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Peggy H. Luh

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PAY OR DON'T PLAY: BACKGROUND MUSIC AND THE SMALL BUSINESS EXEMPTION OF COPYRIGHT LAW

I. INTRODUCTION

Walk into any coffee shop or neighborhood eatery, and you will most likely hear music in the background. The tunes may be soft and almost inaudible, or they may be overwhelming, turning conversations with your dining companions into a near shouting match. Regardless of the type of music or its noise level, music is becoming a staple in public establishments. Proprietors use music in their establishments for several purposes.¹ They may intend for the music to relax the patrons, to enhance the atmosphere, or to promote a theme.² Most people, however, do not realize that in order to play copyrighted music in an establishment, they must first obtain permission from the copyright holder. Regardless if the music comes from a compact disc or from a radio broadcast, a music license is necessary to avoid violating the copyright laws.

There are many reasons why a proprietor fails to obtain a music license. A possible reason may be the music purveyor's perception that such music licenses are not justified. When one merely tunes into a radio broadcast at home, common sense supports the belief that licenses are unnecessary. Both the patrons and management of the establishment may listen to the radio broadcast in their homes or car without special permission from the American Society of Composers, Authors and Publishers ("ASCAP") or Broadcast Music, Inc. ("BMI");³ however, once

1. Establishments which play background music vary endlessly. See, e.g., *BMI v. Claire's Boutiques, Inc.*, 949 F.2d 1482 (7th Cir. 1991) (retail chain stores); *Springsteen v. Plaza Roller Dome, Inc.*, 602 F. Supp. 1113 (M.D.N.C. 1985) (miniature golf course).

2. *Sound Affects: Mommy, Where Does Muzak Come From?*, Oct. 3, 1994, at 2-3 (Muzak promotional literature) (on file with *Loyola of Los Angeles Entertainment Law Journal*) [hereinafter *Sound Affects*]; Jeanne McDermott, *If It's to Be Heard But Not Listened to, It Must Be Muzak*, SMITHSONIAN, Jan. 1990, at 74-80; Andrea Dorfman, *How Muzak Manipulates You*, SCI. DIG., May 1984, at 26.

3. ASCAP, formed in 1914, was created to collectively enforce the performance rights of song writers and publishers. BMI was formed by various radio broadcasters in 1939. These two organizations are the largest of the performance rights groups. There are also other small, privately owned performing rights societies, the most important being the Society of European

the same parties enter a restaurant or a bar and listen to the same broadcast, it seems unimaginable that a license is required. This is because turning on a radio is considered a "performance" of the songs which come over the airwaves, which must be authorized.

A second possible reason for a music purveyor's failure to obtain a license is that the purveyor was unaware of the licensing requirements. And even when they are aware of licensing requirements, a third reason music purveyors may fail to obtain a license is that they believe their use of the music falls under an exemption to the copyright laws. Congress has provided several exemptions which allow unlicensed performances of copyrighted works.⁴ Those exemptions may be found in § 110 of the Copyright Act.⁵ Specifically, § 110(5) provides an exemption to certain businesses, but misunderstanding of the exemption leads establishment owners to the mistaken conclusion that they do not need a music license. In *Merrill v. Bill Miller's Bar-B-Q Enterprises*,⁶ the defendant relied on articles published by the National Restaurant Association and the Texas Restaurant Association, as well as his attorney, in his belief that he did not need to obtain a music license.⁷

This confusion is due to the ambiguous statutory language, and the seemingly arbitrary criteria courts have employed in finding copyright infringement. In response to this confusion, restaurant associations are sponsoring a federal bill extending the current exemption to cover the playing of background music in establishments.⁸

State Authors and Composers ("SESAC, Inc."). 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT, § 8.19, at 8-264 (1995).

The purpose of these performance rights groups is to "reduce the transactional and enforcement costs that would otherwise be incurred in reaching agreements with each individual copyright holder." *Chi-Boy Music v. Charlie Club, Inc.*, 930 F.2d 1224, 1226 n.1 (7th Cir. 1991) (citing *BMI v. Columbia Broadcasting Sys.*, 441 U.S. 1, 4-5 (1979)).

4. 17 U.S.C. § 110 (1994); see, e.g., *id.* § 110(1) (use of works by nonprofit educational institutions for instruction); *id.* § 110(2)(A) (use of works directly related to instruction by education or governmental bodies); *id.* § 110(3) (performance of a religious work in a religious context).

5. *Id.* § 110(5).

6. 688 F. Supp. 1172 (W.D. Tex. 1988).

7. *Id.* at 1175.

8. H.R. 789, 104th Cong., 1st Sess. 1 (1995). Hearings on 104 H.R. 789 (introduced Feb. 2, 1995) are tentatively scheduled for Fall, 1996. Pamela E. Foster, *Music Industry in a Row over Song Rights Bill*, NASHVILLE BUS. J., Mar. 20, 1995, § 1 (statement of Doug Sweeney, legislative correspondent for Rep. James Sensenbrenner, Jr. (R-Wis.)). H.R. 789 and companion bill S. 1137 are identical with respect to the proposed § 110(5) changes. The Senate bill also includes a provision informing the public when a work will fall into the public domain. S. 1137, 104th Cong., 1st Sess. 1 (1995).

This Comment will focus on the current § 110(5) exemption and the courts' varied and often seemingly inconsistent interpretations of the exemption as it applies to restaurants. Part II will briefly introduce the *prima facie* elements of copyright infringement and the development of the small business exemption. Part III will analyze the requirements of the small business exemption, and will examine the difficulties courts face when reconciling the language of the statute with legislative intent. The prevalent theme is that the present case law follows neither congressional intent nor statutory language and that the exemption needs to be redefined to allow for consistency. Finally, Part IV will examine proposed House Bill 789 ("Fairness in Musical Licensing Act of 1995")⁹ and its effect on both copyright holders and copyright law. The author concludes by explaining why passage of the Bill will clarify the law and allow for predictability and fairness to both business owners and copyright holders.

II. COPYRIGHT INFRINGEMENT THROUGH A PUBLIC PERFORMANCE

The Copyright Act confers to copyright holders the exclusive right to publicly perform their work.¹⁰ This right allows the copyright holder the power to authorize any public displays of his or her work, and to seek damages if that right is infringed. An infringing performance of a work does not have to be live or verbatim.¹¹ The performance may be from memory¹² or by playing a recording of the work.¹³ Playing a copyrighted work without permission constitutes infringement.

A. *Prima Facie Elements of Copyright Infringement*

In order to establish a *prima facie* case of copyright infringement, the plaintiff must show: (1) that there was an unauthorized public performance of a copyrighted work, and (2) that no statutory exemptions will relieve the performance from copyright laws.¹⁴

9. H.R. 789, 104th Cong., 1st Sess. 1 (1995) proposes to amend 17 U.S.C. § 110(5), as well as provisions regarding arbitration in fee negotiations between performance rights groups and businesses. *Id.* For purposes of this Comment, only § 2 of the Bill will be discussed.

10. 17 U.S.C. § 106(4) (1994).

11. 2 NIMMER & NIMMER, *supra* note 3, § 8.14, at 8-164 n.8.

12. *Id.*

13. *Id.* § 8.14, at 8-165.

14. David A. Gerber, *The "Small Business Exemption" from Copyright Liability: An Illusory Doctrine?*, 1989 ENT. PUB. & THE ARTS HANDBOOK 11, 12 (Robert Thorne et al. eds., 1989); see also *BMI v. Hartmax Corp.*, No. 88-C2856, 1989 U.S. Dist. LEXIS 12104 (N.D. Ill. 1989).

1. Performance

A copyright infringement action may only be brought if there is an unauthorized performance of a copyrighted work. Section 106(4) of the 1976 Copyright Act gives authors of audiovisual or musical works the exclusive right "to perform the copyrighted work publicly."¹⁵ All other performances must be licensed by the copyright holder or an agent of the holder. The Copyright Act defines "perform" as "to recite, render, play, dance, or act it, either directly or by means of any device or process."¹⁶ Devices or processes include "all kinds of equipment for reproducing [or amplifying] sounds or visual images, any sort of transmitting or amplifying apparatus, any type of electronic retrieval system, and any other techniques and systems not yet in use or even invented."¹⁷ These broad definitions indicate that reproduction of a copyrighted work by any means results in a performance. Playing an album or even singing a work constitutes a performance of that work. Even the act of turning on the radio constitutes a performance of the songs which come over the airwaves because it is the use of an "electronic retrieval system"¹⁸ which recites the copyrighted work.

2. Publicly

Copyright infringement cannot occur unless first, an unauthorized performance of a work occurs, and second, the performance occurs in "public."¹⁹ Section 101 states that a work is performed "publicly" if done "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."²⁰ Thus, performances in "semi-public" places such as

15. 17 U.S.C. § 106(4) (1994).

16. *Id.* § 101.

17. 2 NIMMER & NIMMER, *supra* note 3, § 8.14[B], at 8-168 (1995).

18. *Id.*

19. 17 U.S.C. § 106(4).

20. *Id.* § 101. Although this definition appears simplistic, it presents some interpretative problems. Under the 1909 Copyright Act, courts interpreted the statutory language to mean that as long as the performance was restricted to a particular group, meaning not available to the general public, that performance was not public. See *Metro-Goldwyn-Mayer Distrib. Corp. v. Wyatt*, 21 Copy. Dec. 203 (D. Md. 1932). A problem with this interpretation is that the group could consist of 5 or 100 persons, but the performance would still not be a public performance because the audience is "restricted." 2 NIMMER & NIMMER, *supra* note 3, § 8.14[C], at 8-172 to 8-173. Presumably, then, a large concert could be considered a non-public performance since its audience is restricted to those holding tickets. This interpretation has been abandoned in favor

clubs and prisons constitute a public performance.²¹ The 1976 Copyright Act, however, clearly indicates that where the audience is limited to family members and invited friends, the performance is not public.²²

Under these broad definitions, the act of turning on a radio in a restaurant constitutes a "public performance."²³ Therefore, unless the performance falls within an enumerated exception, the performance constitutes copyright infringement. Congress has provided several exemptions where the public may perform a copyrighted work without fear of infringement.²⁴ Section 110(5) of the Copyright Act represents one such exception. The section reads in pertinent part:

[T]he 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.²⁵

Often called the "small business exemption,"²⁶ the section allows owners of "Mom and Pop"²⁷ establishments to play music without incurring liability for copyright infringement.

of a new rationale. The present approach only requires that a "'public' performance . . . be 'open' to, that is, available to a substantial number of persons. It is not necessary that they in fact attend or receive the performance." *Id.* § 8.14[C], at 8-173 to 8-174 (citations omitted).

21. See *Fermata Int'l Melodies, Inc. v. Champions Golf Club, Inc.*, 712 F. Supp. 1257, 1260 (S.D. Tex. 1989) (golf club held to be a public place), *aff'd mem.*, 915 F.2d 1467 (5th Cir. 1990); *Hinton v. Mainlands of Tamarac*, 611 F. Supp. 494 (S.D. Fla. 1985) (music performance at a clubhouse dance is public); *Op. Cal. Att'y Gen.*, 1981-1982 Copy. Dec. (CCH) ¶ 25,368 (Feb. 5, 1982) (showing videotapes of motion pictures to prison inmates constitutes a public performance). *Contra Op. La. Att'y Gen.*, 1985-1986 Copy. Dec. (CCH) ¶ 25,833 (Jan. 10, 1985).

22. 17 U.S.C. § 101 (1994).

23. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151 (1974).

24. See 17 U.S.C. § 110; *e.g.*, *id.* § 110(1) (use of works by nonprofit educational institutions for instruction); *id.* § 110(2) (use of works directly related to instruction by educational or governmental bodies); *id.* § 110(3) (performance of a religious work in a religious context).

25. *Id.* § 110(5).

26. Gerber, *supra* note 14, at 11.

27. *Id.*

B. *Development of the Small Business Exception Language Through Twentieth Century v. Aiken*

The small business exemption developed from three cases²⁸ which culminated with *Twentieth Century Music Corp. v. Aiken*.²⁹ The *Aiken* court, after examining existing law,³⁰ concluded that defendant Aiken, by turning on his radio, did not "perform" within the meaning of the Copyright Act.³¹ The court's rationale followed two lines of cases dealing with cable television³² and "extend[ed] [the] interpretation of the scope of the 1909 statute's right of 'public performance for profit' to a situation outside the [cable television] context."³³

In *Aiken*, the defendant owned a fast-food restaurant equipped with "[a] single radio connection to four separate loud speakers furnish[ing] background music through normal radio programming"³⁴ which he left on throughout the day. The defendant did not have a performing license and was sued for copyright infringement of two ASCAP-licensed songs which were broadcast over the radio.³⁵ Because infringement requires that a "performance" take place, the case turned on the construction of what constituted a "performance" under the Copyright Act.³⁶

The *Aiken* court applied the functional test³⁷ articulated in *Fortnightly Corp. v. United Artists Television, Inc.*,³⁸ and found that both

28. *Twentieth Century Music Corp. v. Aiken*, 500 F.2d 127 (3d Cir. 1974), *aff'd*, 422 U.S. 151 (1975); *Fortnightly Corp. v. United Artists Television*, 392 U.S. 390, *reh'g denied*, 393 U.S. 902 (1968); *Buck v. Jewell-LaSalle Realty Co.*, 283 U.S. 191 (1931).

29. 500 F.2d 127 (3d Cir. 1974).

30. *Id.* at 131 (discussing *Jerome H. Remick & Co. v. General Elec. Co.*, 16 F.2d 829 (S.D.N.Y. 1926), and *Buck v. Debaum*, 40 F.2d 734 (S.D. Cal. 1929)).

31. *Id.* at 137.

32. *Id.* at 134-37; *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968); *Columbia Broadcasting Sys., Inc. v. Teleprompter Corp.*, 476 F.2d 338 (2d Cir. 1973).

33. H.R. REP. NO. 1476, 94th Cong., 2d Sess. 86 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5701.

34. *Aiken*, 500 F.2d at 128.

35. *Id.* at 129.

36. *Id.* at 130.

37. *Id.* The *Aiken* court announced: "We find no distinction between the two technologies of radio and CATV which would require us to reach a different result than that reached in *Fortnightly*. . . ." *Id.* at 137 n.22.

38. 392 U.S. 390 (1968). In *Fortnightly*, United Artists Television ("United Artists") sued Fortnightly, a cable television corporation that provided television broadcasts to two communities in West Virginia, for copyright infringement. United Artists was the copyright holder of motion pictures which were received by Fortnightly and then retransmitted to its customers without a license. *Fortnightly*, 392 U.S. at 392-93.

Aiken and *Fortnightly* merely "provid[ed] equipment to convert electronic signals into audible sound."³⁹ The Court reasoned that since Aiken was a viewer, he did not "perform" within the meaning of copyright law by merely turning on the radio in his restaurant.⁴⁰ Thus, Aiken did not infringe the plaintiffs' copyrights.

The ruling in *Aiken* contradicts the expansive definitions of the Copyright Act, which considers turning on a radio in a public place as a public performance of the broadcasted songs. Since Aiken did not secure permission from the copyright holders, the Court should have ruled that Aiken infringed the plaintiff's copyrights. Justice Stewart, however, foresaw the "practical unenforceability of a ruling that all of those in Aiken's position are copyright infringers."⁴¹ If the Court held Aiken liable for copyright infringement, the implication would be that all establishments which use radios would also be copyright infringers. "One has only to consider the countless business establishments in this country with radio . . . sets on their premises . . . to realize the total futility of any evenhanded effort on the part of copyright holders to license even a substantial percentage of them."⁴² Economically, the Court also felt that the radio station's licensing fees provided adequate compensation to the copyright owner, and that additional fees from the restaurant were

The Supreme Court in *Fortnightly* rejected the "quantitative" test of *Jewell-LaSalle* and articulated a "functional" test in interpreting the word "performance." 392 U.S. at 396-99. Unlike the *Jewell-LaSalle* "quantitative" test, which focuses on "[h]ow much . . . the [infringer did] to bring about the viewing and hearing of a copyrighted work," *Aiken*, 500 F.2d at 133 n.14, the functional test "depends upon a determination of the function that is played by [cable television] in the overall process of telecasting and reception." *Id.* at 134. The Court noted:

Television viewing results from combined activity by broadcasters and viewers. . . . The television broadcaster in one sense does less than the exhibitor of a motion picture or stage play; he [or she] supplies his [or her] audience not with visible images but only with electronic signals. The viewer conversely does more than a member of a theater audience; he [or she] provides the equipment to convert electronic signals into audible sound and visible images. . . . Broadcasters perform. Viewers do not perform. . . . One [broadcaster] is treated as active performer; the other [viewer], as passive beneficiary.

Fortnightly, 392 U.S. at 398.

Following this analogy, the Court determined that *Fortnightly's* activities were more like the viewer's. *Id.* at 399. Because *Fortnightly's* primary purpose was to enhance its customer's ability to receive signals, and not to directly broadcast any signals into homes, *Fortnightly* did not "perform" within the meaning of the Copyright Act, and therefore did not commit copyright infringement. *Id.*

39. *Fortnightly*, 392 U.S. at 397-400.

40. *Aiken*, 422 U.S. at 162.

41. *Id.*

42. *Id.*

unnecessary.⁴³ After these policy considerations, the Court held that Aiken's simple act of turning on the radio in his restaurant did not constitute copyright infringement.

Congress responded to the decision by revising the Copyright Act. The revision adopted the outcome of *Aiken*, but overruled the Court's application of "performance." Congress considered Aiken's actions infringing, but wanted to exempt him and those like him from licensing requirements for the reasons which Justice Stewart expressed in his opinion. It is this attempt to combine a broad definition of "performance," yet to still allow "Mom and Pop" stores to play radio music without fear of copyright infringement, that resulted in the § 110(5) "small business exemption."⁴⁴

Interestingly, in its revision, Congress rejected the definition of "perform" used in *Fortnightly* and *Aiken* in favor of *Jewell-LaSalle's* broader reading. In essence, § 110(5) rejects the *Aiken* decision, restoring the rationale of *Jewell-LaSalle*, "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."⁴⁵ This decision is largely unexplained. Congress then went on to specifically state that although it accepted the pre-*Aiken* interpretation of *Jewell-LaSalle*, it intended to exempt situations in which "a small commercial establishment . . . [uses] a home receiver with four ordinary loudspeakers grouped within a relatively narrow circumference from the set."⁴⁶ Thus, while Aiken "performed" within the meaning of the Copyright Act, this performance does not require a license. However, *Aiken* would represent "the outer limit" of the exemption.⁴⁷ This "outer limit" language has presented many interpretative problems which courts have been attempting to resolve.

III. THE SMALL BUSINESS EXEMPTION OF THE COPYRIGHT LAWS

To qualify for the small business exemption of the copyright law, an establishment must meet four factors. The establishment in question must:

43. *Id.* at 163.

44. Gerber, *supra* note 14, at 11.

45. H.R. REP. NO. 1476, 94th Cong., 2d Sess. 87 (1976), reprinted in 1976 U.S.C.C.A.N. 5701.

46. Bernard Korman, *Performance Rights in Music Under Section 110 and 118 of the 1976 Copyright Act*, N.Y.L. SCH. L. REV. 521, 532 n.58 (1977) (quoting H.R. REP. NO. 1476, 94th Cong., 2d Sess. 87 (1976)).

47. *Id.*

(1) be a small commercial establishment;⁴⁸ (2) not make a "direct charge" to hear the music;⁴⁹ (3) employ a "single receiving apparatus of a kind commonly used in private homes;"⁵⁰ and finally, (4) "the performances must not be further transmitted to the public."⁵¹

While the factors are generally accepted in most courts, each element of the exemption presents problems in its interpretation and application. Part III will introduce and evaluate some of the approaches courts employ in interpreting the requirements of the small business exemption.

A. *The Establishment Must Be a Small Commercial Establishment*

The first requirement for a small business exemption is that the establishment be a small commercial establishment.⁵² This requirement stems from the legislative history which called for an examination of the business to determine if it was large enough to merit subscription to a commercial music service such as Muzak.⁵³ Congress denies the small business exemption to restaurants "of sufficient size to justify, as a practical matter, a subscription to a commercial background music service."⁵⁴ In determining whether a business qualifies as a small commercial establish-

48. *Hickory Grove Music v. Andrews*, 749 F. Supp. 1031, 1037 (D. Mont. 1990).

49. 17 U.S.C. § 110(5)(A) (1994).

50. *Id.* § 110(5). Some courts further divide this factor into two separate elements. "The exception is available only if (1) a single receiving apparatus is used, (2) the single receiving apparatus is of a kind commonly used in private homes." *Cass County Music Co. v. Muedini*, 55 F.3d 263, 267 (7th Cir. 1995) (quoting *BMI, Inc. v. Claire's Boutiques*, 949 F.2d 1482, 1489 (7th Cir. 1991)).

51. *International Korwin Corp. v. Kowalczyk*, 855 F.2d 375, 378 (7th Cir. 1988); *see also* 17 U.S.C. § 110(5)(B) (1994).

52. *Hickory Grove Music*, 749 F. Supp. at 1038.

53. H.R. REP. NO. 1733, 94th Cong., 2d Sess. 75 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5816. Muzak began in 1934, and is today "the world's largest provider of business music." *Birthday Presence: No Dancing in the Elevators, Please*, Oct. 3, 1994 (Muzak promotional literature) (on file with *Loyola of Los Angeles Entertainment Law Journal*) [hereinafter *Birthday Presence*]. The music provider operates twelve music channels, eleven of which play original artist recordings. The environmental music channel is Muzak's most popular channel. It is "designed to be less obtrusive and for it, vocals are removed from all of the tracks in special Muzak arrangements." *Sound Affects*, *supra* note 2, at 1. In addition to music programming, Muzak also provides satellite-broadcast business music networks, data transmission, and in-store visual messaging for businesses all over the world. *Id.* To date, Muzak has 34 company-owned and 189 independent sales locations throughout the world. *Birthday Presence*, at 2.

54. H.R. REP. NO. 1733, 94th Cong., 2d Sess. 75 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5816. Lack of financial statistics, however, is not crucial to a ruling on summary judgment. *Hickory Grove Music*, 749 F. Supp. at 1038.

ment, courts examine the restaurant's square footage and annual revenues,⁵⁵ although neither factor is explicitly identified in the legislative history.⁵⁶ Based on these facts, courts determine whether the establishment qualifies for exemption from the copyright law.⁵⁷

1. The Physical Size of the Establishment

Analysis of an establishment's size is the least arbitrary of the factors enumerated for the small business exemption.⁵⁸ Failure to satisfy this element automatically disqualifies a business from obtaining an exemption.⁵⁹ To determine whether an establishment qualifies as a small business, courts compare the square footage of the establishment in question to that of Aiken's store.⁶⁰ Aiken's store had 620 square feet open to the public.⁶¹ With one exception,⁶² "the determination of whether the public area of an establishment exceeds 620 square feet has proven to be a fairly accurate indicator as to the establishment's qualification for the exemption."⁶³ Establishments exceeding 620 square feet of public space fail to qualify for the exemption, whereas those with less than 620 square feet may fall within the exemption.

55. See *Crabshaw Music v. K-Bob's of El Paso, Inc.*, 744 F. Supp. 763, 767 (W.D. Tex. 1990) (store with public area of 7000 square feet and annual revenues of \$800,000 to \$900,000 not exempt); *International Korwin Corp. v. Kowalczyk*, 665 F. Supp. 655, 658 (N.D. Ill. 1987), *aff'd*, 855 F.2d 375 (7th Cir. 1988) (business which covered 2640 square feet and had \$35,000 to \$136,000 in annual net profits not a small commercial establishment); *Merrill v. County Stores, Inc.*, 669 F. Supp. 1164, 1170 (D.N.H. 1987) (exemption not available where store was 13,000 square feet and annual sales were \$2.5 million).

56. John Wilk, *Seeing the Words and Hearing the Music: Contradictions in the Construction of 17 U.S.C. Section 110(5)*, 45 RUTGERS L. REV. 783, 814 (1993).

57. See *Hickory Grove Music v. Andrews*, 749 F. Supp. 1031, 1038 (D. Mont. 1990) (citing *BMI v. Hartmarx Corp.*, No. 88 C 2856, 1989 U.S. Dist. LEXIS 12104 (N.D. Ill. 1989)); *Gnossos Music v. Quido DiPompo*, 1989 Copy. Dec. (CCH) ¶ 26,483 at 22,937 (D. Me. 1989); *International Korwin Corp.*, 665 F. Supp. at 658 ("given both [the restaurant's] physical size and substantial revenues, the Orbit is a large enough establishment to accommodate a background music service."). *Id.*

58. Wilk, *supra* note 56, at 812.

59. *Hickory Grove Music*, 749 F. Supp. at 1039. The *Hickory Grove* court determined that the defendants' 880 square foot establishment "exceed[ed] the public area in *Aiken* [620 square feet]. On this basis alone, defendants have failed to show their restaurant is a 'small commercial establishment' as contemplated by the § 110(5) exemption." *Id.*

60. See *Merrill v. Bill Miller's Bar-B-Q Enters., Inc.*, 688 F. Supp. 1172 (W.D. Tex. 1988); *International Korwin Corp.*, 665 F. Supp. at 652; *Sailor Music v. Gap Stores, Inc.*, 516 F. Supp. 923 (S.D.N.Y. 1981), *aff'd per curiam*, 668 F.2d 84 (2d Cir. 1981), *cert. denied*, 456 U.S. 945 (1992).

61. *Gnossos Music v. Quido DiPompo*, 1989 Copy. Dec. (CCH) ¶ 26,483 (D. Me. 1989).

62. *Springsteen v. Plaza Roller Dome, Inc.*, 602 F. Supp. 1113, 1114 (M.D.N.C. 1985).

63. Wilk, *supra* note 56, at 813.

In *Sailor Music v. The Gap Stores, Inc.*,⁶⁴ Sailor Music sued Gap, a well-known chain store, for copyright infringement arising out of a radio broadcast in two of Gap's New York stores.⁶⁵ The court noted that the average size of Gap stores (3500 square feet) was larger than Aiken's shop (1055 square feet), and was "of sufficient size to justify, as a practical matter, a subscription to a commercial background music service."⁶⁶ After reviewing all of the factors, the appellate court affirmed the district court's determination that the defendants engaged in a public performance, and therefore had infringed Sailor Music's copyrighted works.⁶⁷ The court applied a strict reading of the "outer limit" language, and concluded that the Gap store exceeded the outer limit of congressional allowance.⁶⁸

2. The Establishment's Financial Size or Ability to Pay for a Commercial Music Service

In addition to the square footage, courts also review the revenue of the establishment. This factor stems from Congress' intent to the grant exemption to business establishments not large enough to "justify . . . a subscription to a commercial background music service."⁶⁹ Courts have not offered an explanation of the nexus between the financial ability to subscribe to a commercial music service and copyright infringement.⁷⁰ No case has ever used this factor as the sole reason to refuse granting the

64. 516 F. Supp. 923 (S.D.N.Y. 1981), *aff'd per curiam*, 668 F.2d 84 (2d Cir. 1981), *cert. denied*, 456 U.S. 945 (1982). For a discussion of the case, see Robert Cash, *Sailor Music: Exposing the Gaps in 17 U.S.C. § 110(5)*, 9 RUTGERS COMPUTER & TECH. L.J. 133 (1982).

65. *Sailor Music*, 516 F. Supp. at 923-24.

66. *Id.* at 925 (quoting H.R. REP. NO. 1733, 94th Cong., 2d Sess. 75 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5816).

67. *Sailor Music*, 668 F.2d at 86.

68. *Id.*

69. *BMI v. Claire's Boutiques, Inc.*, 754 F. Supp. 1324, 1332-33 (N.D. Ill. 1991). In *Springsteen v. Plaza Roller Dome, Inc.*, 602 F. Supp. 1113 (M.D.N.C. 1985), the district court held that a golf course qualified for the § 110(5) exemption because it was not a business "of sufficient size to justify, as a practical matter, a subscription to a commercial background music service." *Id.* at 1118-19 (quoting H.R. REP. NO. 1476, 94th Cong., 2d Sess. (1976)). Unlike Aiken's restaurant, which "operated year-round, did a brisk business, and undoubtedly generated substantial revenues," the golf course was only open six months per year and generated less than \$6000 during that period. *Id.* at 1119. The court held that, although the golf course did generate revenue, it was not substantial enough to justify subscription to a commercial music service.

Id.

70. Wilk, *supra* note 56, at 814; Susan A. Maslow, Comment, "Watts" the Perimeter of the Doctrine of the Communication of a Radio Broadcast Under Section 110(5) of the Copyright Act?, 55 TEMP. L.Q. 1056, 1092 n.184 (1984).

§ 110(5) exemption;⁷¹ thus the weight given to a business' financial status is still questionable.⁷²

3. Criticism of the "Small Commercial Establishment" Requirement

The current standards promulgated by the courts also ignore considerations of whether a business actually wants, needs, or benefits from a commercial music service.⁷³ The rationale for the current view appears to be a policy that restaurants of a certain size and financial status should not receive the benefits of free music. This assertion is supported by the fact that even if a large establishment chooses to obtain its music from radio broadcasts, it must still obtain a license if it is "large enough to be a potential customer of a background music service."⁷⁴ However, the unpredictable interpretations of this requirement have not garnered acceptance from all the courts.

Some courts have refused to apply the "small commercial establishment" standard.⁷⁵ These criticizing courts refuse to analyze an establishment's size or revenue, stating instead that:

although the legislative history may . . . help a court discover the statute's meaning, it may not be used to change it. . . .

The text of the § 110(5) includes nothing at all about the size of a business, the area that it covers, or the revenue that it generates. . . . [Legislative history may not] be used to supply additional elements beyond those specified in the statute.⁷⁶

So, while legislative history suggests that Congress intended to provide an exemption to the "Mom and Pop" restaurant, these courts point out that § 110(5) does not articulate a test based upon a restaurant's size or revenue, but rather on the type of equipment employed by the establishment.⁷⁷ The

71. *BMI v. Claire's Boutiques, Inc.*, 949 F.2d 1482, 1492 (7th Cir. 1991); see *BMI v. United States Shoe Corp.*, 678 F.2d 816 (9th Cir. 1982); *Sailor Music v. Gap Stores, Inc.*, 668 F.2d 84 (2d Cir. 1981), cert. denied, 456 U.S. 945 (1982).

72. *Claire's Boutiques, Inc.*, 754 F. Supp. at 1334 (disapproving the revenues analysis, pronouncing the "examination of a store's revenues and profits to be of minimal importance").

73. In *Sailor Music*, defendants noted that they had attempted to subscribe to a commercial service but found the subscription either inadequate or too expensive. *Sailor Music*, 668 F.2d at 84.

74. Korman, *supra* note 46, at 534. Mr. Korman is general counsel of ASCAP.

75. *BMI v. Claire's Boutiques, Inc.*, 949 F.2d 1482 (7th Cir. 1991); *Edison Bros. Stores, Inc. v. BMI*, 760 F. Supp. 767 (E.D. Mo. 1991), *aff'd*, 954 F.2d 1419 (8th Cir. 1992).

76. *BMI v. Claire's Boutiques, Inc.*, 754 F. Supp. 1324, 1333 (N.D. Ill. 1991), *aff'd*, 949 F.2d 1482 (7th Cir. 1991), cert. denied, 504 U.S. 911 (1992).

77. *Edison Bros. Stores, Inc.*, 760 F. Supp. at 771; Paul Warenski, *Copyrights and Background Music: Unplug the Radio Before I Infringe Again*, 15 HASTINGS COMM. & ENT. L.J.

Eighth Circuit summed up the criticism by offering that “[i]f Congress intended to impose a physical size limitation on the establishment qualifying for the exemption, it might easily have written it into the statute.”⁷⁸

Nevertheless, courts still examine an establishment’s physical and financial size in order to determine if it qualifies for the exemption. Another problem is that the square footage and revenue factors presume that establishments exceeding a critical certain size and revenue can afford a commercial music service and should be required to subscribe to one. This presumption is neither rationalized nor explained by the courts or by Congress.⁷⁹ One theory is that a commercial service may be more suitable to provide music to a larger establishment.⁸⁰ This assumption, however, ignores several facts about commercial music services and musical preferences.

The square footage factor for determining availability of the exemption focuses on the physical area of the establishment. Commercial services, however, provide programming and reception of certain musical selections.⁸¹ While they do provide their subscribers with sound equipment, it is not their main service.⁸² Thus, the equipment provided by the music services does not provide a justification for the distinction between large and small establishments.

A third argument may be that the musical programming offered by commercial music services are better suited to larger establishments. This argument ignores the fact that musical programming depends upon personal taste and choice, and not upon the size of the venue where the music will be heard.⁸³ Perhaps courts are attempting to promote the idea that music from a commercial service is more suitable for establishments exceeding a certain size—that of Aiken’s fast food restaurant. But the rationale for this assertion remains unknown. The lack of a fixed standard results in a case-by-case determination in which a restaurant of 620 square feet of

523, 541 (1992).

78. *Edison Bros. Stores, Inc v. BMI*, 954 F.2d 1419, 1424 (8th Cir. 1992).

79. *Claire’s Boutiques, Inc.*, 949 F.2d at 1491 (inquiring how the financial size of a business relates to the exemption).

80. *Wilk*, *supra* note 56, at 815.

81. See *McDermott*, *supra* note 2, at 70; *Maslow*, *supra* note 70, at 1089-90.

82. For a listing of Muzak services and products, see *Sound Affects*, *supra* note 2.

83. While equipment may be chosen with the size of the establishment in mind, music is usually selected based on its intended purpose. See *supra* note 2 and accompanying text.

public space is allowed to claim the exemption, but stores of 2769 square feet or larger are outside of the exemption.⁸⁴

Neither Congress nor the courts have articulated a financial standard for determining which establishments must subscribe to a commercial music service.⁸⁵ No reasonable justification for the vague standards that are in place has been offered. Implicit in the revenue analysis is the assumption that restaurants exceeding a certain revenue level can afford commercial music service.⁸⁶ Yet, the revenue analysis does not consider whether the business makes a profit.⁸⁷ Currently, the law requires a high-revenue business to subscribe to a commercial music service despite the fact that the business may actually be operating at a loss. It appears that unless an establishment is on the brink of bankruptcy, it will not qualify for the small business exemption.⁸⁸ If a court wished to carry the requirement to an extreme, solvent small businesses that were meant to be exempt would need to license background music on the theory they are as able to pay for the service as large establishments.⁸⁹ The exemption would become "de minimis," available only to establishments on the brink of bankruptcy.⁹⁰

Despite the widespread acceptance of the size and revenue tests, the courts have not satisfactorily reconciled congressional intent to exempt small business establishments from copyright laws with statutory language. The "small business establishment" requirement of the exemption presents courts with interpretive problems, as it currently calls for an examination of the size and revenues of an establishment, neither of which receive mention in the statute.

B. Patrons Cannot Be Charged to Hear the Music

A second requirement to qualify for a small business exemption to the copyright law is that an establishment must not directly charge patrons to

84. Maslow, *supra* note 70, at 1091.

85. BMI v. Claire's Boutiques, Inc., 754 F. Supp. 1324, 1333 (N.D. Ill.), *aff'd*, 949 F.2d 1482 (7th Cir. 1991), *cert. denied*, 504 U.S. 911 (1992) (noting that while Congress could have easily articulated a financial standard, it did not do so).

86. Wilk, *supra* note 56, at 816; *see also* Maslow, *supra* note 70, at 1092 n.184 (proposing that there may be a relationship between square footage and revenue because larger establishments generally require higher gross receipts to cover rent).

87. *See* Henry Sellin, ATTORNEY'S HANDBOOK OF ACCOUNTING § 5.01[2] (3d ed. 1994) (discussion of net income).

88. Gerber, *supra* note 14, at 13-14.

89. *Id.*

90. *Id.*

hear the music.⁹¹ The “direct charge” factor is an easily measured objective criterion, and has not presented the courts with the same problems that plague the other three factors. Restaurants satisfy this factor if they do not specifically charge their customers for listening to the music. Most restaurants do not separately charge their patrons for background music, thus satisfying this portion of the test.⁹²

C. The Stereo Equipment Must Be a “Single Receiving Apparatus of a Kind Commonly Used in Private Homes”⁹³

The third requirement for an exemption focuses on the type of receiving system employed in the restaurant. In deciding whether a restaurant qualifies for the exemption, courts examine the nature of the “receiving apparatus” (the sound system) in the establishment.⁹⁴ A music user fails this requirement in one of two ways: (1) by using non-home-type components, or (2) by using home-type components in a configuration inconsistent with home use.⁹⁵

This factor is the most difficult to analyze because though it is clear that Congress “intended the exemption to apply only to stereo systems that produce music over a limited area,”⁹⁶ it did not set a “hard and fast rule”⁹⁷ to guide the courts or business owners in determining which stereo system equipment or configurations qualify for the exemption. Instead, Congress set out several factors which should be considered. These factors include:

the 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 apparatus is altered or augmented for the purpose of improving

91. See *Cass County Music Co. v. Muedini*, 55 F.3d 263 (7th Cir. 1995); *BMI v. Claire's Boutiques, Inc.*, 949 F.2d 1482 (7th Cir. 1991); *Hickory Grove Music v. Andrews*, 749 F. Supp. 1031 (D. Mont. 1990).

92. *BMI v. Claire's Boutiques, Inc.*, 949 F.2d 1482 (7th Cir. 1991); *BMI v. Edison Bros. Stores, Inc.*, 760 F. Supp. 767 (E.D. Mo. 1991), *aff'd*, 954 F.2d 1419 (8th Cir. 1992).

93. 17 U.S.C. § 110(5) (1994).

94. See, e.g., *Hickory Grove Music v. Andrews*, 749 F. Supp. 1031 (D. Mont. 1990); *Sailor Music, Inc. v. Gap Stores, Inc.*, 516 F. Supp. 923 (S.D.N.Y. 1981), *aff'd*, 668 F.2d 85 (2d Cir. 1981), *cert. denied*, 456 U.S. 945 (1982).

95. *Hickory Grove*, 749 F. Supp. at 1037. See generally *Cass County Music Co. v. Muedini*, 55 F.3d 263 (7th Cir. 1995).

96. *Claire's Boutiques, Inc.*, 949 F.2d at 1493-94.

97. *Id.* at 1493.

the aural or visual quality of the performance for individual members of the public using those areas.⁹⁸

What types or configurations of stereo components constitute an infringement is unclear. Congress neglected to articulate detailed specifications, but explicitly stated that the facts of *Aiken* "represent the outer limit of the exemption."⁹⁹ Use of the "outer limit" language may suggest that Congress intended to exempt only small establishments such as Aiken's; still, such a possibility would not mean that all electronic equipment more complex than Aiken's would be automatically denied exemption from copyright laws.¹⁰⁰

The congressional report and statutory language, however, do not support this interpretation.¹⁰¹ Assuming that Aiken's stereo configuration, and not the size of the restaurant, represents the "outer limit" of the exemption, the use of an augmented receiving apparatus more sophisticated than that used in Aiken's restaurant would not automatically disqualify a restaurant from a small business exemption.¹⁰² Courts, which accept the physical and financial size test, have not declared this factor as a dispositive test for the exemption.¹⁰³

In *Springsteen v. Plaza Roller Dome, Inc.*,¹⁰⁴ the defendant owned and operated an outdoor miniature golf course next to its roller rink in North Carolina. ASCAP alleged that the defendant committed copyright infringement when songs were broadcast through the golf course's radio and speaker system.¹⁰⁵ It was undisputed that the six speakers, "mounted on light poles interspersed over the 7,500 square foot area of the course- . . . [did] not project well, and [could] be heard without distortion only at a close proximity" from the speakers.¹⁰⁶

98. H.R. REP. NO. 1476, 94th Cong., 2d Sess. 87 (1976), reprinted in 1976 U.S.C.C.A.N. 5701. "*Aiken's* utility in interpreting specific factors mentioned in the legislative history is questionable, since these factors were not discussed in the Supreme Court's decision." Wilk, *supra* note 56, at 801.

99. H.R. REP. NO. 1476, 94th Cong., 2d Sess. 87 (1976), reprinted in 1976 U.S.C.C.A.N. 5701.

100. H.R. REP. NO. 1733, 94th Cong., 2d Sess. 75 (1976), reprinted in 1976 U.S.C.C.A.N. 5816.

101. H.R. REP. NO. 1476, 94th Cong., 2d Sess. 87 (1976), reprinted in 1976 U.S.C.C.A.N. 5701.

102. *Springsteen v. Plaza Roller Dome, Inc.*, 602 F. Supp. 1113 (M.D.N.C. 1985) ("When due weight is given to each of the factors . . . the slightly larger number of speakers . . . standing alone" does not disqualify a business from exemption.) *Id.* at 1119.

103. *See, e.g., id.* at 1117-18.

104. 602 F. Supp. 1113 (M.D.N.C. 1985).

105. *Id.* at 1114.

106. *Id.*

The district court refused to use the number of speakers as a dispositive factor in evaluating whether the defendant would qualify for the exemption.¹⁰⁷ In particular, the court rejected the approach employed by other courts when evaluating the nature of the "receiving apparatus."¹⁰⁸ Rather than simply comparing the physical arrangement and the number of speakers with the system in *Aiken*, the court focused on congressional intent, placing emphasis on the "noise level and audibility" of songs transmitted over the defendant's loudspeakers.¹⁰⁹ The court noted that due to the poor quality of the speakers, and because the system was outdoors,¹¹⁰ the "noise level of the areas within the establishment where the transmissions are made audible"¹¹¹ is not of the same quality as that in *Sailor Music* or in *United States Shoe Corp.* Hence, the district court concluded that the stereo system in the golf course was "inferior to those involved in the *Aiken* case."¹¹²

Although this prong is universally accepted by the courts, courts differ in how they analyze the stereo system, and how much importance to attach to this factor. Because § 110(5) was intended to adopt *Aiken*, courts use the physical arrangement and components of *Aiken's* radio as the standard. Systems more complicated than *Aiken's* would not qualify as an "apparatus of a kind commonly used in private homes,"¹¹³ while systems smaller than *Aiken's* would receive an exemption from the copyright laws.¹¹⁴ The problem is that some courts evaluate the entire system as a whole,¹¹⁵ while others consider each component of the system separately.¹¹⁶

Even in jurisdictions that evaluate individual components, the courts add that "individual components of a system may be commonly used in

107. *Id.* at 1119.

108. *Id.* at 1117-18.

109. *Springsteen*, 602 F. Supp. at 1118.

110. *Id.*

111. H.R. REP. NO. 1476, 94th Cong. 2d Sess. 87 (1976), reprinted in 1976 U.S.C.C.A.N. 5656, 5701.

112. *Springsteen*, 602 F. Supp. at 1118.

113. 17 U.S.C. § 110(5) (1994).

114. See *Merrill v. Bill Miller's Bar-B-Q Enters., Inc.*, 688 F. Supp. 1172 (W.D. Tex. 1988) (2 speakers spaced 30 feet apart); *Laminations Music v. P&X Markets, Inc.*, 1985 Copyright L. Dec. (CCH) ¶ 25,790 (N.D. Cal. 1985); *Rodgers v. Eighty Four Lumber Co.*, 617 F. Supp. 1021, 1023 (W.D. Pa. 1985); *Sailor Music v. Gap Stores, Inc.*, 516 F. Supp. 923 (S.D.N.Y. 1981), *aff'd per curiam*, 668 F.2d 84 (2d Cir. 1981), *cert. denied*, 456 U.S. 945 (1982).

115. *Cass County Music Co. v. Muedini*, 55 F.3d 263 (7th Cir. 1995). "The focus, we stressed, must be on the entire audio reproduction system." *Id.* at 267.

116. *Merrill*, 688 F. Supp. at 1174. *But see Hickory Grove Music v. Andrews*, 749 F. Supp. 1031 (D. Mont. 1990). "[C]ourts must examine the entire system and the context of its use, rather than focusing on individual components." *Id.* at 1037.

homes, [but] the whole apparatus once installed may not qualify as a 'home-type' system"¹¹⁷ which would exempt transmissions from copyright laws.

Analysis of a defendant's stereo system also includes an investigation into how the components are arranged or attached. Specifically, courts focusing on the placement of the receiver in relation to the speakers have held that where the receiver and speakers were in different rooms, the system was not a type commonly found in the home.¹¹⁸ Systems that are not "of a type commonly used in a private home"¹¹⁹ include those with concealed receivers to speaker wires¹²⁰ and systems with recessed mounted speakers.¹²¹

In May 1995, the Seventh Circuit examined the applicability of the § 110(5) exemption in *Cass County Music Co. v. Muedini*.¹²² Defendant Muedini played music in his restaurant and was sued for infringing rights of copyrighted works without first obtaining a license from ASCAP.¹²³ The Seventh Circuit held that the facts of the case satisfied the requirements of § 110(5) that (1) a single receiving apparatus was used, and (2) that no charge was made to listen to the music.¹²⁴

The main issue of the case was determining whether the stereo system used was of similar to the types used in private homes.¹²⁵ Rather than adopting *Springsteen* or articulating another test, the court declared that it "need not decide . . . whether a certain number of speakers is the absolute limit that may be attributed to a 'homestyle' set. What [constitutes] 'a single receiving apparatus of a kind commonly used in private homes' must be determined on a case-by-case basis."¹²⁶ The court went on to hold,

117. *Hickory Grove Music*, 749 F. Supp. at 1037 (citing *Merrill*, 688 F. Supp. at 1174).

118. See, e.g., *International Korwin Corp. v. Kowalczyk*, 855 F.2d 375, 378 (7th Cir. 1988) (receiver in office while speakers throughout restaurant not an arrangement commonly found in homes).

119. 17 U.S.C. § 110(5) (1994).

120. *International Korwin Corp.*, 855 F.2d at 378 (hidden wiring is "not commonly found in homes"); *Merrill*, 688 F. Supp. at 1175 (sound system with 40 feet of concealed wiring not common home use); *Sailor Music v. Gap Stores, Inc.*, 516 F. Supp. 923, 925 (S.D.N.Y. 1981).

121. *International Korwin Corp.*, 855 F.2d at 378 (recessed speakers are "not commonly found in homes"); *Gnosso Music v. Quido DiPompo*, 1989 Copy. Dec. (CCH) ¶ 26,483 (D. Me. 1989) (portable stereo receiver connected to eight recessed ceiling speakers is commercial in nature).

122. 55 F.3d 263 (7th Cir. 1995).

123. *Id.* at 265.

124. *Id.* at 268.

125. 17 U.S.C. § 110(5) (1994); *Cass County*, 55 F.3d at 269.

126. *Cass County*, 55 F.3d at 269 (citing *BMI v. United States Shoe Corp.*, 678 F.2d 816, 817 (9th Cir. 1982) (in which the court noted that the phrase "commonly used in the private

however, that due to the added components, the augmented system "cannot be characterized fairly as composed of only home-type components, nor can it be said to be configured in a manner commonly found in a home."¹²⁷ Thus, defendant's electronic equipment was not one that would be common to the home, and was not entitled to the § 110(5) exemption.¹²⁸

2. An Alternative Approach to the Narrow Reading of Congressional Language

A literal application of Congress' "outer limit" language poses problems. Rather than defining which type of apparatus represents "home type," the courts' use of *Aiken* as a rigid standard fails to take into consideration the technological advances in sound equipment.¹²⁹

An alternative approach focuses on the latter portion of the test which requires that the receiver be of a type "commonly used in private homes."¹³⁰ The advantage of this approach is that instead of comparing the spatial arrangement and specifics of a defendant's sound system to those in *Aiken*, it provides a more flexible definition of what types of sound systems are ordinarily found in a private home.¹³¹ This approach would allow the standard to account for technological advances. The current standard derived from *Aiken* means that only a handful of today's electronic equipment actually falls under the exemption.

Different results are obtained under the current proposed analyses. For example, under the present, literal approach, restaurants using a stereo with greater than four speakers would not satisfy this portion of the small business exception test.¹³² Using the alternative stereo receiver-based analysis, the number of speakers would not be a predetermined number, but could vary as technology progresses.¹³³

home" is understandable to a person of "ordinary intelligence," and is not vague)). *Id.*

127. *Id.* at 268.

128. *Id.* at 269.

129. Gerber, *supra* note 14, at 14.

130. *Sailor Music v. Gap Stores, Inc.*, 516 F. Supp. 923, 925 (S.D.N.Y. 1981). "There is a factual dispute between the parties' experts as to whether or not the particular components used in these two Gap stores are actually 'commonly used in private homes,' and consequently the court cannot grant summary judgment on this basis." *Id.*; see Gerber, *supra* note 14, at 14.

131. See generally Gerber, *supra* note 14.

132. See *International Korwin Corp. v. Kowalczyk*, 855 F.2d 375, 378 (7th Cir. 1988) (stereo with eight speakers held not to be a receiver "commonly used in the home"); *Gnosso Music v. Guido diPompo*, 1989 Copy. Dec. (CCH) ¶ 26,483 (D. Me. 1989); *Springsteen v. Plaza Roller Dome, Inc.*, 602 F. Supp. 1113 (M.D.N.C. 1985) (six speakers, compared with four speakers in *Aiken's* shop).

133. Gerber, *supra* note 14, at 14.

Of course, this method is not without flaws. A flexible receiver-based standard would raise different issues from the current *Aiken* test. Under this "flexible" standard, courts would need to define what "ordinary" means, and how an "ordinary" household uses receivers and speakers.¹³⁴ The question of whether "ordinary" should be defined according to the community or geographical location of the alleged infringer, or according to a national standard, would also need to be resolved.¹³⁵ Different community interpretations of "ordinary" could lead to inconsistent results throughout the country.

Thus, this approach may have undesirable effects precisely due to its flexibility. A local definition of "ordinary" could result in a particular establishment being liable for copyright infringement in one jurisdiction but not in another. A national standard, however, may yield unfair holdings if the standard is set below what is commonly understood or accepted in particular regions of the country.¹³⁶ Another possible pitfall of using the proposed approach is a complete exemption if home receivers advance to the stage where augmentation is no longer necessary. Despite this possibility, a receiver-based test has the advantage of being flexible enough to keep up with technology and allow proprietors to use "home type" systems which would not otherwise qualify for the exemption under *Aiken* standards.

D. *The Broadcast Must Not Be "Further Transmitted to the Public"*

The fourth element for a business to qualify for a small business exemption requires that the transmission received is not "further transmitted to the public."¹³⁷ The Copyright Act defines "transmit" as "to communicate . . . by any device or process whereby images or sounds are received beyond the place from which they are sent."¹³⁸

Courts have traditionally looked to two factors in analyzing whether an establishment retransmits the sound. The two factors are the size of the establishment and the physical arrangement of the sound system.¹³⁹ In

134. *Id.*

135. *Id.*

136. *Id.*

137. 17 U.S.C. § 110(5)(B) (1994).

138. *Id.* § 101.

139. See *Little Mole Music v. Mavar's Supermarket*, No. 4, 1989 Copy. Dec. (CCH) ¶ 26,440, at 22,735 (N.D. Ohio 1989).

Sailor Music v. Gap Stores, Inc.,¹⁴⁰ the district court noted that further transmission was a function of the size of the store,¹⁴¹ yet the relationship between the size of the store and retransmission is unclear. The *Sailor Music* court compared the average sizes of Gap stores to the 620 square foot Aiken store, and noted that Gap stores were substantially larger.¹⁴² Thus, “[b]y virtue of the size of . . . Gap stores, the radio transmissions received on the radio receivers and played via the recessed loud speakers [were] ‘further transmitted to the public.’”¹⁴³

Other courts interpret the word “transmission” as the electrical signal traveling through the wire from the receiver to the speaker.¹⁴⁴ This concept from congressional language that a broadcast “is further transmitted [when it is heard] beyond the place where the receiving apparatus is located.”¹⁴⁵ Under this interpretation, a second transmission occurs whenever the receiver and the speakers are located in different rooms.¹⁴⁶ Under this definition of “transmit,” a proprietor, by placing his receiver and speakers in separate rooms, would be guilty of “further transmit[ting]” a broadcast.¹⁴⁷ The same proprietor could, however, avoid a further transmission of the radio broadcast if the components were moved to the same room.

There are two possible explanations for the bar against retransmissions. Recall that the first requirement in establishing a copyright violation

140. 516 F. Supp. 923 (S.D.N.Y. 1981), *aff'd*, 668 F.2d 84 (2d Cir. 1981) (per curiam), *cert. denied*, 456 U.S. 945 (1982). In *Sailor Music*, copyright owners sued Gap Stores for copyright infringement. Gap played radio music in its stores through loudspeakers connected to a radio receiver. Gap argued that it qualified for the § 110(5) exemption, and therefore did not infringe the plaintiffs' rights. The court held that Gap's activities constituted copyright infringement as they were beyond “the outer limit of the exemption” provided by § 110(5). *Id.* at 924-25.

141. *Id.* at 925.

142. *Id.*

143. *Id.*

144. See *BMI v. Claire's Boutiques, Inc.*, 754 F. Supp. 1324, 1331 (N.D. Ill. 1990), *aff'd*, 949 F.2d 1482 (7th Cir. 1991), *cert. denied*, 456 U.S. 945 (1992) (in which the court rejected this interpretation, since “[e]very radio requires wiring—whether external or internal—to reach the speakers which make the sound”). *Id.*

145. *Id.*

146. *Merrill v. Bill Miller's Bar-B-Q Enters., Inc.*, 688 F. Supp. 1172, 1176 (W.D. Tex. 1988); *International Korwin Corp. v. Kowalczyk*, 665 F. Supp. 652, 657 (N.D. Ill. 1987), *aff'd*, 855 F.2d 375 (7th Cir. 1988).

147. See *Hickory Grove Music v. Andrews*, 749 F. Supp. 1031, 1038 (D. Mont. 1990); *Merrill*, 688 F. Supp. at 1176 (broadcasts were further transmitted because the receiver and speakers were not located in the same room); *International Korwin Corp.*, 665 F. Supp. at 657 (broadcasts were further transmitted when speakers were located in a separate room from the receiver); *Rodgers v. Eighty Four Lumber Co.*, 617 F. Supp. 1021, 1022 n.1, 1023 (W.D. Pa. 1985) (holding that “transmit,” as defined in 17 U.S.C. § 101, was satisfied when a receiver was located in a private office while the speakers were in the public area).

is that there must be a performance.¹⁴⁸ A transmission is considered a "performance" under the copyright laws.¹⁴⁹ Thus, if a proprietor retransmits a broadcast to his or her patrons, he or she would be "re-performing" the broadcast. Without proper authorization, the proprietor re-performing the radio broadcast is infringing copyright laws.

Another rationale for prohibiting retransmissions stems from congressional language that denies an exemption "where broadcasts are transmitted by means of loudspeakers or similar devices in such establishments as . . . restaurants and quick-service food shops of the type involved in *Twentieth Century Music Corp. v. Aiken*."¹⁵⁰ Understanding the congressional language requires an examination of how "transmit," is defined, and what the phrase "beyond the place where they are sent" means.¹⁵¹

"Place" as used in the phrase "place where they are sent" appears to literally refer to the source of the sound. In a traditional stereo, the source of the sound, or "place," would be the loudspeakers. Under this literal interpretation, transmissions occur whenever a speaker makes a sound because soundwaves travel from the speaker to the listener's ear.¹⁵² This interpretation would render the small business exemption meaningless, as such a transmission occurs every time a radio is turned on. Congress specifically granted the exemption to establishments similar to *Aiken*, and thus this literal interpretation cannot be correct.¹⁵³ Under a broader, perhaps more logical, reading of the statute, the term "place" is not confined to the speakers, but to the establishment as a whole.¹⁵⁴ This interpretation implies that "a further transmission to the public occurs when . . . members of the public outside the confines of the establishment are able to hear the performance."¹⁵⁵ The broader reading is not only more logical, but reconciles congressional intent to exempt small business establishments from the statutory requirements of § 110(5).¹⁵⁶

148. See *supra* notes 15-18 and accompanying text.

149. 2 NIMMER & NIMMER, *supra* note 3, § 8.18[B], at 8-207.

150. Korman, *supra* note 46, at 532 (quoting 122 CONG. REC. 1546 (daily ed. Feb. 6, 1976)).

151. 17 U.S.C. § 101(5).

152. Wilk, *supra* note 56, at 807.

153. *Id.* at 808. This reading of the section would also violate the rule that "[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant. . . ." 2A NORMAN J. SINGER, STATUTES & STATUTORY CONSTRUCTION § 46.06 (5th ed. 1992).

154. See Wilk, *supra* note 56, at 808.

155. *Id.*

156. *Id.* at 808 n.121.

None of the interpretations of the "further transmitted to the public" factor is satisfactory. A narrow interpretation of the phrase "beyond the place where they are sent" disqualifies every system, rendering the exemption meaningless. Alternatively, a broad reading may exempt virtually all systems, so long as the music cannot be heard outside of the establishment.¹⁵⁷

While the policy behind the small business exemption is understandable, the ambiguous statutory language has been riddled with inconsistent and unexplained interpretations. The four factors for determining whether an establishment qualifies for the small business exemption have been discussed repeatedly, but the results have not been totally consistent to allow for predictability. The result is a body of case law which offers interpretations not reflective of either legislative intent or statutory language, and "over a decade of litigation has not produced any consensus on what the factors mean."¹⁵⁸ One commentator has even expressed sympathy to courts which must attempt to make sense of the "statute whose language and legislative history are at odds with the practical intention to preserve the *Aiken* exemption for small businesses which make incidental use of broadcasted copyrighted works."¹⁵⁹ As Judge Bullock stated in *Springsteen v. Plaza Roller Dome, Inc.*,¹⁶⁰ "an objective assessment of the facts is much more complex than [an] open and shut analysis."¹⁶¹ It is clear that the small business exemption needs to be re-examined so that the issues may be resolved.

157. *Id.* at 811.

158. Wilk, *supra* note 56, at 841.

159. Gerber, *supra* note 14, at 15.

160. 602 F. Supp. 1113 (M.D.N.C. 1985).

161. *Id.* at 1117.

IV. THE "FAIRNESS IN MUSICAL LICENSING ACT OF 1995"¹⁶²A. *Rationale Behind the Proposed Changes*

A possible solution to the problem of the small business exemption is the Fairness in Musical Licensing Act of 1995 ("House Bill 789").¹⁶³ House Bill 789 was introduced in response to the current confused state of the small business exemption as well as to restaurant owners' complaints about practices which performance rights groups such as ASCAP and BMI employ in enforcing their rights.¹⁶⁴ The two groups have attempted to negotiate licensing agreements, but without success.¹⁶⁵ Both groups assert that the other is unreasonable, portraying themselves as the vulnerable David, and casting the other as the monolithic Goliath.¹⁶⁶ This

162. Section 2 of H.R. 789 reads:

Section 110(5) of title 17, United States Code, is amended to read as follows:

'(5) communication by electronic device of a transmission embodying a performance or display of a work by the reception of a broadcast, cable, satellite, or other transmission, unless—

'(A) an admission fee is charged specifically to see or hear the transmission, or

'(B) the transmission is not properly licensed, except that this paragraph shall apply in the case of a performance or display in a commercial establishment only if the performance or display is incidental to the main purpose of the establishment;

104 H.R. 789 is identical to S. 1137 in the amendment. H.R. 789, 104th Cong., 1st Sess. (1995); see S. 1137, 104th Cong., 1st Sess. § 2 (1995).

163. This concern came to the attention of resolution sponsor Rep. James Sensenbrenner, Jr. (R-Wis.) after representatives from one of the performance rights groups entered a bar and began to measure the television sets in order to fix the licensing fees. Brooks Boliek, *Background Music to the Fore*, HOLLYWOOD REP., Feb. 6, 1995, at 3, 16.

164. David E. Rovella, *Business Seeks Exemption from Paying Royalty Fees*, NAT'L L.J., Feb. 6, 1995, at B2.

165. In February 1995, the performance rights groups offered to amend the exemption by enlarging the square footage of restaurants qualifying for the exemption, and by allowing the use of four speakers, instead of two. Bill Holland, *Rights Societies' Restaurant Fees Proposal Rejected*, BILLBOARD, Oct. 7, 1995, at 20. The National Restaurant Association rejected the offer, stating in a letter, that "[a]n amendment based on square footage or number of receivers simply will not meet the reasonable needs of the members of the coalition." *Id.*

166. J. Kevin Lamb, *Counterpunch: Music in Restaurants, Bars Is More Than Incidental*, L.A. TIMES, May 1, 1995, at F5; see also *American Songwriters Rally to Stop Unfair Music Licensing Bills*, PR NEWswire, Apr. 26, 1995 (Entertainment, Television, & Culture Section), available in LEXIS, News Library, Curnws File.

The National Restaurant Association argues that the current exemption allows the groups to collect from both the broadcasters of the music and the businesses which pick up and broadcast. Rovella, *supra* note 164, at B2. The performance rights groups get to "double dip," by collecting royalties from the radio station airing the work, and from the restaurant that tunes

is also not the first time that music users have attempted to voice their complaints through legislation. Many bills attempting to change or reverse the Supreme Court's *Jewell-LaSalle* holding have not been enacted.¹⁶⁷ A bill similar to House Bill 789 was introduced in 1994, but Congress adjourned before discussing the bill.¹⁶⁸

The proposed amendment to § 110(5) substantially broadens the current exemption. First, the bill eliminates two areas of ambiguity. By changing the language from "communication of a transmission . . . on a single receiving apparatus of a kind commonly used in private homes"¹⁶⁹ to "communication by electronic device of a transmission . . . by the reception of a broadcast, cable, satellite, or other transmission,"¹⁷⁰ courts will no longer have to struggle with categorizing sound systems as "commercial" or "commonly used in private homes."¹⁷¹ The new exemption would apply to all transmissions regardless of the stereo's size, complexity, or common usage.

Second, the bill also eliminates language¹⁷² which denies an exemption if the broadcasted works are "received [and] further transmitted to the public."¹⁷³ The current provision follows the older, pre-*Aiken* standard which would render activities, such as those in *Jewell-LaSalle*, acts of infringement.¹⁷⁴ By comparison, the new subsection would only prohibit exemption if the "transmission is not properly licensed,"¹⁷⁵ meaning that restaurant owners will have to pay licensing fees only if the original

into the station. Frank Green, *Out of Tune with ASCAP, BMI Fees Have Restaurant, Bar Owners Singing the Blues*, SAN DIEGO UNION-TRIB., May 3, 1995, at C1.

Nonetheless, music users agree that authors should receive payment for their creations. See also Valerie Kuklenski, *It's Not Just 10 Cents a Dance*, UNITED PRESS INT'L, Aug. 3, 1995, at Arts & Entertainment, available in LEXIS, News Library, Curmws File. Because of this concern, the bill only applies to 'incidental' radio music played over elaborate, multi-speaker systems. Music which is live, or comes from jukeboxes, records, tapes, or videos would still require licenses. Bill Holland, *Rights Groups to Renew Bar Bill Fight*, BILLBOARD, Sept. 2, 1995, at 5.

167. Korman, *supra* note 46, at 531.

168. Ron Ruggles, *Operators to Lawmakers: Now You're Playing Our Song*, NATION'S RESTAURANT NEWS, Feb. 27, 1995, at 1.

169. 17 U.S.C. § 110(5) (1994).

170. H.R. 789, 104th Cong., 1st Sess. 1-2 (1995).

171. Elimination of this language from the current exemption will render this analysis unnecessary.

172. H.R. 789, 104th Cong., 1st Sess. (1995).

173. 17 U.S.C. § 110(5)(B).

174. H.R. REP. NO. 1476, 94th Cong., 2d Sess. 87 (1976), reprinted in 1976 U.S.C.C.A.N. 5656, 5701.

175. H.R. 789, 104th Cong., 1st Sess. 2 (1995).

broadcast of the work were not licensed by the initial broadcaster.¹⁷⁶ This language would only be applicable to a situation like that in *Jewell-LaSalle*, where the transmission of the music received and then rebroadcast by the proprietor was not properly licensed by the initial broadcaster, the radio station.¹⁷⁷

In other words, the proposed amendment only denies exemption to music users who tune into a station that has not attained the proper license to air the copyrighted work. As a practical matter, owners today who tune into a radio station should not have to worry about infringing copyrights since the radio station presumably have already obtained the proper licensing agreements with royalty groups.

While these two changes already broaden the scope of the exemption, the most significant modification is the additional clause which would exempt nearly all public establishments whose "main purpose" is "incidental"¹⁷⁸ to the musical performance.¹⁷⁹ The clause directly addresses establishments which use radio broadcasts as "background music." The amendment, if passed, would exempt restaurant and bar owners from obtaining a license for using radio music, since the musical broadcast would be "incidental" or "aside" to the main purpose of their business which is to serve food.¹⁸⁰

B. Overall Effect of the Proposed Bill

House Bill 789 exempts music purveyors who use radio broadcasts as their musical source from having to purchase licenses.¹⁸¹ The federal bill extends the § 110(5) exemption,¹⁸² the "most litigated exemption of the Copyright Act"¹⁸³ so that background or incidental radio music played in

176. *Id.*

177. H.R. REP. NO. 1476, 94th Cong., 2d Sess. 87 (1976), reprinted in 1976 U.S.C.C.A.N. 5656, 5701.

178. H.R. 789, 104th Cong., 1st Sess. 2 (1995).

179. Boliek, *supra* note 163, at 3, 16.

180. The "incidental" concept may take the place of the "direct charge" language, since the entire concept of incidental or background music is that it is aside from the main purpose of a restaurant. By imposing a direct charge to hear the music, it no longer remains in the background and thus, is not incidental to an establishment's goal of providing food and service. Proprietors, then, should not reap the benefits of the exemption if they financially gain from the music.

181. H.R. 789, 104th Cong., 1st Sess. (1995).

182. *Id.*

183. 140 CONG. REC. E1700-03, (daily ed. Aug. 10, 1994) (testimony of Rep. Jack Reed (D-R.I.)).

stores, regardless of the size of the receiving apparatus or establishment, would not require a license.¹⁸⁴

Although elimination of certain language in the section would make application and interpretation of the statute simpler, opponents of the proposal contend that doing so would have grave implications.¹⁸⁵ Performance rights groups contend that passage of these bills would not only decrease the royalties received by copyright holders, but would effectively "destroy general licensing, as restaurant owners would serve only no-fee music to customers."¹⁸⁶ Some copyright experts predict that passage of the bill will also have international implications.¹⁸⁷ The amendment marks further erosion of copyright protection and may send the message to foreign countries that public broadcasting of copyrighted materials may not be subjected to copyright laws.¹⁸⁸ The legislation would "undermine the United States' credibility when it demands strict enforcement of copyrights on American music and other intellectual properties in foreign markets."¹⁸⁹

Performance rights groups state that licensing fees paid by businesses to broadcast music in their establishments comprise approximately twenty to twenty-five percent of songwriters' revenues.¹⁹⁰ Although the exemption eliminates a portion of a copyright holder's income, the loss may not be as substantial as it seems at first glance. The exemption addresses and only applies to radio music played over multi-speaker systems.¹⁹¹ Owners who do not wish to hear commercials or talk from radio personalities will not want to use radio broadcasts in their establishments.¹⁹² They may opt to provide music through sources such as juke boxes, or by

184. *Id.* See generally Ruggles, *supra* note 168, at 1; *NRF Urges House to Support Fairness in Musical Licensing Act of 1995*, PR NEWSWIRE, Feb. 2, 1995, available in LEXIS, News Library, Cumws File.

185. Rovella, *supra* note 164, at B2.

186. Bill Holland, *Rights Societies' Restaurant Fees Proposal Rejected*, BILLBOARD, Oct. 7, 1995, at 20. Not all performance rights groups oppose the legislation. Alicia C. Evelyn, of Alicia Carolyn Evelyn Music Publishing Co., believes that "[s]ongwriters of limited success may benefit from . . . possible exposure of their music to the dining public." *Letters*, BILLBOARD, Aug. 26, 1995, at 6.

187. Rovella, *supra* note 164, at B2.

188. *Id.*

189. Kuklenski, *supra* note 166.

190. Rovella, *supra* note 164, at B2.

191. H.R. 789, 104th Cong., 1st Sess. (1995).

192. Of course, the opposite is also true. See *BMI v. Claire's Boutiques, Inc.*, 949 F.2d 1482 (7th Cir. 1991) (retail chain store had a trial subscription to a commercial background music service but canceled the subscription because employees preferred radio music).

subscribing to a commercial music service such as Muzak.¹⁹³ Thus, while it is possible that this amendment will diminish the publishing royalties which copyright holders receive, and may even encourage some establishments to switch over to radio music, it will not completely eliminate revenue. Even if all restaurants switch to radio music, royalties will not evaporate, since radio stations still are subject to copyright laws and must obtain licenses in order to broadcast the songs.

V. CONCLUSION

Background music has been analogized to the decorative piece of parsley on plates: "It looks good, but it's insignificant. But because it's insignificant, should parsley growers be required to give their product away?"¹⁹⁴ Performance rights groups, which represent and collect royalties for songwriters, contend that restaurants and bars which wish to provide music over multi-speaker systems to their patrons should pay for it.¹⁹⁵ While the reasons behind the sentiment are clear—that copyright holders should receive royalties for performances of their works—interpretation of the law in this area has been less than clear.

The policy of the Copyright Act is to balance the interests of the public against those of the copyright holder.¹⁹⁶ "The primary policy of the Copyright Act is to give the public maximum access to the author's work; a secondary purpose is to remunerate the copyright owner."¹⁹⁷ Radio broadcasts of a song give the writer and composer maximum exposure to the public as well as royalties to the copyright holder. This amendment would also remedy the situation in which a licensing group obtains more than one license for the same performance of a work. For

193. Music from juke boxes, compact discs, and tapes will still require proper licenses. Holland, *supra* note 166, at 5. For explanation of Muzak and its services, see *Birthday Presence*, *supra* note 53; *Sound Affects*, *supra* note 2.

194. Rovella, *supra* note 164, at B1 (quoting Marvin L. Berenson, general counsel of BMI); see also *American Songwriters Rally to Stop Unfair Music Licensing Bills*, PR NEWSWIRE, Apr. 26, 1995, available in LEXIS, News Library, Curnws File (analogy of music to parsley); Foster, *supra* note 8, § 1.

The analogy is not perfect, however, as parsley growers directly lose even if restaurants give parsley away. The same is not true with music. Songwriters do not suffer a direct loss when their music is played. Arguably, allowing restaurants to play music without a fee serves as an advertisement and may encourage the patrons to purchase the copyrighted works.

195. As a policy, ASCAP does not require a license for radio music which is played over a receiver with only one speaker. Korman, *supra* note 46, at 528 n.32.

196. See Philip C. Bobbit, *Cable Television and Copyright Royalties*, 83 YALE L.J. 554, 557-58 (1974).

197. *Id.*

example, if a marching band plays an ASCAP tune during a half-time show, the band, the stadium, the television network broadcasting the game, the teams, and any restaurant which shows the game in its premises all need to pay licensing fees.¹⁹⁸ Requiring restaurateurs to purchase what is otherwise free to the public may discourage use of music as a whole. This in turn would limit the public's exposure to works, thereby undermining the intent of the Copyright Act.

It also seems counter-intuitive to categorize the mere act of turning on a radio as a "further transmission," and to require restaurants to pay for the music which is played by a particular radio station, but not require licenses for listening to the same broadcast in private homes.¹⁹⁹ By specifically addressing radio music and eliminating ambiguous language concerning the type of receiving apparatus, House Bill 789 makes the exemption easier to understand. The proposed exemption allows restaurant and small business owners and their attorneys to assess their circumstances, and to determine if the establishment is exempt from having to obtain a license, or if the owner should negotiate a license with the performance rights groups.²⁰⁰ The amendment also avoids ambiguities concerning which electronic equipment and configurations are "commonly used in private homes," thus avoiding the dangers of changing any set standards as technology advances.

Although the amendment may grant the exemption to more businesses, thereby reducing performance royalties received by copyright holders, the "Fairness in Musical Licensing Act of 1995" is a closer step toward solving the inconsistencies created by the small business exemption. The amendment will allow increased exposure of copyrighted works to the public, and at the same time ensure that contemporary versions of Aiken's chicken restaurant will receive the copyright exemption Congress intended.

198. Kuklenski, *supra* note 166.

199. *See* Buck v. Debaum, 40 F.2d 734 (S.D. Cal. 1929). The court observed that: One who . . . merely actuates electrical instrumentalities, . . . does not 'perform' within the meaning of the Copyright Law. The performance in such case takes place in the studio of the broadcasting station, and the operator of the receiving set . . . 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.

Id. at 735.

200. 141 CONG. REC. S12079-03, 812085 (daily ed. Aug. 9, 1995) (testimony of Sen. Craig Thomas (R-Wyo.) in support of legislation).

*Peggy H. Luh**

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