. as contributory infringers since they knowingly participated in the infringing activity and ignored requests from Columbia to cease and desist. *Id.* at 160-61. Regarding the antitrust counterclaims against Columbia, the court found no allegations of fact to show a violation of the antitrust laws. The Third Circuit then upheld the lower court's dismissal of Maxwell's counterclaims. *Id.* at 161.

60. *See Redd Horne*, 749 F.2d at 154; *Aveco*, 612 F. Supp. at 315.

61. 17 U.S.C. § 106(3) (1977). *See supra* note 10.

62. Anyone who knowingly violates the exclusive rights of a copyright owner is a copyright infringer. 17 U.S.C. § 501(a) (1977).

63. For a detailed discussion regarding the legal rights involved in home videotaping, see Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417 (1984).

64. 17 U.S.C. § 109(a) (1977).

65. *See supra* note 61.

rarely necessary to resort to the courts to resolve these matters.[66] Today, however, these same copyright owners are now forced to resort to the courts to protect their rights, especially regarding the public performance of videocassettes.[67]

Although a district court in the Third Circuit subsequently followed the *Redd Horne* rationale in a case involving similar facts,[68] other courts may not reach the same decision.[69] What remains, then, is a relatively undeveloped area of copyright law as a result of videocassette technology.

The implications of the *Redd Horne* decision can be seen more vividly when they are extended to somewhat different circumstances. One interesting scenario to consider: what result if Maxwell's were to provide patrons with the videocassette and allow the customers to place it into a videocassette player located inside the viewing booth, rather than having an employee place the selected tape into the videocassette machine located at the front of the store?[70] The threshold question is whether Maxwell's still would be performing the videocassettes. If this were considered to be a performance, then it must be determined whether it also would be a public performance.

Regarding the performance issue, as stated previously, "[t]o perform a work means . . ., in the case of a motion picture . . ., to show its images in any sequence or to make the sounds accompanying it audible."[71] In our scenario, it could be argued that since Maxwell's employees would give the cassettes to the patrons, the patrons actually would be performing the cassettes since they would be inserting the tapes into the machines. Although this argument has merit, it fails to recognize that such a performance would take place at Maxwell's. Undoubtedly, if the

66. It should be noted that while the copyright owners were (and are) predominantly motion picture producers and distributors who as an aggregate possessed enormous resources and capital to protect their interests, the infringers often were small-scale, low-budget operations, which usually were not willing or able to challenge such matters in court. Conversation with Professor Lionel Sobel, Loyola Law School, Los Angeles, Nov. 15, 1985.

67. Columbia Pictures Industries, Inc. v. Professional Real Estate Investors, No. 83-2594 (C.D. Cal. Dec. 16, 1985). This is an oral opinion. *See infra* note 78.

68. *Aveco*, 612 F. Supp. at 319. In this case, copyright holders in videocassette movies (major motion picture producers and distributors in the United States) brought an infringement action against "Nickelodeon Video Showcase," claiming that the store was publicly performing copyrighted videocassettes without a license. The district court, relying heavily upon *Redd Horne*, held that the rental of videocassettes and rooms equipped with couches, television sets and cassette players constituted unauthorized public performances of the copyrighted works.

69. *See infra* note 78.

70. *See* Columbia Pictures Industries, Inc. v. Aveco, 612 F. Supp. 315 (M.D. Pa. 1985).

71. 17 U.S.C. § 101 (1977).

patron rented the tape and played it on a machine at home, then the patron would be performing. However, although Maxwell's employee would not be playing the cassette on the machine in this case, Maxwell's would still exercise dominion and control over the tapes because the tapes would not be allowed to leave the store.[72] Therefore, according to this analysis, since the patron would be inserting Maxwell's tape into Maxwell's machine, which would then be viewed on Maxwell's premises, Maxwell's would be the party performing the tapes.

The question of whether such a performance would be public can be answered more readily. Section 101 states that a public performance occurs when a work is performed "at a place open to the public or at a place where a substantial number of persons outside of a normal family circle and its social acquaintances is gathered."[73] Thus, if the customer performed the videocassette in the viewing booth, such a performance theoretically might not be public. But if Maxwell's performed the tape, Maxwell's would meet the first part of the statutory test for a public performance since Maxwell's, the relevant place, is a public place.[74] Therefore, even if Maxwell's employee were to allow patrons to place the tape into the machine in the viewing booth, Maxwell's would still be publicly performing the motion picture since the audience would be of a public nature and since the movies would be shown on Maxwell's premises.

Another situation to consider is whether a hotel which provides videocassette players in each guest's room, as well as a selection of tapes from which to choose, would be publicly performing those tapes. The analysis here would be the same as in the previous situation, where a patron at Maxwell's would rent a tape and place it in the machine in the viewing booth. For the same reasons, both would constitute performances by the proprietors.[75] The more difficult issue is whether such a performance in a hotel room would constitute a public performance. Interpreting the second definition of a public performance,[76] occupants of a hotel room appear to fall outside of the requirement of substantially more than a circle of a family and its social acquaintances. However, the

72. *Redd Horne*, 749 F.2d at 160. In the situation presented, it is presumed that Maxwell's does not rent the videocassettes for home viewing and that the cassettes do not leave the store. Note that this scenario differs from that in *Aveco*, 612 F. Supp. at 315, where videocassettes were rented either for in-store or home viewing.

73. 17 U.S.C. § 101 (1977).

74. *Redd Horne*, 568 F. Supp. at 500.

75. The rationale is that, here, as at Maxwell's, the tape is being played or performed on the proprietor's premises. The proprietor, therefore, is the one performing the work.

76. *See supra* text accompanying note 35. By the nature of its size and function, a hotel room necessarily is limited to a small number of occupants, who, at least presumably, can be considered social acquaintances.

House Report accompanying the Act stated that "a performance made available by transmission to the public at large is 'public' . . . . The same principles apply whenever the potential recipients of the transmission represent a limited segment of the public, such as occupants of hotel rooms."[77] Arguably, then, the motion picture would be transmitted,[78] and the legislative history indicates that hotel rooms should be considered public places, just as Maxwell's viewing rooms were held to be public places.[79] Therefore, the performing of a videocassette in a hotel room could be a transmission to the public at large and thus constitute a public performance under section 101(2).[80]

Similarly, it should be noted that even if Maxwell's or a hotel did not provide videotapes, unauthorized public performances might still occur, since the definition of a performance of a motion picture looks to the playing or showing of the work,[81] and not the work itself. Accordingly, the activity of playing a videocassette in a sequential showing of the motion picture's images and in making the sounds accompanying it audible would constitute a performance under section 101.[82]

A third situation to consider involves exhibiting videocassettes of copyrighted motion pictures to prison inmates over television monitors placed in viewing areas.[83] There is no doubt that the showing of these videocassettes by correctional authorities would constitute a performance

77. H.R. REP. NO. 1476, 94th Cong., 2d Sess. 64-65, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5659, 5678.

78. To transmit a performance is to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent. 17 U.S.C. § 101 (1977).

79. However, in a recent case, Columbia Pictures Industries, Inc. v. Professional Real Estate Investors, No. 83-2594 (C.D. Cal. Dec. 16, 1985), where the hotel provides videodisc players in its rooms and where guests could rent videodiscs from the front desk, the district court reached the opposite conclusion from the *Redd Horne* court. In an oral opinion, the court held that since hotel rooms have traditionally been considered private under various laws, including the fourth amendment, they were not public places. Specifically, the court stated that hotel rooms are private primarily because guests reaonably expect them to be private. Additionally, the court distinguished this case from *Redd Horne* on the grounds that the sole purpose of renting a hotel room is not to view movies.

The court in *Professional Real Estate* implied that the relevant place (within the meaning of a public performance as defined in § 101) was the individual hotel room and not the hotel in its entirety. This, however, is contrary to the Third Circuit's holding in *Redd Horne*, 749 F.2d at 159, as well as to the legislative intent as found in the House Report. *See supra* note 76.

80. 17 U.S.C. § 101 (1977). *See supra* note 42.

81. *Id.*

82. *Redd Horne*, 749 F.2d at 158.

83. In an analysis quite similar to that used by the Third Circuit in *Redd Horne*, the California Attorney General rendered an opinion that such an exhibition would constitute a public performance. Infringement of Copyright, 65 Op. Att'y Gen. 106 (1982).

of the copyrighted motion pictures within the meaning of section 101.[84] The key issue, then, is whether such a showing would constitute a public performance. Although a prison is not open to the general public, it is still a place where a substantial number of persons outside of a family and its social acquaintainces is gathered.[85] At the very least, a prison is a semipublic place, and the legislative history of the Act indicates that performance in semipublic places will constitute a public performance.[86] At the very most it is a public place. Either way, the result would constitute a public performance. Finally, even if the inmates were to view the videocassettes in different viewing areas, the performances would still be public due to the transmission of the motion pictures to the television monitors.[87]

There are countless other situations where uncertainty exists as to whether public performances have occurred. Among these are the exhibiting of motion pictures on airliners, in bars, restaurants, and hospital rooms. Since the facts will differ in each case, it will be important to consider the nature and composition of the audience and the type of establishment, as well as whether a transmission has occurred. However, even after a thorough examination, it still may be difficult to determine whether a public performance indeed has occurred.

By enacting the Copyright Act of 1976, Congress conferred upon copyright holders certain exclusive rights to authorize public performances of their copyrighted works,[88] and to protect those works from being infringed. The *Redd Horne* decision upholds these rights regarding the unauthorized public performance of copyrighted motion pictures and, in so doing, reinforces the purpose of the Act—to grant the work's owner a "monopoly" in nearly every aspect of that work.[89]

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84. 17 U.S.C. § 101 (1977). *See supra* text accompanying note 33.

85. 17 U.S.C. § 101 (1977). *See supra* text accompanying note 35.

86. H.R. REP. NO. 1476, 94th Cong., 2d Sess. 64, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5659, 5677-78. Although the House Report makes no mention of prisons, such institutions certainly appear to fall within the same classification as clubs, lodges, schools and camps.

87. 17 U.S.C. § 101 (1977). *See supra* note 77.

88. 17 U.S.C. § 106(4) (1977).

89. The purpose of the Copyright Act is to protect the interests that authors have in their artistic works by granting them legal monopolies in the performance of their copyrighted works. Chess Music, Inc. v. Sipe, 442 F. Supp. 1184, 1185 (D. Minn. 1977). The purpose also is to create incentives for creative effort. *Sony*, 464 U.S. at 429.