
I. INTRODUCTION

Since the earliest reported copyright cases, courts have struggled to develop the most productive balance between copyright protection and information dissemination. This struggle frequently pits the creative artist's interest in the control and exploitation of his or her work against society's competing interest in the free flow of ideas, information and commerce. As technology advances and society's access to the arts increases, the tension between these competing interests creates far reaching implications for commercial users of copyrighted music. Remarkably, even small restaurant owners who play background music hoping to make the dining atmosphere more comfortable may now find themselves deeply entangled in this struggle if they refuse to pay required licensing fees.

Generally, musical copyright owners enjoy statutory protections regarding the use of their works within a commercial establishment. As a general rule, a business owner may not use copyrighted music commercially, unless the business owner obtains the musical copyright owner's permission.

3. See Cass County Music Co. v. Muedini, 55 F.3d 265 (7th Cir. 1995). For a discussion of the facts in Muedini, see infra notes 18-39 and accompanying text.
   Subject to sections 107 through 120, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following: . . .
   (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly. . . .

Id.
to use copyrighted music may seek out the individual copyright owner to negotiate a fee for using the copyright owner's works, this approval method is seldom used for two reasons. See 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, 784 n.11 (1993). First, the transactional costs are prohibitive to a user who seeks to license multiple copyright owners' works. See id. Second, the copyright owner's infringement monitoring costs are prohibitively high. See id. In response, several music licensing organizations have evolved to facilitate the functioning of the market place for copyright owners and users. See id. Three groups, the American Society of Composers Authors & Publishers (ASCAP), Broadcast Music, Inc. (BMI), and Society of European Songwriters, Authors and Composers, Inc. (SESAC, Inc.) dominate this market. See id. (discussing ASCAP and BMI); see also Broadcast Music, Inc., 441 U.S. at 4-5 (discussing ASCAP and BMI). Each society is built on a different set of alliances and different marketing strategies. See Michael D. Scott, Multimedia: Law & Practice § 26.04 at 26-8 (Prentice Hall, 1995 Supp.). For example, while both ASCAP and BMI license broadcast rights, songwriters and publishers own ASCAP while radio and television broadcasters own BMI. See id. at 26-9. One commentator metaphorically advises that one must know what to do and what to avoid in order to know the way through this "labyrinth of music licensing." Id.

ASCAP, the organization involved in Cass County Music Co. v. Muedini, was organized by a small group of composers led by Victor Herbert in 1914 because "those who performed copyrighted music for profit were so numerous and widespread, and most performances so fleeting, that as a practical matter it was impossible for the many individual copyright owners to negotiate with and license the users and to detect unauthorized uses." International Korwin Corp. v. Kowalczyk, 855 F.2d 375, 376 n.1 (7th Cir. 1988) (citing Columbia Broadcasting Sys. v. ASCAP, 400 F. Supp. 737, 741 (S.D.N.Y. 1975)). ASCAP serves as a clearinghouse for copyright owners and users to meet each other's music licensing needs. See Broadcast Music, Inc., 441 U.S. at 5. (citing Columbia Broadcasting Sys., 400 F. Supp. at 741).

In 1959, CBS led broadcasting industry members to form the nonprofit organization called BMI, the other dominant player in this market. See id. at 5. Although CBS liquidated its interests in BMI in 1959, BMI represents thousands of publishing companies, authors and composers in a similar capacity to ASCAP. See id. at 5 n.4.

Together, ASCAP, BMI and SESAC serve the copyright interests of copyright owners and users. Typically, a musical copyright owner registers the copyright with one of the organizations and becomes an ASCAP member, or a SESAC or BMI affiliate. See id. at 4-5 (describing process copyright owners follow to protect their works through licensing organizations); see also Wilk, supra, at 784 n.11 (same). This registration allows the user to negotiate with the organization for a non-exclusive license to use the copyrighted work. See Wilk, supra, at 784 n.11. The user pays an annual fee for the license to publicly perform the copyrighted material an unlimited number of times. See id.

All three organizations primarily issue "blanket licenses" to users of copyrighted music. See Broadcast Music, Inc., 441 U.S. at 5. A "blanket license" gives the licensee the right to perform all the organization's titles as often as the licensee desires within a stated term. Id. By the late 1970s, the combined repertories of ASCAP and BMI ran into the millions, and contained almost every domestic copyrighted composition in existence. See id.; Wilk, supra, at 784 n.11.

The organizations ordinarily compute blanket license fees using a total revenue percentage or a flat dollar amount, irrespective of the amount or type of music used. See Broadcast Music, Inc., 441 U.S. at 5. In 1994, where establishments used mechanical music, ASCAP, SESAC and BMI used a graduated fee schedule based on factors such as the number of speakers used and the commercial establishment's floor space. See E.S. Johnson, Storecasting and the Copyright Law—Understanding the § 110(5) Exemption for Small Commercial Establishments, NAB HelpFax
The 1976 Copyright Act carves out a small exception to this rule for businesses who play radio broadcasts via home-style receiving systems — the "home-style exemption." Under the home-style exemption, a business owner may not charge admission to hear the music or further transmit the music to the public. In today's climate of rapidly advancing technologies, courts face significant difficulties when they attempt to apply this vague standard to different businesses and evolving audio equipment. The Seventh Circuit's decision in Cass County Music Co. v. Muedini directly addressed section 110(5)'s home-style exemption. Focusing on the sound system's capabilities, the Muedini court denied section 110(5) protection to a restaurant owner who played radio background music over a Radio Shack brand receiver connected through separate transformers to nine in-ceiling speakers. In rendering its deci-


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

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

(5) communication of a transmission embodying a performance or display of a work by the public reception of 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 . . . .

Id.

7. See id.

8. 2 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 8.18, at 8-215 (1995) ("This, then, leaves some vague area of interpretation where courts will be called upon to apply the exemption to particular fact situations."). A variety of anomalous decisions resulted from this ambiguous standard. See Wilk, supra note 5, at 785.

9. 55 F.3d 263 (7th Cir. 1995).

10. See id. at 268.

11. See id.
sion, the Seventh Circuit raised serious doubts about whether courts will ever establish a bright line rule to determine when a small business owner qualifies for the home-type exemption under section 110(5) of the 1976 Copyright Act. 12

This Note examines the Seventh Circuit’s decision in Muedini and assesses the feasibility of a bright line rule for applying section 110(5). Part II describes the factual foundation upon which the Muedini court based its holding. 13 Part III examines the relevant copyright law developments both before and after Congress enacted section 110(5). 14 Part IV carefully dissects the Muedini court’s analysis, explaining the arguments the court accepted and those it rejected. 15 Part V discusses how the court’s holding simplifies the section 110(5) analysis, but fails to establish a workable bright line rule for future cases. 16 Finally, Part VI assesses the practical repercussions of the Muedini decision for small business owners using background music, and suggests simpler considerations to help resolve potential home-type exemption controversies. 17

II. FACTS

In 1992, Vasfi Muedini owned and operated the Port Town Family Restaurant in Racine, Wisconsin. 18 The restaurant consisted of a free standing building that could accommodate a maximum of 128 patrons in a 1,500 square foot dining area. 19

12. See id. The Muedini court announced, “what is a ‘single receiving apparatus of the kind commonly used in private homes’ must be determined on a case-by-case basis.” Id. (citing 17 U.S.C. § 110(5)).

13. See infra notes 18-39 and accompanying text.

14. See infra notes 41-191 and accompanying text.

15. See infra notes 192-210 and accompanying text.

16. See infra notes 211-230 and accompanying text.

17. See infra notes 231-237 and accompanying text.

18. See Cass County Music Co. v. Muedini, 55 F.3d 265, 266 (7th Cir. 1995). Evidence indicates that Muedini owned the restaurant from at least 1985, until June 16, 1994. See Brief of Amicus Curiae at 2 n.3, Cass County Music Co. v. Muedini, 55 F.3d 263 (7th Cir. 1995) (No. 92-C-706); Irwin Aff., Cass County Music Co. v. Muedini, 55 F.3d 263 (7th Cir. 1995) (No. 92-C-706). On June 16, 1994, Tom Pam purchased the Port Town Restaurant from Muedini. See Irwin Aff., Muedini (No. 92-C-706). Pam kept the existing stereo system but changed the restaurant’s name to the River Run Restaurant. See id.

19. See Appellants’ Brief at 6, Cass County Music Co. v. Muedini, 55 F.3d 263 (7th Cir. 1995) (No. 92-C-706). Muedini’s restaurant contained approximately 31 tables, of which 16 were free standing and 15 were booths. Brief of Amicus Curiae at 2, Muedini (No. 92-C-706).
To provide his patrons with background music, Muedini equipped his restaurant with a "radio-over-speaker" sound system. The system utilized a Radio Shack receiver connected by concealed speaker wire to nine speakers that were recessed into a dropped acoustic tile ceiling. In addition, Muedini equipped each speaker with a seventy-volt transformer to allow the receiver to power the entire system without appreciable signal degradation. With a total rated power output of forty watts per channel, Muedini's customized setup, known as a distributed seventy-volt system, could power thirty-six more speakers than Radio Shack intended its factory receiver to handle without overloading. Tuned to a Milwaukee radio station, Muedini's sound system provided a consistent and evenly audible level of background music throughout the public seating area.

When the American Society of Composers, Authors and Publishers ("ASCAP") discovered Muedini's background music use, the organization opined that Muedini required a license to use the copyrighted music. From May 1985 until December 1991, ASCAP

20. Muedini, 55 F.3d at 267. A "radio-over-speaker" sound system describes an arrangement where a sound system receives a radio broadcast and plays the broadcast through one or more loudspeakers. Id. at 264-68.

21. See id. at 267-68. Muedini used a Realistic Model No. STA-700 AM/FM 40-watt stereo receiver/amplifier. See Appellant's Brief at 6, Muedini (No. 92-C-706). At the time of trial, the receiver cost approximately $200. See Muedini, 55 F.3d at 268.

22. See Muedini, 55 F.3d at 268.

23. See id. Each speaker consisted of a 12 inch aluminum grille, an 8 inch loudspeaker and a 70-volt loudspeaker, line matching transformer. See id.

24. See id. With the 70-volt transformers attached to each speaker, the nominal impedance load presented to the amplifier in the receiver increased from 8 Ohms to 10,000 Ohms. See id. This increase in impedance allowed Muedini's system to power up to 40 speakers wired in parallel with 1,000 feet of low-medium gauge wire. See id.

25. See id.

26. See id. at 265. The radio station, WMYX-FM was an ASCAP licensee. See id. The radio station's license agreement with ASCAP provided:

Nothing in this agreement shall be construed as granting, or as authorizing Licensee to grant to others any right to perform publicly . . . any of the musical compositions licensed under this agreement, or as authorizing any receiver of any radio broadcast to perform publicly or reproduce the same in any manner.

Id.

27. See Muedini, 55 F.3d at 269.

28. See id. at 265. For a discussion of ASCAP's creation and purpose, see supra note 5. Precisely how ASCAP became aware of Muedini's copyright use remains unknown. However, licensing similar business establishments falls within the ordinary business practices of ASCAP. See Appellants' Brief at 7 n.5, Muedini (No. 92-C-706).
used letters and personal contacts to persuade Muedini to obtain an ASCAP license. Muedini disregarded ASCAP's requests, refused to obtain a license and continued to use his sound system to play background music.

On Saturday, March 13, 1992, ASCAP sent two independent investigators to Muedini's restaurant to note the number of patrons that dined there and whether Muedini played copyrighted music. While eating, the investigators heard WMYX-FM broadcasts played over Muedini's system. They remained in the restaurant for three and one-half hours and identified at least six songs whose copyrights ASCAP members owned. The copyright owners subsequently brought suit against Muedini under 17 U.S.C. § 106, to enjoin Muedini from playing any copyrighted music at the restaurant and to recover statutory damages, costs and attorneys' fees.

The United States District Court for the Eastern District of Wisconsin dismissed the plaintiff copyright owners' suit on their mo-
tion for summary judgment and held that Muedini needed no license to perform the copyrighted works as background music in his restaurant. On appeal, the Seventh Circuit reversed the district court's dismissal and held that Muedini did not qualify for the section 110(5) exemption because he did not use a home-style sound system.

III. BACKGROUND

Current standards regarding copyright protection for public performance of musical works emerge from a patchwork of evolving legislation and judicial precedent. Early copyright legislation completely ignored the musical copyright owner's ability to control public performances of the author's work. However, around the turn of the century, Congress granted copyright owners the right to control public performances rendered "for profit." Early court decisions grappled with this "for profit" condition until, Congress overhauled the entire copyright statute in 1976. With the 1976 Act's passage, musical copyright owners received broadened protection, including the explicit right to control public performances of their works. However, section 110(5) of the 1976 Act provides an exemption for performances that occur via a "home-style receiving apparatus." Similar to the earlier "for profit" language, the language of the "home style exemption" poses an interpretive dilemma for modern courts. This dilemma forces courts to draw lines between private and commercial grade equipment and then redraw these lines as technology advances.

38. See Muedini, 821 F. Supp. at 1279. The district court also denied the copyright owners' motion for default judgment. See id. The copyright owners requested reconsideration of the decision to dismiss. See Muedini, 55 F.3d at 265. The district court granted a further hearing, but upheld its decision and entered judgment. See id.

39. See Muedini, 55 F.3d at 269.

40. See infra notes 47-52 and accompanying text.

41. See infra notes 53-55 and accompanying text.

42. See infra notes 56-96 and accompanying text.

43. For a further discussion of these amendments, see infra notes 97-126 and accompanying text.


46. For a discussion of judicial interpretation of the 1976 Act, see supra notes 127-180 and accompanying text.
A. Early Copyright Legislation

Copyright protection for the public performance of musical works derives from Article I of the United States Constitution, which authorizes Congress to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."\(^{47}\) Despite this grant, during the late eighteenth century and most of the nineteenth century, musical copyright owners neither possessed nor desired to possess the right to control public performance of their musical works.\(^{48}\) The first copyright legislation, passed in 1790, limited protection to books, charts and maps, but did not protect public communications of their contents.\(^{49}\) As technological advances catapulted the United States into the industrial revolution and the era of mass production, Congress responded to changing copyright needs and gradually extended the protection of Article I to cover other art forms including photographs, sculptures, written musical compositions and public performance of dramatic works.\(^{50}\)

47. U.S. Const. art. I, § 8, cl. 8.
48. See Act of Aug. 18, 1856, ch. 169, 11 Stat. 481 (repealed 1870). This Act conferred upon musical copyright owners the right to control public performance of their works. See id. However, copyright owners were reluctant to enforce their public performance rights because they feared that doing so would suppress sheet music sales. See Bernard Korman, Performance Rights in Music Under Sections 110 and 118 of the 1976 Copyright Act, 22 N.Y.L. Sch. L. Rev. 521, 523-24 (1977). In addition copyright owners may have lacked effective enforcement mechanisms until ASCAP was formed in 1914. See John M. Kernochan, Music Performing Rights Organizations in the United States of America: Special Characteristics, Restraints, and Public Attitudes, 10 Colum.-Vla J.L. & Arts 333, 336 (1986).
49. See Act of May 31, 1790, ch. 15, 1 Stat. 124 (repealed 1802). Under the act, "the author ... of any map, chart ... or books printed within these United States ... shall have the sole right and liberty of printing, reprinting, publishing and vending ... for the term of fourteen years from the recording of title thereof in the clerk's office ... ." Id.

Almost 12 years after the 1790 Act, Congress extended copyright protection to "arts of designing, engraving, and etching historical and other prints." Act of Apr. 29, 1802, ch.36, 2 Stat. 171, 171-72 (repealed 1831). With the repeal of the 1790 and 1802 Acts, Congress further broadened copyright protection to include musical compositions. See Act of Feb. 3, 1831, ch. 16, 4 Stat. 436 (repealed 1870). This right lost value due to the rise of the player piano and phonograph because neither machine's operation fit within the ambit of existing copyright legislation. See Robert S. Lee, An Economic Analysis of Compulsory Licensing in Copyright Law, 5 W. New Eng. L. Rev. 203, 205 (1982). Dramatic performances gained protection in 1856. See Act of Aug. 18, 1856, ch. 169, 11 Stat. 138, 139 (repealed 1870). In 1865,
Finally, in 1897, Congress put musical compositions on an equal footing with dramatic composition and expanded copyright protection to include public performance of musical works.

Responding to fears that the 1897 Act overextended copyright protection, the 1909 Congress added a "for profit" limitation to the musical copyright owner's right to control public performance. Under this new 1909 Act, copyright owners gained the right to receive compensation for their work's public performance if they proved three elements: first, the infringer "performed" the copyright owner's work; second, the infringer performed publicly; and finally, the infringer publicly performed the work "for profit." Congress added photographs and negatives to the protected list. See Act of Mar. 3, 1865, ch. 126, 13 Stat. 540 (repealed 1870). Five years later, in 1870, Congress extended copyright protection to paintings, drawings, statuettes, statuary, models and designs intended to be perfected as works of fine art. See Act of July 8, 1870, ch. 230, §§ 86, 100, 16 Stat. 198, 212, 214 (repealed 1909).

The Supreme Court recognized an artist's assignable right to control the use of his or her private works in 1834. See Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 660 (1834). However, the Court denied the plaintiff recovery because the private work had already been publicly disseminated. See id. at 677.

51. See White-Smith Music Co. v. Apollo Co., 209 U.S. 1, 16 (1907) (stating that Congress sought to put dramatic composition and musical composition on equal ground).

52. See Act of Jan. 6, 1897, ch. 4, 29 Stat. 481 (repealed 1909). Under this Act, any "person publicly performing or representing any dramatic or musical composition for which a copyright has been obtained, without consent of the proprietor of said dramatic or musical composition .... shall be liable for damages ...." Id. at 481-82. Despite this grant, musical copyright owners were slow to enforce their rights to control public performance of their works. See Wilk, supra note 5, at 787-88. During the 19th century, sheet music royalties represented a musical copyright owner's primary income source. See id. at 788. Therefore, even after the Jan. 6, 1897 Act, musical copyright owners declined to enforce public performance rights because they feared that doing so might suppress sheet music sales. See id.; see also Korman, supra note 48, at 523-24 (explaining historical development of musical copyright).


The 1909 Act provided in pertinent part:
That any person entitled thereto, upon complying with the provisions of this Act, shall have the exclusive right:

(e) To perform the copyrighted work publicly for profit if it be a musical composition; and for the purpose of public performance for profit, and for the purposes set forth in subsection (a) hereof, to make any arrangement or setting of it or of the melody of it in any system of notation or
Although Congress clearly intended the Act to protect public performances where a business owner charged patrons a direct fee to hear the performance, it left the courts with the more difficult task of deciding whether the Act protected incidental public performances where a business owner charged no fee but provided music for background purposes.

B. Case Law Under the 1909 Act

In a series of decisions that spanned sixty years, federal courts attempted to develop rules to govern copyright protection for incidental performances in commercial settings. The conflicting decisions and enduring confusion with which the judiciary grappled precipitated further amendment to the slowly developing copyright act.

Within ten years after Congress passed the 1909 Act, the Supreme Court announced in *Herbert v. Shanely Co.* that live performances of copyrighted music performed in a restaurant fell within the ambit of the 1909 Act's public performance "for profit"
doctrine. Applying the 1909 Act's "for profit" language, the Supreme Court prohibited a restaurant's unauthorized use of copyrighted music played by a live orchestra, even though the proprietor charged the patrons no admission fee to hear the music. Justice Holmes reasoned that, although the restaurant declined to charge patrons directly, the patrons ultimately bore the performance costs through increased prices for other services.

_Herbert_ represents the first in a series of decisions that construed the 1909 Act in the copyright owners' favor and imposed liability on unauthorized users. Later, federal courts held that radio broadcasting stations performed both "publicly" and "for profit" although audience members could listen for free from geographically distinct locations. In 1929, the Fifth Circuit held that

57. In _Herbert_, a restaurant owner employed an orchestra to play background music in his restaurant. _Id._ at 594. Victor Herbert's suit against the hotel for unauthorized performances of the song "Sweethearts" failed in both lower courts, but was unanimously reversed by the Supreme Court. _See_ _Herbert_ v. _Shanley Co., 222 Fed. 344_ (S.D.N.Y. 1915), _aff'd_, 229 Fed. 340 (2d Cir.), _rev'd_, 242 U.S. 591 (1917). On appeal, the Supreme Court consolidated a companion case where John Phillips Sousa's publisher sued the Vanderbilt Hotel for similar infringing performances. _See_ _Herbert_, 242 U.S. at 591; Bernard Korman & I. Fred Koenigsberg, _Performing Rights in Music and Performing Rights Societies_, in _9 PATENTS, COPYRIGHTS, TRADEMARKS AND LITERARY PROPERTY COURSE HANDBOOK SERIES PLI/PAT_ 16 (Practicing Law Institute, 1987).

58. _See_ _Herbert_, 242 U.S. at 594.

59. _See_ _id_. The Supreme Court reasoned that the restaurant owner lacked any reason for employing the orchestra other than increasing revenues. _See_ _id._ at 595. Following that logic, Justice Holmes wrote for the majority that although the owner charged no direct fee, the increased revenue that the owner received from employing the orchestra characterized the arrangement as "for profit," bringing the performances within the 1909 Act's scope. _Id._ He stated:

If the rights under the copyright are infringed only by a performance where money is taken at the door they are very imperfectly protected. Performances not different in kind from those of the defendants could be given that might compete with and even destroy the success of the monopoly that the law intends the plaintiffs to have. It is enough to say that there is no need to construe the statute so narrowly. The defendants' performances are not eleemosynary. They are part of a total for which the public pays, and the fact that the price of the whole is attributed to a particular item which those present are expected to order, is not important. It is true that the music is not the sole object, but neither is the food, which probably could be got cheaper elsewhere. The object is a repast in surroundings that to people having limited powers of conversation, or disliking rival noise, give a luxurious pleasure not to be had from eating a silent meal. _If music did not pay it would be given up. If it pays it pays out of the public's pocket. Whether it pays or not, the purpose of employing it is profit, and that is enough._

_Id._ at 594-95 (emphasis added).

60. _See_ Korman & Koenigsberg, _supra_ note 57, at 17.

a commercial user publicly performed copyrighted music for profit when he played a record on a phonograph.  

Two decades passed after the 1909 Act’s enactment before a case determined whether a business violated copyright protections where it used radio broadcasts which contained copyrighted music to provide background music. In 1931 the Supreme Court reviewed this controversy in Buck v. Jewell-LaSalle Realty Co. There, the Supreme Court, per Justice Brandeis, extended 1909 Act liability to a hotel owner who played radio broadcasts through speakers installed throughout his hotel. With Jewell-LaSalle, no

broadcasted a live musical performance without the musical copyright owner’s permission. Jerome H. Remick, 5 F.2d at 411. The court reasoned that a performance could be “public” within the meaning of the 1909 Act regardless of whether the audience gathered in a stadium or listened in isolation from within their homes. Id. at 412. According to the circuit court, radio allowed for the widest audience of any medium during that time. See id. While these cases established liability for primary users, like radio stations, they failed to determine the liability for secondary users, like the receivers of the broadcast and the stations’ listeners. See Cass County Music Co. v. Muedini, 55 F.3d 263, 269 (7th Cir. 1995) (addressing secondary user liability).

In M. Witmark, a radio broadcaster used an announcement reciting: “L. Bamberger & Co., One of America’s Great Stores, Newark, N.J.” at the beginning and end of a radio program broadcast. M. Witmark, 291 Fed. at 779. The district court found unpersuasive the defendant’s argument that the copyright owners benefited because the user promoted the music broadcast. See id. The court stated that by granting the right of public performance to the copyright owner, Congress intended that the copyright owner have the right to control the method of promotion through public performance. See id.

62. See Irving Berlin, Inc. v. Daigle, 31 F.2d 832, 835 (5th Cir. 1929). “The provision conferring . . . the exclusive right of publicly performing for profit contains nothing which can be given the effect of excepting a public performance for profit by means of a phonograph record.” Id.

63. See Buck v. Duncan, 32 F.2d 366 (W.D. Mo. 1929). In Buck a Missouri district court held that a business owner violated copyright protections where he used radio broadcasts which contained copyrighted music to provide background music for his business. Id.

64. 283 U.S. 191 (1931).

65. See id. The hotel proprietor connected speakers in both public and private areas to one central receiver and offered loud-speakers or headphones to guests. See id. at 195. The receiver transmitted radio broadcasts from a local station through all the speakers and head-phones in the hotel. See id. Interestingly, the radio station continued to broadcast unauthorized copyrighted music despite the copyright owners efforts to obtain a fee. See id. As a result, the copyright owner brought suit against the radio station and the hotel proprietor. See id. Although the district court entered default judgment against the radio station, the plaintiffs continued their suit against the hotel. See id.

The circuit court certified the issue to the Supreme Court using the following language:

Do the acts of a hotel proprietor, in making available to his guests, through the instrumentality of a radio receiving set and loudspeakers installed in his hotel and under his control and for the entertaining of his guests, the hearing of a copyrighted musical composition . . . constitute a
longer would a single rendition of a copyrighted work result in only one performance. The notion that a single rendition could be simultaneously performed—performed by an initial source (i.e., radio station) and also performed in a public place via a receiving apparatus (i.e., the hotel owners receiver and speaker system)—became known as the "multiple performance doctrine." The Jewel-LaSalle decision not only extended the 1909 Act's prohibitions to an entirely new class of music receivers, but also acted as a windfall for both copyright owners and performing rights societies. This windfall lasted more than thirty years. As courts continued the Herbert pattern of interpreting the 1909 Act to impose liability on users, the class of users from which copyright owners and performing rights societies could collect fees drastically expanded from the performance of such composition within the meaning of 17 U.S.C. § 1(e)?

Id. at 195-96.

66. In the Jewel-LaSalle situation, where a radio station plays a record and transmits this performance via radio waves, at least two performances occur: 1) when the record is played in the station and converted into radio waves; and 2) where a receiver and speaker convert radio waves into audible sounds. See Jewel-LaSalle, 283 U.S. at 199 n.5, 200-01; Maslow, supra note 50, at 1067 n.49.

67. The Supreme Court drew the following analogy to underscore the multiple performance idea:

The transmitted radio waves require a receiving set for their detection and translation into audible sound waves, just as the record requires another mechanism for the reproduction of the recorded composition. In neither case is the original program heard; and, in the former, complicated electrical instrumentalities are necessary for its adequate reception and distribution. Reproduction in both cases amounts to a performance.


68. For a discussion of how subsequent decisions applied and expanded the 1909 Act's coverage against users, see infra note 71. ASCAP and copyright owners in general sought to capitalize on the Jewel-LaSalle ruling. See Society of European Stage Authors & Composers, Inc. v. New York Hotel Statler Co., 19 F. Supp. 1, 3 (S.D.N.Y. 1937) (underscoring copyright owner's argument that business' unauthorized retransmission of licensed radio broadcast constituted infringing for profit public performance).

During the thirty years following the Jewel-LaSalle decision, ASCAP thwarted much potential litigation by amending its standard broadcast licensing agreement to include a provision prohibiting the license from running in favor of any other users (i.e., receivers of the broadcasts). See Shipley, supra note 54, at 481. The Jewel-LaSalle holding served as the basis for ASCAP's licensing of commercial establishments which used radio broadcasts over loudspeakers. See id. at 481 n.39. However, ASCAP declined to assert its licensing rights against small "Mom and Pop" establishments that used only small home type radios and no detached loudspeakers. See id. (citing Twentieth Century Music Corp. v. Aiken, 422 U.S. 151 (1975)).

69. See Korman & Koenigsberg, supra note 57, at 16.
primary public performers (i.e., radio stations and business owners who hired orchestras or publicly played phonographs) to secondary performers (i.e., business owners who publicly played radio broadcasts). Although users attempted creative defenses, courts remained unpersuaded and routinely upheld copyright owners' claims for infringing performances.

70. For a discussion of judicial interpretations of these factual situations, see supra note 57 and accompanying text.

71. One commentator suggests that after Jewell-LaSalle, anyone who played a radio in public for commercial advantage ran the risk of violating copyright law unless they obtained a license from the copyright owners. See Shipley, supra note 54, at 481. This statement seems correct in light of the many subsequent decisions which continued to construe the 1909 Act in favor of copyright owners. In 1944, the Second Circuit held that a radio station infringed an owner’s copyright and “publicly performed for profit” even where a non-profit organization owned and operated the station. Associated Music Publishers Inc. v. Debs Memorial Radio Fund, 141 F.2d 852, 855 (2d Cir.), cert. denied, 323 U.S. 766 (1944). More often than not in the case of private night clubs that maintained minimal admissions standards, courts favored the copyright owners and held that the clubs “performed publicly.” Lerner v. Club Wander In, Inc., 174 F. Supp. 731 (D. Mass. 1959); see also M. Witmark & Sons v. Tremont Social & Athletic Club, 188 F. Supp. 787 (D. Mass. 1960) (holding that club orchestra publicly performed for profit where club maintained open admission to most citizens over 21 years of age); but see Metro-Goldwyn-Mayer Distrib. Corp. v. Wyatt, 21 C.O. BULL. 203 (D. Md. 1932) (denying plaintiff's copyright infringement claim).

At least one court applied joint and several liability to the emerging technology of background music services and their subscribers where the service supplied the music and the subscriber publicly broadcast the music. See Harms, Inc. v. Sansom House Enterprises, Inc., 162 F. Supp. 129 (E.D. Pa. 1958), aff'd per curiam sub nom. Leo Feist, Inc. v. Lew Tenderl Tavern, Inc. 267 F.2d 494 (3d Cir. 1959).

The issue of whether performances violated copyright protections where they were rendered by mechanical means, rather than by live musicians, arose once again in the mid 1960s. See Chappell & Co. v. Middletown Farmers Market & Auction Co., 334 F.2d 303 (3d Cir. 1964).


In Veltin, a tavern owner failed to avoid liability even though he posted signs within his tavern and specifically instructed the band not to play certain musical selections. Veltin, 47 F. Supp. at 648-49.

73. See supra notes 71-72. However, in its unanimous holding, the Court in Jewell-LaSalle never expressed whether it would have allowed the hotel's rebroadcast if the copyright owner authorized the radio station to broadcast the work. Buck v. Jewell-LaSalle, 283 U.S. 191, 198 (1931). In dicta citing the lower court's decision, the Court acknowledged that a distinction between authorized and unauthorized broadcast might influence future decisions. See id. at 199 n.5 (citing Buck v. Debaum, 40 F.2d 734 (S.D. Cal. 1929)). The district court created an implied license in a cafe owner who installed a radio and broadcast ASCAP licensed radio
By the 1960s, increasingly frequent technological advances placed severe stress on the copyright protections of the 1909 Act and raised serious questions about the Act's application to novel technologies. Three cases decided between 1968 and 1975 forced the Supreme Court to revisit and revise its 1909 Act pro-copyright owner position. In these cases, attempts to apply the "performance" language of the 1909 Act to community antenna television systems (CATV) and developing audio technologies.

The Supreme Court arguably recognized that an implied license could exist if the copyright owner issued consent to a radio station with knowledge that commercial businesses received and retransmitted the station's broadcasts of the copyright owner's work. See Maslow, supra note 50, at 1067-68. ASCAP often nullifies this sublicense possibility by inserting a clause expressly prohibiting the license from running in favor of subsequent radio receivers. See Letter from Richard H. Reimer, Director of Legal Affairs and Managing Attorney, ASCAP, to James B. MacDonald, Editor of Student Works, Villanova Sports and Entertainment Law Journal 21 (Sept. 19, 1996) (on file with Villanova Sports and Entertainment Law Journal) (explaining that ASCAP licenses are negotiated with broadcasters and that such exclusions are often inserted at broadcasters insistence). An economic benefit inures to broadcasters who opt for this exclusion because they pay only for their own broadcasts; and not for any implied sublicense in favor of subsequent receivers of the broadcasts. See id.

74. See Wilk, supra note 5, at 791-93. Congress attempted revision efforts on the 1909 Act during the 1920s. See I. Fred Koenigsberg, The 1976 Copyright Act: Advances for the Creator, in 9 PATENTS, COPYRIGHTS, TRADEMARKS AND LITERARY PROPERTY COURSE HANDBOOK SERIES PLI/PAT 1 (Practicing Law Institute, 1987). These attempts proved unsuccessful and ultimately stalled altogether with the advent of the Second World War. See id. Following the war, the United States directed its copyright energy toward perfecting an international copyright treaty. See id. These efforts eventually produced the 1976 Act. See id. at 6.


76. See Korman & Koenigsberg, supra note 57, at 18.

77. "A CATV system consists... of a central antenna which receives and amplifies television signals and a network of cable through which the signals are then transmitted to the receiving sets of individual subscribers, who thereby get better reception and more [TV] channels to choose from." Copyright Law Revision: Hearings on H.R. 4347, 5680, 6831 and 6835 Before Subcomm. No. 3 of the House Comm. on the Judiciary, 89th Cong., 1st Sess. 55 (1965) [hereinafter "1965 Hearings"] (excerpting statement of George D. Cary. Deputy Register of Copyrights, May 26, 1965).

Available in rural areas after World War II, CATV improved otherwise poor reception. See id. at 45. Although CATV initially attracted few subscribers, by the late 1960s, the central antenna technology grew into a prosperous industry whose annual revenues exceeded $100 million. See id. at 35.
proved unsuccessful.\textsuperscript{78} In the first two decisions, \textit{Fortnightly Corp. v. United Artists Television, Inc.}\textsuperscript{79} and \textit{Teleprompter Corp. v. CBS},\textsuperscript{80} the majority refused to apply the Jewell-LaSalle doctrine to retransmissions of copyrighted television programs by CATV operators.\textsuperscript{81} In \textit{Fortnightly}, the Supreme Court divided users into two classes: (1) broadcasters, who performed; and (2) viewers, who did not perform.\textsuperscript{82} Since the Court determined that CATV operators fell under the nonperforming class, the 1909 Act’s public performance prohibitions did not apply to their use of copyrighted materials.\textsuperscript{83} The Supreme Court’s later decision in \textit{Teleprompter} reaffirmed \textit{Fortnightly}, and held that the public performance prohibitions did not apply to CATV operators even where a great distance separated the broadcasting station and the viewer.\textsuperscript{84} In \textit{Fortnightly}, the Supreme

\textsuperscript{78} See Korman & Koenigsberg, supra note 57, at 18.
\textsuperscript{79} 392 U.S. 390, reh’g denied, 393 U.S. 902 (1968).
\textsuperscript{80} 415 U.S. 394 (1973).
\textsuperscript{81} For a discussion of \textit{Fortnightly} and \textit{Teleprompter}, see infra notes 82-84 and accompanying text.
\textsuperscript{82} \textit{Fortnightly}, 392 U.S. at 392. In \textit{Fortnightly}, a CATV operator retransmitted programming from five television broadcast stations. \textit{Id.} Copyright owners sued the CATV operator after it retransmitted programming containing certain motion pictures without a license. \textit{See id.} Some of the licensing agreements between the copyright owners and the television broadcast stations expressly prohibited the license from running in favor of broadcast receivers like the CATV operator. \textit{See id.} In overturning the lower court rulings, the Supreme Court, per justice Stewart, avoided the lower court findings of an implied sublicense, and instead held that no “performance” occurred. \textit{Id.} at 398; \textit{see United Artist Television, Inc. v. Fortnightly}, 255 F. Supp. 177, 204 (S.D.N.Y. 1966), aff’d, 377 F.2d 872, 880 (2d Cir. 1967). Justice Stewart defined a narrow line between the users that perform and those that do not perform, writing, “[b]roadcasters perform. Viewers do not perform.” \textit{Fortnightly}, 392 U.S. at 399.
\textsuperscript{83} \textit{See id.} For the court, Justice Stewart concluded that CATV did not broadcast and fit better within the “viewer” class than the “broadcaster” class. \textit{Id.} Therefore, if CATV operators did not broadcast, they did not perform and could not be liable under the 1909 Act. \textit{See id.}
\textsuperscript{84} In \textit{Teleprompter}, Teleprompter Corporation retransmitted various unauthorized CBS broadcasts via CATV. \textit{Teleprompter}, 415 U.S. at 396. CBS sued for copyright infringement. \textit{See id.} at 396-97. Relying on the Supreme Court’s recent \textit{Fortnightly} decision for its dismissal, the district court held that Teleprompter merely retransmitted the signals but did not render any performance within the meaning of the 1909 Act. \textit{See id.} at 398. While the Second Circuit affirmed the retransmission finding, it reversed the dismissal on a new theory that Teleprompter received distant and otherwise nonreceivable signals rather than local signals from the broadcasting stations. \textit{See Columbia Broadcasting System, Inc. v. Teleprompter Corp.}, 476 F.2d 338, 349 (2d Cir. 1973). In reversing the circuit court, the Supreme Court held that a CATV operator “does not lose its status as a nonbroadcaster and thus a ‘nonperformer’ for copyright purposes, when the signals it carries are from distant rather than local sources.” \textit{Teleprompter}, 415 U.S. at 409. To lay the CATV issue to rest the court stated:

When a television broadcaster transmits a program, it has made public for simultaneous viewing and hearing, the contents of that program. The privilege of receiving the broadcast electronic signals and converting
Court briefly distinguished *Jewell-LaSalle* on its facts, while the *Teleprompter* decision completely avoided any reference to the thirty-year-old precedent.\(^85\)

The Supreme Court's decision in *Twentieth Century Music v. Aiken*\(^86\) addressed a radio-over-loudspeaker use of copyrighted music that appeared similar to the use in *Jewell-LaSalle*.\(^87\) In *Aiken*, George Aiken played radio broadcasts in a small Pittsburgh fast food restaurant via a receiver and four ceiling mounted speakers.\(^88\) Since Aiken never obtained a license, the plaintiff copyright owners sued him and alleged that his reception and playing of the broadcasts constituted a "performance" within the meaning of the 1909 Act and therefore infringed upon the copyright holders' exclusive right to publicly perform their copyrighted works for profit.\(^89\)

Relying on both the *Fortnightly* and the *Teleprompter* decisions, the Supreme Court in *Aiken* dealt a critical blow to the *Jewell-LaSalle* doctrine when it held that Aiken's conduct did not constitute a "performance" within the meaning of the 1909 Act.\(^90\) Given the small scale of Aiken's restaurant, the Supreme Court reasoned that a rule finding infringement on the *Aiken* facts would ultimately become unenforceable because of the large number of businesses...

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\(^85\) *Fortnightly*, 392 U.S. at 392. Distinguishing *Fortnightly* from *Jewell-LaSalle*, the majority explained that the 1931 case may have been decided differently had the *Jewell-LaSalle* copyright holder authorized the original transmitter, the radio station, to broadcast the music. *Id.* at 397 n.18 (citing *Buck v. Jewell-LaSalle Realty Co.*, 283 U.S. 191 (1931)).

\(^86\) 422 U.S. 151 (1975).

\(^87\) *See* Korman & Koenigsberg, *supra* note 57, at 18.

\(^88\) *Aiken*, 422 U.S. at 152. Aiken received unedited broadcasts including news and advertisements from a radio station which possessed a license from ASCAP to broadcast music, but the station's license contained the provision preventing the license from running in favor of subsequent receivers. *See id.* at 153.

\(^89\) *Id.* at 157. The Supreme Court assumed that Aiken's acts fit with the "publicly" and "for profit" elements. *Id.*

\(^90\) *Id.* at 161.
with radio and television sets.\textsuperscript{91} From a technological perspective, analogizing \textit{Fortnightly} and \textit{Teleprompter} to Aiken’s situation, the Supreme Court explained that if sophisticated CATV retransmission was not a “performance” within the 1909 Act’s meaning, then Aiken’s use of his relatively primitive radio could not qualify as a performance.\textsuperscript{92}

Taken together, these three cases virtually overruled the \textit{Jewell-LaSalle} court’s decision.\textsuperscript{93} In \textit{Fortnightly}, \textit{Teleprompter} and \textit{Aiken}, the Supreme Court suggested that only a single performance occurred when CATV operators or small businesses used broadcast copyrighted works.\textsuperscript{94} Moreover, the \textit{Aiken} court clearly eviscerated the multiple performance doctrine from small businesses when it decided that a small business establishment does not perform musical copyrighted works when it plays the radio publicly and for profit.\textsuperscript{95}

By urging Congress in \textit{Fortnightly}, \textit{Teleprompter} and \textit{Aiken} to enact new legislation to keep stride with advancing technologies the Supreme Court evinced the attitude that the 1909 Act had become hopelessly outdated.\textsuperscript{96} Less than two years later, Congress responded.\textsuperscript{97}

\textsuperscript{91.} Id. at 162. The Supreme Court noted that an infringement holding would, “authorize the sale of an untold number of licenses for what is basically a single public rendition of a copyrighted work.” \textit{Id.} at 162-63.

\textsuperscript{92.} \textit{Id.; see also} Warenski, \textit{supra} note 54, at 526 (explaining holding of \textit{Aiken}).

\textsuperscript{93.} \textit{See} Korman & Koenigsberg, \textit{supra} note 57, at 19.

\textsuperscript{94.} \textit{See id.}

\textsuperscript{95.} \textit{See Wilk, supra} note 5, at 795. Observing that copyright owners already received “adequate” royalties from broadcasters based on listener popularity, the Supreme Court feared that “multiple tribute” would result in a windfall for copyright owners. \textit{Id.} Moreover, the Supreme Court explained that blanket licenses fail to fully protect small business owners who have no way of knowing whether a particular song is within ASCAP’s or BMI’s repertoire. \textit{Compare Aiken, 422 U.S. at 162} (stating “a person in Aiken’s position would have no sure way of protecting himself from liability for copyright infringement except by keeping his radio set turned off.”) \textit{with Wilk, supra} note 5 (stating that, by the mid-1970s the repertoires of ASCAP and BMI ran into millions and contained almost every domestic copyrighted musical composition in existence). Although the Supreme Court distinguished \textit{Jewell-LaSalle} on the grounds that the \textit{Jewell-LaSalle} radio station was not licensed, \textit{Aiken} effectively overruled \textit{Jewell-LaSalle} since the existence of an unlicensed broadcaster is highly unlikely in modern times. \textit{See Wilk, supra} note 5, at 795-96.


\textsuperscript{97.} \textit{See 17 U.S.C. §§ 101-120 (1994)}. 

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C. Copyright Act Revision: Introducing the "Home-Style Exemption" in the 1976 Copyright Act

On October 19, 1976, Congress attempted to end the confusion surrounding the *Jewell La-Salle* precedent and enacted the General Revision of Copyright Law of 1976. Under section 106 of the 1976 Act, Congress broadened the types of uses that required a copyright owner’s consent. Congress also granted musical copyright owners the exclusive right “to perform the copyrighted work publicly.” Moreover, Congress codified the *Jewell La-Salle* definition of “perform.” Under the 1976 Act, a user “performs” a musical work when the user, “directly or by means of any device or process,” renders, recites or plays the work. The Act added the definition of “publicly” to mean a place open to the public or any place where a substantial number of persons gather, outside of a normal circle of family and social acquaintances. Joining these two definitions together, to publicly perform a work under the 1976 Act’s language, a user must simply communicate the work to the public by any process or device. To temper the broad copyright protection of section 106, sections 107 through 120 carve out certain specific

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   (1) to reproduce the 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 . . . musical . . . works . . . to perform the copyrighted work publicly; and
   
   (5) in the case of . . . musical . . . works, to display the copyrighted work publicly.

*Id.*


102. *Id.*

103. See *id.* The 1976 Act states that to publicly perform a work means: [T]o transmit or otherwise communicate a performance or display of the work to . . . the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.

*Id.*
limitations on the copyright owner's exclusive rights to control use of the work.\textsuperscript{104}

One of these narrow restrictions, section 110(5), exempts a small business establishment from copyright liability where it plays radio or television broadcasts on a "single receiving apparatus of a type commonly used in private homes."\textsuperscript{105} Specifically, this exemption, called the "home-style exemption," provides:

\begin{quote}
Notwithstanding the provisions of section 106, the following are not infringements of copyright:
\begin{itemize}
\item \textsuperscript{5} communication of a transmission embodying a performance or display of a work by the public recep-
\end{itemize}
\end{quote}

\textsuperscript{104} See Wilk \textit{supra} note 5, at 797 n.83 (citing limitations on copyright owners' exclusive rights in: section 107 (addressing fair use); section 108 (discussing reproduction by libraries and archives); section 109 (explaining effect of transfer of particular copy or phonorecord); section 110 (describing exemption of certain performances or displays); section 111 (detailing secondary transmissions); section 112 (addressing ephemeral recordings); section 113 (discussing scope of exclusive rights in pictorial, graphic and sculptural works); section 114 (explaining scope of exclusive rights in sound recordings); section 115 (addressing scope of exclusive rights in nondramatic musical works; compulsory license for making and distributing phonorecords); section 116 (describing scope of exclusive rights: compulsory licenses for public performances by means of coin operated phonorecord players); section 117 (addressing computer programs); section 118 (detailing scope of exclusive rights; use of certain works in connection with noncommercial broadcasting); section 119 (describing limitations on exclusive rights; secondary transmissions of superstations and network stations for private home viewing); section 120 (addressing scope of exclusive rights in architectural works). For a discussion of whether these rights are natural or artificial, see Gary Kauffman, \textit{Exposing the Suspicious Foundation of Society's Primacy in Copyright Law: Five Accidents}, 10 \textit{COLUM.-VLA J.L. & ARTS} 381 (1986).

\textsuperscript{105} Cass County Music Co. v. Muedini, 55 F.3d 263, 265 (7th Cir. 1995). Section 110 contains other narrowly tailored exemptions. For example, section 110(1) exempts performances rendered in "a classroom or similar place devoted to instruction...:" 17 U.S.C. § 110(1). Section 110(2) provides an exemption for nonprofit instructional performances occurring during the course of radio or television broadcasts. 17 U.S.C. § 110(2). Section 110(3) includes an exemption for performances of "sacred" works in places of "religious assembly" during "the course of services." 17 U.S.C. § 110(3). Section 110(4) provides a limited exemption for certain performances by nonprofit organizations if the performances are not broadcast publicly via radio, television, etc. 17 U.S.C. § 110(4). Section 110(6) provides an exemption from vicarious liability for government bodies and nonprofit agricultural or horticultural organizations who sponsor exhibitions at which individual vendors render performances. 17 U.S.C. § 110(6). Section 110(7) provides an exemption to owners of vending establishments who perform copyrighted works solely to promote sales of those copyrighted works. 17 U.S.C. § 110(7). Sections 110(8) and 110(9) exempt certain performances directed at certain handicapped groups. 17 U.S.C. § 110(8), (9). Section 110(10) specifically exempts certain performances by nonprofit fraternal and veterans organizations like "Elks, Kiwanis, Shriners..." 17 U.S.C. § 110(10); see 128 \textit{CONG. REC.} S13155 (daily ed. Oct. 1, 1982) (Sen. Strom Thurmond).
The basic rationale behind exempting performances by means of a receiving apparatus commonly used in private homes is that these performances pose such a minimal threat to copyright owners that no liability should extend to users. Before users qualify for the home-style exemption that section 110(5) provides, they must meet three requirements. First, they must use a “single receiving apparatus of a kind commonly used in private homes.” Second, the users must not charge a direct admission to hear or see the transmission. Third, they must not further transmit the broadcast to the public.

Congress intended the first requirement, that the device used must be a “single receiving apparatus of a kind commonly used in private homes,” to apply to situations where a user publicly played music or television broadcasts over an ordinary receiving system commonly sold for in-home use (a “home-style” receiving apparatus). In codifying section 110(5), Congress explicitly reinstated the pre-Aiken, Jewell-LaSalle rule stating that any commercially public broadcast: (1) via non-home-type means; and (2) not fitting with the other narrowly drawn exemptions, infringes upon copy-
right protection.114 Without overruling Aiken in its entirety, Congress characterized the facts of Aiken as the “outer limit” of this new section 110(5) “home-style exemption.”115

Observing that the facts of Aiken, together with the brief wording of section 110(5), provided inadequate guidance to courts faced with applying the 1976 Act to new factual situations, the Conference Committee adopted the House Report’s legislative findings as a further aid to courts faced with interpreting the new legisla-

The majority of the Supreme Court in the Aiken case based its decision on a narrow construction of the word “perform” in the 1909 statute. This basis for the decision is completely overturned by the present bill and its broad definition of “perform”... The committee has adopted the language of Section 110(5), with an amendment expressly denying the exemption in situations where “the performance or display is further transmitted beyond the place where the receiving apparatus is located”[sic]; in doing so, it accepts the traditional, pre-Aiken, interpretation of the Jewell-LaSalle decision, under which public communication by means other than a home receiving set, or further transmission of a broadcast to the public, is considered an infringing act. Id. (emphasis added). Note that the report purports to “completely overturn” the Aiken court’s definition of perform, but accepts the factual situation of Aiken as the “outer limit” of exempted use. Id.

Unlike the 1909 Act, the 1976 Act included a definition for “perform” in Section 101. 17 U.S.C. § 101. Jewell-LaSalle addressed only the issue of whether a “performance” occurred and created the multiple performance doctrine; the decision did not focus on the nature of the receiving apparatus. Buck v. Jewell-LaSalle Realty Co., 283 U.S. 191 (1931). Thus, some commentators believe that whether or not a home type receiver was used was irrelevant to the Jewell-LaSalle decision. See, e.g., Wilk, supra note 5, at 800 n.93. Significantly, subsequent rulings that refer to Jewell-LaSalle make no distinction between commercial and home type equipment. See e.g., id.; Society of European Stage Authors and Composers v. New York Hotel Statler Co., Inc., 19 F. Supp. 1, 6 (S.D.N.Y. 1937) (finding copyright infringement where hotel company broadcast copyrighted music via two central receiving sets).

In 1974, a year before Aiken, the Senate passed a version of section 110(5) that permitted small businesses including taverns and doctors offices to retransmit radio and television broadcasts over home style type equipment for incidental entertainment. See S. 1361, 93d Cong. (1974); S. Rep. No. 93-383, at 130 (1974). After Aiken, the Senate offered a different response than the House, and stated that the exemption would not apply to factual situations like that set forth in Aiken. See 122 Cong. Rec. S. 1546 (daily ed. 1976). However, the Conference Committee met to reconcile the differences between the House and Senate Bills and adopted the Senate’s limited version of the exemption, but kept the House Report’s statement of intent. See Shipley, supra note 54, at 488. For a detailed discussion of the bill’s passage through both the House and the Senate, see id. at 487-89.

115. H.R. Rep. No. 94-1476, at 87 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5701. In the legislative history, Congress emphasized the crucial factual circumstances in Aiken. See id. The House Report characterizes Aiken’s stereo as “a home receiver with four ordinary loudspeakers grouped within a relatively narrow circumference from the set...” Id. The entire system was located within a “small commercial establishment.” Id. The report states, “this Committee considers this fact situation to represent the outer limit of the exception, and believes the line should be drawn at that point.” Id.
tion. The House Report cautions against augmenting a home-type apparatus, opining that "sophisticated or extensive amplification equipment" shifts the sound system's status from an exempt home-type apparatus into a non-exempt commercial-type sound system. Factors that influence whether a particular use involves a home-type or commercial sound system include, "size, physical arrangement, and noise level of areas within the establishment where the transmissions are made audible or visible, and the extent to which the receiving apparatus is altered or augmented" to improve transmission quality for the audience. Whether the business is "of sufficient size to justify a subscription to a commercial background music service" should also influence whether the exemption applies.


118 Id.

119 Id. Background music services customarily provide re-recorded versions of popular songs produced for commercial-free music programming. See Wilk, supra note 5, at 815 n.151. MUZAK, Inc. and AEI, represent the largest providers of these services. See id. (citing Jeanne McDermott, If it's to Be Heard but Not Listened to, it must Be Muzak, SMITHSONIAN, Jan. 1990, at 70). "Depending on the programming package selected, the service is made available to customers through scrambled radio broadcasts, special long-playing tapes, and satellite broadcasts." Id. (citing MUZAK SOUND & COMMUNICATIONS SYSTEMS (1990)). The services provide brand name publicly available equipment, and each format requires special equipment to receive the broadcasts or play the tapes. See id. As an example of the type of system commonly used by small business subscribers, AEI provides an integrated tape deck-amplifier rated at 10 watts. See id. at 806 n.110. MUZAK and AEI market their services on claims that the scientifically formulated programming will create an atmosphere conducive to worker productivity and increased consumer activity. See id. at 816-17 n.151.

As an indication of the cost of such subscriptions, in 1991 service providers charged from $510 (MUZAK) to $600 for a 1,500 square foot business (similar to Port Town Restaurant). See id. at 818 n.158. These costs probably included equipment rental. See id.

120 See H.R. Rep. No. 94-1733, at 75 (1976), reprinted in 1976 U.S.C.C.A.N. 5816. Like the House Report, the Conference Committee Report uses Aiken as an example of a business that lacked sufficient size to justify a subscription to a commercial background music service. See id. Interestingly, the report then states, "[h]owever, where the public communication was by means of something other than a home-type receiving apparatus, or where the establishment actually makes a further transmission to the public, the exemption would not apply." Id. This passage reinforces the notion that despite other factors like the business's physical or financial size, presence of either: (1) broadcast via a non-home-type receiver; or (2) further public transmission, automatically negates the section 110(5) exemption. See id.
Legislative history offers little explanation of the second and third requirements, which prohibit both direct charges and further transmissions.\textsuperscript{121} While Congress explicitly opted to qualify the word “charge” with the adjective “direct,”\textsuperscript{122} Congress indicated that it intended the amendment to restore the Jewell-LaSalle doctrine, under which liability attached if the proprietor received pecuniary benefit from the performance.\textsuperscript{123} In addition, while the definition in section 101 of “transmit” merely requires that a performance be communicated to a receiving device beyond the place from which the performance is rendered, Congress failed to describe the modified phrase in section 110(5), “further transmit,” other than to adopt the pre-Aiken, Jewell-LaSalle interpretation.\textsuperscript{124}

Neither the Act’s plain language nor its legislative history establishes any bright line rule apart from explicitly referring to the Aiken facts as the exemption’s outer limit.\textsuperscript{125} The utility of Aiken for establishing a bright line rule, however, is limited because the Aiken court had not discussed any of the factors that the legislature later mentioned as additional considerations.\textsuperscript{126}

D. Judicial Interpretation of the 1976 Act

In light of the vague wording of both the statute and Congress’ intent, courts have experienced difficulties in applying the section 110(5) home-style exemption to fact patterns that differ from that in Aiken.\textsuperscript{127} Statutory ambiguities currently divide courts according to two main methods of statutory construction. Some courts con-

\textsuperscript{121} See id. For a further description of the second and third requirements, see supra note 105 and accompanying text.

\textsuperscript{122} 17 U.S.C. § 110(5).

\textsuperscript{123} See H.R. Rep. No. 94-1476, at 87 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5701. “[In enacting the 1976 Act, Congress] accepts the traditional, pre-Aiken, interpretation of the Jewell-LaSalle decision, . . . .” Id. Congress advised that the facts of Aiken represented the outer limit of the section 110(5) exemption, and that any further receiver modification would be ineligible for the exemption. See id.

\textsuperscript{124} Id. Although Congress never indicated that communication to separate rooms was necessary, in Jewell-LaSalle the hotel proprietor ran speakers from a central receiver into separated private rooms. For a discussion of the Jewell-LaSalle facts, see supra notes 65-66.


\textsuperscript{126} See Wilk, supra note 5, at 801; H.R. Rep. No. 94-1476, at 87 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5701. For a discussion of these other factors, see supra note 114-17 and accompanying text.

\textsuperscript{127} See 17 U.S.C. § 110(5); H.R. Rep. No. 94-1476, at 87 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5701; see also Shipley, supra note 54, at 499 (noting tortuous history of exemption’s legislative history and indicating lack of information given to courts interpreting exemption); Wilk, supra note 5, at 801.
strue the exemption strictly according to the statutory language and merely require businesses to utilize a single receiving apparatus of a kind commonly used in private homes without further transmitting the received broadcast to the public. Other courts place considerable emphasis on an additional requirement not mentioned in the statutory language — that the exempt business be a small commercial establishment.

1. Statutory Elements

a. Receiving Apparatus of a Type Commonly Used in Private Homes

Courts encounter difficulty interpreting the requirement in section 110(5) that the user communicate the performance via "a single receiving apparatus of a kind commonly used in private homes." While some courts advocate viewing the entire system and its use as a whole, other courts focus their reviews on particular components. Although the courts that scrutinize individual components fail to agree on which components indicate non-home-type systems, at least one decision indicates that the more powerful a system's amplification equipment, the more it is likely that the system will fall outside the home-style exemption.

128. See Warenski, supra note 54, at 532; see, e.g., Broadcast Music, Inc. v. Claire's Boutiques, Inc., 949 F.2d 1482 (7th Cir. 1991) (applying strict statutory construction to home-style exemption).


130. 17 U.S.C. § 110(5); see Wilk, supra note 5, at 802-05 (arguing that courts often disqualify systems that would otherwise meet fact pattern of Aiken).

131. Compare Merrill v. Bill Miller's Bar-B-Q Enters., 688 F. Supp. 1172, 1175 (W.D. Tex. 1988) (focusing on specific components like recessed ceiling speakers and concealed wiring to find that system was not of type commonly used in private homes), with Hickory Grove Music v. Andrews, 749 F. Supp. 1031, 1037 (D. Mont. 1990) (holding that rather than merely focusing on specific components, entire system should be viewed in whole and considered in context of system's actual use). For two recent decisions advocating the totality approach to sound system review, see infra notes 156-81 and accompanying text.

132. Compare Merrill, 688 F. Supp. at 1175 (finding ceiling recessed speakers, wire length and concealment important factors), with Broadcast Music, Inc. v. Claire's Boutiques, Inc., 754 F. Supp. 1324, 1330 (N.D. Ill. 1990), aff'd, 949 F.2d 1482 (7th Cir. 1991) (finding same factors insignificant if receiver itself is commonly used in private homes).

b. Further Transmission to the Public

Section 110(5) exempts radio broadcasts via a home-style receiving apparatus unless the user: (1) directly charges customers who listen to the broadcasts; or (2) further transmits the broadcast to the public.\footnote{134} The Act defines "transmit" as: "communicat[ing] . . . by any device or process whereby images or sounds are received beyond the place from which they are sent."\footnote{135} Courts and commentators differ on how narrowly to construe the definition's phrase, "beyond the place from which they are sent."\footnote{136} Some courts examine an establishment's physical size to determine whether a further transmission to the public occurred.\footnote{137} Under this approach, the bigger the establishment's square footage, the more likely it is that the user further transmits the broadcast.\footnote{138} Other courts construe the further transmission language more strictly, holding that further transmission occurs when a signal runs through speaker wire to speakers located in different rooms from the receiver.\footnote{139}

of speaker terminals: 8 ohms, 25 volts, and 70 volts . . . capable of driving up to 40 speakers," was not type commonly used in private homes).

\footnote{134} 17 U.S.C. § 110(5).
\footnote{135} 17 U.S.C. § 101.
\footnote{136} For example, under a narrow construction, any speaker-made sound would be disqualified, since the speakers are located beyond the antenna (the place where the transmission is initially received), and beyond the receiver. Furthermore, any audible sound could be disqualified under the theory that a sound must travel beyond the place where it is received in order to reach the eardrum. See Wilk, \textit{supra} note 5, at 807-08 (arguing that further transmission to public occurs when those members of public outside confines of establishment are able to hear performance). \textit{But cf.} Springsteen v. Plaza Roller Dome, Inc., 602 F. Supp. 1113 (M.D.N.C. 1985) (holding open air Putt-Putt course exempt).

\footnote{138} See \textit{id.} (holding transmission occurred where establishments measure 2,769 square feet and 6,770 square feet). \textit{But see} Springsteen, 602 F. Supp. at 1113 (holding no further transmission occurred despite use in 7,500 square foot open air Putt-Putt course).

c. Physical and Financial Size: The Small Business Requirement

One of the first reported cases to address the home-style exemption of section 110(5) considered the business' physical size as a crucial factor.\textsuperscript{140} In \textit{Sailor Music v. Gap Stores, Inc.},\textsuperscript{141} copyright owners brought suit against two New York City Gap clothing stores for playing background music via a receiver connected to several recessed ceiling speakers.\textsuperscript{142} Holding that the Gap was not the type of small commercial business that Congress intended to exempt in section 110(5), the district court granted summary judgment in favor of the copyright owners.\textsuperscript{143} In reaching its decision, the district court not only relied upon the language in the statute, but relied heavily upon the size guidelines set forth in the House Committee Report to find that the Gap's large stores facilitated further transmission to the public.\textsuperscript{144} Without reaching the issue of whether the sound system was of a type commonly used in homes,
the Second Circuit affirmed the district court's holding and explained that Gap's size, which exceeded the 620 square foot outer limit of Aiken, justified a background music service subscription. The circuit court implicitly disagreed with Gap's argument that "further transmission" could not be found where all the speakers were located in the same place as the receiver. While physical size proved an important factor in Sailor Music, the question remained whether physical size independently enabled courts to make a section 110(5) classification.

In 1988, the Seventh Circuit adopted the small business requirement as an independent element that must be proven along with the home-style receiving apparatus and the lack of further transmission requirements. On facts similar to Muedini, an Illinois restaurant owner broadcast Chicago station 'FM 100' throughout his three room restaurant via a radio receiver and eight recessed ceiling speakers. In order to entreat customers, he broadcast Chicago station 'FM 100' throughout his three room restaurant via a radio receiver and eight recessed ceiling speakers.

145. See Sailor Music, 668 F.2d at 86. "The Gap store in the instant case exceeds this 'outer limit' [established in Aiken] . . . . Furthermore, the store is 'of sufficient size to justify . . . a subscription to a commercial background music service,' . . . a factor which further suggests Congress did not intend that the Gap store would be exempt." Id. (citations omitted). For a discussion of the legislative history regarding size and subscription to commercial background music service see supra notes 116-20 and accompanying text.

146. Sailor Music, 668 F.2d at 86; see Maslow, supra note 50, at 1081, n.123. Gap argued that liability attached only where a user communicated the radio broadcasts to different places or rooms within the same commercial establishment or different establishments, and further argued that there was no further transmission because the receiver and speakers used in the one room Gap stores were located in the same place. See Sailor Music, 668 F.2d at 86. Under section 110(5), communications are exempt if they are not received beyond the place from which they are sent. See 17 U.S.C. §§ 101, 110(5).

147. See Wareski, supra note 54, at 534. The Second Circuit failed to indicate whether the Gap stores' size merely served as evidence of a prohibited "further transmission," or whether any establishment larger than the one in Aiken (620 square feet) automatically failed to meet the exemption. Sailor Music, 668 F.2d at 86.

148. See International Korwin Corp. v. Kowalczyk, 665 F. Supp. 652, 657-58 (N.D. Ill. 1987), aff'd, 855 F.2d 375, 378 (7th Cir. 1988). The district court stated and the circuit court affirmed, "17 U.S.C. § 110(5) . . . has three basic requirements for application: (1) the receiving apparatus must be of a kind commonly used in homes; (2) the performances must not be further transmitted to the public; and (3) the business must be a small commercial establishment." Id. (emphasis added).

149. Mr. Kowalczyk owned and operated the Orbit restaurant. See Kowalczyk, 855 F.2d at 377. In order to entertain customers, he broadcast Chicago station 'FM 100' throughout his three room restaurant via a radio receiver and eight recessed ceiling speakers. See id. After ASCAP's phone calls, letters and personal contacts failed to convince him to purchase a license, the society sent two investigators to the establishment. See id. The investigators noted six copyrighted songs owned by ASCAP members and broadcast over the system during their visit. See id. The ASCAP member sued for copyright infringement. See id.

The district court held that Mr. Kowalczyk failed to meet any of the three required elements. See Kowalczyk, 665 F. Supp. at 657-58; for the three elements, see supra note 148 and accompanying text. First, the district court favored ASCAP's expert who testified to the system's commercial quality. See Kowalczyk, 665 F.
found that a restaurant owner, whose restaurant measured 2,664 square feet and netted annual profits of $35,000 to $136,000, "ha[d] sufficient space and generates enough revenue to justify the use of a commercial background music service," thus diminishing the nature of the use as the determining factor in considering whether the section 110(5) exemption applies. The Seventh Circuit affirmed the district court's reasoning that the large physical size and large financial strength of a business militate against exempting the use under section 110(5).

One court used the small economic size of a business over all other factors to find that the section 110(5) exemption applied. In *Springsteen v. Plaza Roller Dome, Inc.*, the Middle District of North Carolina minimized the factual significance of *Aiken* and exempted an outdoor miniature golf course that used six outdoor speakers mounted on light poles, to communicate radio broadcasts throughout the 7,500 square foot course. The district court found that the golf course's seasonal business and low revenues placed the small business within the ambit of the section 110(5) exemption.

Supp. at 657-58. The court noted, "[the sound system] has paging capabilities and possesses three sets of speaker terminals: 8 volts, 25 volts, and 70 volts. The receiver is capable of driving up to 40 speakers..." *Id.* at 655. Second, the district court relied on the Act's plain language defining the term "transmit," and held that the concealed wires running between the office mounted receiver and ceiling mounted speakers "further transmitted" the radio broadcasts. *Id.* at 657 (citing 17 U.S.C. § 101). Finally, the court determined that the Orbit was not the type of small business Congress intended to exempt. *See Kowalczyk*, 855 F.2d at 378.

150. 665 F. Supp. 652 (N.D. Ill. 1987), aff'd, 855 F.2d 375 (7th Cir. 1988).

151. *Kowalczyk*, 665 F. Supp. at 655. According to the district court, size embodied at least two components: first, a physical component; and second an economic component. *See id.* at 658. Despite the other elements that Mr. Kowalczyk failed to meet, the district court found the Orbit's sheer size independently sufficient to remove the case from section 110(5) exemption. *See id.*

152. *See Kowalczyk*, 855 F.2d at 375.


154. *Id.*

155. *Id.* at 1117-18. Aware that the course measured over 10 times the area in *Aiken* and used two more speakers, the court explained, "[t]he size of the... facility and the number of speakers are not... the sole or even predominant factors to consider in determining the applicability of the exemption." *Id.*

156. *See id.* Defendant golf course owner operated the course only six months out of the year. *See id.* at 1119. During this business season, the owner rarely produced more than $1,000 in business per month. *See id.* In rendering its decision, the district court noted, "if any operation is 'not of sufficient size to justify... a commercial background music service,' it is [the] Defendant's Putt-Putt course." *Id.* at 1118-19.
2. Decisional Law Based on Pure Statutory Analysis

Two recent decisions abandoned attempts to decode the complex language of the legislative history. Instead, these courts focused their analysis solely on the language of the 1976 Act. In doing so, they broke the nexus between the "small business requirement" and the section 110(5) exemption.

In Broadcast Music, Inc. v. Claire's Boutiques, Inc., the Seventh Circuit held that section 110(5) exempted a retail chain store, despite the store's relatively large physical size and gross revenues. Refusing to consider the retail chain's economic size, the district court criticized other decisions for using legislative history to change the meaning of the Act's plain language. The Claire's Boutiques court identified four factors referred to in the statute: (1) the number of receiving apparatuses; (2) whether the sound system is of a type commonly used in private homes; (3) whether music is further transmitted; and (4) whether the establishment charges admission. The circuit court explained that, rather than...
financial or physical size, the type of system used provides a far more valuable indicator in determining whether a particular user infringed a copyright. The circuit court found physical size relevant only to assess a particular stereo system’s reach. Examining the entire system, the court determined that infringement occurs only when the user either: (1) uses any non-home type components; or (2) arranges the components in a non-home type configuration. The store used only home-type equipment arranged in a typical configuration. Moreover, Claire’s did not further transmit any performances because it did not use any device or process that expanded the small home-type receiver’s normal limits.

162. See id. at 1492.

163. See id. at 1494 & n.12. Although the circuit court perceived financial size as completely irrelevant, it did not view physical size as entirely irrelevant. See id. Using the legislative history together with an assumption that home-type systems typically cover only a limited area, the circuit court found that a store may be able to argue that a particular system only covers a limited portion of the store’s total square footage. See id. Significantly, the court referred to the legislative history’s example and noted that the particular Claire’s stores at issue were small. See id. at 1494. However, the court explained, “[w]e do not do note that . . . larger stores (greater than 2,000 square feet) are closer to exceeding the size of a typical home and thus present closer cases.” Id.

164. Id.

165. See id. at 1493-94. Although Claire’s hid both the speakers and the wiring in a dropped ceiling, the circuit court affirmed the district court’s holding that these factors enjoy only minimal weight. See id. at 1494.

166. See id. at 1495. Again, the circuit court referred to legislative history, this time stating that, had Congress intended “further transmitting” to cover any system where the receiver and speakers were located in separate rooms, it could have easily done so. Id. The circuit court also observed that further transmission of a performance means more than merely running a speaker wire through a wall, or concealing the wire. See id. The court stated:

It must entail the use of some device or process that expands the normal limits of the receiver’s capabilities. We recognize that this construction of “further transmission” means that most systems that further transmit also are not home-type. But since it is conceivable that even a home-type component could further transmit under this approach, the requirement of no “further transmission” is not mere surplusage.

Id. The circuit court noted that a number of cases held “further transmission” occurred when users located speakers and receivers in different rooms. See id. (citing Gnosos Music v. DiPompo, 13 U.S.P.Q. 2d 1539, 1542 (D. Me. 1989); International Korwin Corp. v. Kowalczyk, 665 F. Supp. 652, 657 (N.D. Ill. 1987), aff’d, 855 F.2d 375 (7th Cir. 1988); Merrill v. Bill Miller’s Bar-B-Q Enters., Inc., 688 F. Supp. 1172, 1176 (W.D. Tex. 1988); Lamminations Music v. P & X Markets, Inc., 1985 Copyright L. Rep. (CCH) 19,555, 19,556 ¶ 25,790, 1985 WL 17704 (N.D. Cal. 1985); Rodgers v. Eighty Four Lumber Co., 617 F. Supp. 1021, 1022 n.1 (W.D. Pa. 1985); Sailor Music v. Gap Stores, Inc., 516 F. Supp. 923 (S.D.N.Y.), aff’d, 668 F.2d 84 (2d Cir. 1981). The circuit court explained that “[n]one of these cases relied solely on a finding of further transmission to support its holding”. Id. at 1495 n.14. Thus, the circuit court implied that those courts did not consider the further transmission requirement as carefully as they should have. See id.
Similarly, in *Edison Bros. Stores v. Broadcast Music, Inc.*, the Eighth Circuit refused to read into the statute any physical or financial size considerations. On analogous facts to *Claire's Boutiques*, the District Court for the Eastern District of Missouri held that a system's low grade, home-type quality and home-type configuration brought it within the section 110(5) exemption. Carrying the narrow statutory analysis of *Claire's Boutiques* one step further, the *Edison Bros.* court flatly refused to consider physical or financial size. However, the Eighth Circuit fell short of establishing a bright line rule. In holding that "[t]he home style exemption makes no sense unless it is applied on a store by store basis, to see" whether each application fits within the section 110(5) exemption, the district court supported an ad hoc rule for determining whether to apply section 110(5). The Eighth Circuit rejected the argument that section 110(5) does not exempt an establishment that can afford a subscription to a background music service. In refusing to consider size, the circuit court's section 110(5) analysis focused primarily on the equipment used.

Both the Seventh and Eighth Circuits abandoned previous holdings that physical and financial size prove reliable indicators when considering whether to apply the section 110(5) exemp-

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168. *Edison Bros.*, 954 F.2d at 1425.

169. See *Edison Bros.*, 760 F. Supp. at 771. Edison owned a chain of 2,500 retail clothing and shoe stores. See *Edison Bros.*, 954 F.2d at 1420. While some Edison stores had obtained licenses from BMI via their subscriptions to commercial music background services, the remaining stores used simple single receivers attached with no more than 15 feet of wire to two speakers to play radio broadcasts. See *id.* at 1420-21. In these remaining stores, Edison established a policy requiring that low grade systems with only two speakers located within 15 feet of the receiver be used to play only radio broadcasts. See *id.* When BMI's attempts to license these remaining stores failed, Edison filed suit to obtain declaratory judgment. See *id.* at 1421. BMI appealed the decision to the Eighth Circuit. See *id.*

170. *Edison Bros.*, 954 F.2d at 1425.


172. See *Edison Bros.*, 954 F.2d at 1425. In response to BMI's argument that Edison should not enjoy section 110(5) protection if it could afford a background music service subscription, the circuit court explained that neither the legislative history, nor previous opinions could persuade the Eighth Circuit to ignore the statutory language. See *id.*

173. See *id.* The circuit court noted that had Congress intended to use size as a factor, it could easily have written size into the statute. See *id.* Instead, the court noted, "[t]he statute focuses on the equipment being used, and so must we. This Court is not a legislative body, and it has no authority to rewrite the statute." *Id.*
Rather these courts focused on statutory language to conduct a scrutinizing review of the user's equipment. These decisions considered the system and its component parts as a whole. Both courts considered whether the user incorporates any non-home-type components into the system, and whether the user configures these components in a non-home-type manner. If the user either uses any non-home-type components, or configures the system in a non-home-type manner, the exemption does not apply. Concealed wiring and speakers provide only a minimal indication of whether the system is non-home-type. A performance cannot be further transmitted unless a device or process, like recording and playback, expands the normal limits of a receiver. However, neither case espoused a bright line rule. Instead, both cases support an ad hoc factual inquiry to determine the applicability of the section 110(5) home-style exemption.

As a result of these decisions, there have arisen various legislative and private attempts to clarify the ambiguity of section 110(5). In 1994, a proposal to amend the section 110(5) exemption was introduced in the House of Representatives. The amendment would eliminate both the home-style receiver requirement and the further transmission requirement. Instead, any transmission would be exempt unless the business owner directly or indirectly
charged patrons to see or hear the transmission.184 This bill has not yet been enacted into law.

On October 27, 1995 representatives from ASCAP, the National Licensed Beverage Association (NLBA), Broadcast Music, Inc. (BMI), and the Society of European Songwriters, Authors and Composers, Inc. (SESAC, Inc.), reached an accord to clarify the home style exemption.185 The agreement contemplates an amendment to section 110(5) that would consider a combination of the establishment's size in addition to the type of equipment used.186 The agreement refers to the Standard Industrial Code to divide commercial users into two classes: retail businesses and eating/drinking establishments.187

On March 15, 1996 a bill was introduced to amend certain sections of the 1976 Act, including section 110(5).188 The drafter designed the bill to provide a clear exemption for the performance of copyrighted works in small commercial establishments.189 Like

184. See id. The proposed bill provides:
Section 110(5) of the title 17, United States Code, is amended to read as follows:
"communication of a transmission embodying a performance or display of a work by the public reception of the transmission by television or radio sets located in a business establishment, unless a direct or indirect charge is made to see or hear the transmission."

Id.

185. See Memorandum from NLBA, ASCAP, BMI and SESAC (October 31, 1995) (on file with ASCAP and author).

186. See id. The agreement seeks to clarify the home style exemption to carve out clearer protections for small business while preserving copyright owners' rights to control and profit from public performances of their works. See id.

187. See id. The agreement provides:
For Retail:
Radio and Television Licensing Policy:
- under 1,500 square feet in total gross leasable space, any radio and/or TV use is exempt; . . .
- over 1,500 square feet in total gross leasable space, radio use with five or more speakers is licensable; . . .
- uses over those limits are licensable.

For Eating and Drinking Establishments
Radio and Television Licensing Policy:
- under 3,500 square feet in total gross leasable space, any radio and/or TV use is exempt; . . .
- over 3,500 square feet in total gross leasable space, radio use with up to six speakers and no more than four speakers in any room, is exempt;
- uses over those limits are licensable.

Id.

188. S. 1619, 104th Cong. (1996).
189. See id. ("To amend the provisions of title 17, United States Code, to provide for an exemption of copyright infringement for the performance of nondramatic musical works in small commercial establishments, and for other purposes.").
the 1995 ASCAP/NLBA agreement, the bill contemplates a system of identifying exempt commercial establishments based upon the size of the establishment and the type of equipment used. The proposed legislation however, identifies other criteria including the kind, number and location of the equipment, gross revenues, number of employees and "other relevant factors."  

190. See id. The bill first provides a blanket exemption for "small commercial establishments" who do not make a direct charge to see or hear the transmission and who do not further transmit the performance to the public. Id. The amendment then gives the Register of Copyrights the power to define the term "small commercial establishment" and provides a list of acceptable criteria upon which to base the definition. Id.

191. The proposed amendment provides in relevant part:

(a) IN GENERAL.—Section 110 of title 17, United States Code, is amended—

(1) in the matter preceding paragraph (1) by inserting "(a)" before "Notwithstanding";

(2) by amending paragraph (5) to read as follows:

"(5) (A) communication of a transmission embodying a performance or display of a work (except a nondramatic musical work) by the public reception of the transmission on a single receiving apparatus of a kind commonly used in private homes, unless—

(i) a direct charge is made to see or hear the transmission; or

(ii) the transmission thus received is further transmitted to the public, or

(B) communication of a transmission embodying a performance or display of a nondramatic musical work by the public reception of the transmission on the premises of a small commercial establishment, unless—

(i) a direct charge is made to see or hear the transmission; or

(ii) the transmission thus received is further transmitted to the public;"; and

(3) by adding at the end thereof the following new subsection:

"(b) (1) For purposes of subsection (a) (5) (B), the Register of Copyrights shall define the term 'small commercial establishment' by regulation, which shall include specific, verifiable criteria. Such criteria may relate to—

(A) the area of the establishment, including whether the establishment is of sufficient size to justify, as a practical matter, a subscription to a commercial background music service;

(B) the kind, number, and location of equipment used;

(C) the gross revenue of the establishment;

(D) the number of employees; and

(E) other relevant factors.

(2) The definition of small commercial establishment shall not result in an exemption to the right of public performance or to the right of public display the scope of which exceeds that permitted under the international treaty obligations of the United States.".
The United States Court of Appeals for the Seventh Circuit began its determination of whether the district court properly dismissed the case against Muedini by examining the plain language of the 1976 Copyright Act.\(^{192}\) The court next turned to the section 110(5) exemption.\(^{193}\)

To determine whether section 110(5) exempted Muedini’s use, the Seventh Circuit relied almost entirely on its earlier Claire’s Boutiques decision.\(^{194}\) Following the Claire’s Boutiques decision as closely as a “how-to” book, the Muedini court applied the Claire’s Boutiques four-part test.\(^{195}\) Construing Claire’s Boutiques, the Seventh Circuit held that a user lost the exemption if the user either incorporated any non-home-type components, or configured home-type equipment in a manner not commonly used in a home.\(^{196}\) The court interpreted Claire’s Boutiques as holding that while financial strength should not be considered, physical size provided a relevant indication of a stereo system’s reach.\(^{197}\) Finally, as in Claire’s Boutiques, the Muedini court stressed that a court should consider the entire sound system rather than merely the receiver.\(^{198}\) Further-

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\(^{192}\) See Cass County Music Co. v. Muedini, 55 F.3d 263, 266 (7th Cir. 1995). As a procedural matter, the circuit court noted that in the face of default, the district court properly required the plaintiffs to demonstrate that they were entitled to judgment as a matter of law. See id. at 265. The circuit court affirmed that under default circumstances, a court must assume that all plaintiffs’ factual allegations are true. Id. at 265-66.

\(^{193}\) See Muedini, 55 F.3d at 266. The court noted that playing a radio fell within the meaning of “performance” under the Act. Id.

\(^{194}\) See id. (citing Broadcast Music, Inc. v. Claire’s Boutiques, Inc., 949 F.2d 1482 (7th Cir. 1991), cert. denied, 504 U.S. 911 (1992)). For a discussion of Claire’s Boutiques, see supra notes 157-66 and accompanying text.

\(^{195}\) See Muedini, 55 F.3d at 267. The Muedini court reiterated, “the exemption 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, (3) the transmission is provided free of charge, and (4) the transmission is not ‘further transmitted’ to the public.” Id. (quoting Claire’s Boutiques, 949 F.2d at 1489).

\(^{196}\) See id. (citing Claire’s Boutiques, 949 F.2d at 1493).

\(^{197}\) See id. (construing Claire’s Boutiques, 949 F.2d at 1494 n.10). The circuit court rejected the Eighth Circuit’s view in Edison Bros. that neither physical size nor financial strength provided any indication of whether the section 110(5) exemption applies. See id. (construing Edison Bros. Stores v. Broadcast Music, Inc., 954 F.2d 1419, 1424 nn.11-12 (8th Cir. 1992)).

\(^{198}\) Id. at 267 (construing Claire’s Boutiques, 949 F.2d at 1493). “If the Congress had wanted the review to be limited to the receiver, it would have used the word ‘receiver’ and not ‘receiving apparatus.’ Apparatus signifies the ‘totality of means by which a designated function is performed . . . or a group of machines used together . . . to accomplish a task.’” Id. (quoting Claire’s Boutiques, 949 F.2d at 1493 (quoting AMERICAN HERITAGE DICTIONARY 120 (2d ed. 1982))).
more, the court found it “notable whether the speakers and speaker wire were concealed.”

Applying these factors to the factual setting of Muedini, the court declined to extend the home-style exemption to Muedini. While the Seventh Circuit explained that Muedini’s use met the first and third requirements — Muedini used a single receiving apparatus and provided the transmission free of charge — it concluded that he failed to meet the second requirement, that the single receiving apparatus be of a kind commonly used in private homes. The circuit court faulted the district court for its failure to consider the system as a whole. The Seventh Circuit explained that the court below focused too closely on the system’s receiver without fully considering the system’s configuration or the customizing features Muedini had installed.

The Muedini court held that Muedini both augmented his system with non-home-style components, and configured those components in a non-home-style manner. The court emphasized that Radio Shack designed Muedini’s receiver “to drive only four speakers over moderate lengths of speaker cable,” and explained that the seventy-volt transformers attached to each of the nine speakers substantially increased the receiver’s nominal impedance load (from 8 ohms to 10,000 ohms), and allowed Muedini to use up to 1,000 feet of wire without appreciable signal degradation. Moreover, the court noted that Muedini’s additional transformers allowed the system to power thirty-six more speakers than under its

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199. Id. (construing Claire’s Boutiques, 949 F.2d at 1494).
200. Muedini, 55 F.3d at 269.
201. See id. at 268. Muedini charged no fee to listen to the music. See id. The court found that Muedini’s receiver and speaker system constituted a single receiving apparatus. See id.
202. See id.
203. See id.
204. Id. The circuit court indicated that the district court should have examined Muedini’s entire system and configuration. See id.
205. Muedini, 55 F.3d at 268. In keeping with its position of accepting plaintiffs’ factual allegations as true on defendant’s default, the Seventh Circuit declined to consider the new facts presented for the first time on appeal. See id. at 264 n.2. For example, an affidavit was submitted with the amicus brief, stating that the transformers were incompatible and not used with the system. See Brief of Amicus Curiae, Cass County Music Co. v. Muedini, 55 F.3d 265 (7th Cir. 1995) (No. 92-C-706). The court rejected this attempt to introduce new expert testimony on the facts. Surprisingly, although both the amicus brief and the plaintiffs’ reply brief advised the circuit court that plaintiffs erred when they alleged that the transformers were incompatible and not used with the system. See Appellant’s Reply Brief at 4 n.3, Cass County Music Co. v. Muedini, 55 F.3d 265 (7th Cir. 1995) (No. 92-C-706).
original four-speaker design.\textsuperscript{206} Implicitly applying the \textit{Claire's Boutiques} physical size consideration, the court noted that the system's evenly spaced nine speakers, together with the customized "distributed 70-volt system," provided audible music throughout the entire 1,500 square foot dining area.\textsuperscript{207} The circuit court also found that the parallel wiring further enhanced the system's capabilities.\textsuperscript{208}

Without explaining the weight accorded to each finding, the court concluded that the system as a whole clearly exceeded the characteristics of a home-style system.\textsuperscript{209} As in \textit{Claire's Boutiques}, the court here clearly declined to establish any rule regarding the number of speakers used, and instead adhered to the circuit's ad hoc rule that, "[w]hat is 'a single receiving apparatus of a kind commonly used in private homes'" must be determined on a case by case basis.\textsuperscript{210}

V. CRITICAL ANALYSIS

In \textit{Cass County Music Co. v. Muedini}, the Seventh Circuit closely adhered to its easy-to-apply \textit{Broadcast Music, Inc. v. Claire's Boutiques} decision. While it simplified section 110(5) analysis when it abandoned financial size consideration, the court also considered inappropriate factors that frustrate home-style exemption analysis.\textsuperscript{211} In sum, the \textit{Muedini} opinion distances the Seventh Circuit's analysis from other federal courts and underscores the need for clarification of the home-style exemption in the form of a bright line rule.\textsuperscript{212}

\textsuperscript{206} See \textit{Muedini}, 55 F.3d at 268.
\textsuperscript{207} Id. at 268-69.
\textsuperscript{208} See id.
\textsuperscript{209} See id. at 269.
\textsuperscript{210} Id. Notably the circuit court rejected the notion found in \textit{Broadcast Music, Inc. v. U.S. Shoe Corp.} that a person of ordinary intelligence could understand the precise language of exemption. \textit{See Muedini}, 55 F.3d at 269 (citing \textit{Broadcast Music, Inc. v. U.S. Shoe Corp.}, 678 F.2d 816, 817 (9th Cir. 1982)).
\textsuperscript{211} Cass County Music Co. v. Muedini, 55 F.3d 263, 267 (7th Cir. 1995) (considering recessed speakers and hidden speaker wire and also stating "[t]he critical factors are the 'type and sophistication of equipment used, the size of the area in which the broadcast is audible, and whether the equipment has been altered, augmented or integrated in some fashion.'"). In rendering its decision, the \textit{Muedini} court explained that in addition to the four part test, the establishment's physical size provided a relevant consideration for determining a stereo system's reach. \textit{Id}. The \textit{Muedini} court based its decision in part, on the lower court's finding that Muedini's system provided evenly audible sound throughout a 1,500 square foot dining area. \textit{Id}.
\textsuperscript{212} For a discussion of copyright music performance litigation, see \textit{supra} notes 56-96, 127-80 and accompanying text.
In abandoning the financial size consideration, the *Muedini* court simplified the section 110(5) analysis in two ways. First, the court avoided the laborious task of interpreting the phrase "sufficient [financial] size to justify . . . a subscription to a commercial background music service . . . ."213 While other courts struggled with the gross revenues and varying profits of a business, the *Muedini* court arrived at its holding without considering these factors.214 Second, the court avoided the morass of determining which businesses could afford commercial background music systems.215 The *Muedini* court properly avoided any implication that the ability of a business to pay licensing fees can be inferred from its ability to afford a background music service.216 Licensing organizations share no agreements to maintain equal pricing with commercial background music services.217 Under the "ability to afford background music" theory, if commercial background music prices increased while direct licensing fees remained constant, the pool of businesses exempted under section 110(5) would expand in proportion to these price increases.218 Any bright line rule considering the ability of a business to afford a background music service would produce skewed results.

Although *Muedini* simplified section 110(5) by discarding the considerations of financial size and ability to afford a background music service, the Seventh Circuit inappropriately considered the physical size of a business.219 In allowing the physical size of the

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215. See Cass County Music Co. v. Muedini, 55 F.3d 263 (7th Cir. 1995).
216. Id. at 267.
217. For a comparison of the relative pricing for both a blanket performing rights license and a commercial background music subscription, see supra notes 5, 119. Often, a license is less expensive than a commercial background music subscription. For a discussion of this pricing differential, see supra notes 5, 119. However, many such subscriptions feature low wattage sound systems. For a discussion of these subscriptions, see supra note 119.
218. See Wilk, supra note 5, at 817 n.158 (contending that "if music services and radio broadcasts were substitutes for each other, the price of one would serve as a check on the other"); see also, CAMPBELL R. McCONNELL, ECONOMICS 502 (10th ed. 1987) (describing methods of determining cross-elasticity of demand). Performing rights licensing fees influence commercial background music subscription cost because music services pay license fees to cover both the music service's performance and their subscriber's subsequent performances. See Wilk, supra note 5, at 817 n.158. For a discussion of the multiple performance doctrine, see supra notes 5, 66-67 and accompanying text.
restaurant to influence the sound system’s scope, the Muedini court dramatically underestimated even a low grade sound system’s ability to provide audible sound throughout a relatively large venue.\(^{220}\) For example, a 4,000 square foot enclosed area requires only one watt of power to provide evenly audible background music.\(^{221}\) Muedini’s system, before any modification, produced forty watts.\(^{222}\) Accordingly, even in an unaltered condition, Muedini’s sound system greatly exceeded the capacity of a home-style sound system. Under the physical size criterion, even a sound system identical to the one in *Twentieth Century Music Corp. v. Aiken,* which Congress clearly intended to exempt, would more than adequately provide many venues, including the Port Town Family Restaurant, with evenly audible background music.\(^{223}\) Consequently, any consideration of physical size by the Muedini court to determine “reach of the sound system” possesses so little probative value regarding the sound system’s scope, that other courts should not consider the physical size of a business in making a section 110(5) determination.\(^{224}\)

Interestingly, the Muedini court departed from strict statutory construction and precedent when it determined that recessed

\(^{220}\) See Wilk, * supra* note 5, at 805 n.110. Loudness is measured in units called decibels, (dB), with 1 dB representing the threshold of audible tones and 130 dB representing the threshold of pain. See *id.* Normal conversation measures around 65 dB. See *id.* Background music is typically played at 60-65 dBs. See *id.* (citing *Relative Loudness Levels of Common Sounds,* STEREO REV., Jan. 1976, at 56). Acoustical power, which is measured in watts, is the total amount of energy radiated from an acoustical energy source (i.e. loudspeaker). See *id.* The amount of acoustical power necessary for a desired loudness may be computed based upon the geometric volume of the listening space. See *id.* (citing HARRY F. OLSON, MODERN SOUND REPRODUCTION 295 (1972)). Establishments with a 10 foot ceiling and 620 (similar to *Aiken*) to 4,000 square feet require only .001 to .005 watts to generate 70 dB sounds. See *id.* The amount of amplifier wattage needed to produce a given sound level depends upon the speaker’s efficiency rating. See *id.* Standard speakers operate at 1% efficiency. See *id.* at 294. A standard speaker coupled with an amplifier that operates at 50% of its rated power, requires .2 to 1 watt of power to provide background music for a listening space with a 10 foot ceiling and 620 to 4,000 square feet of floor space. See Wilk, * supra* note 5 at 805 n.110. Considering that Muedini’s receiver operated at a 40-watt rating before any customized improvements, such low cost systems clearly exceed any size/sound system scope test contemplated by the Seventh Circuit.

\(^{221}\) See Wilk, * supra* note 5, at 805 n.110.

\(^{222}\) See Cass County Music Co. v. Muedini, 55 F.3d 263, 268 (7th Cir. 1995).

\(^{223}\) Multiple statements of intent suggest that Congress may have intended courts to make an ad hoc determination of cases. See Wareniski, * supra* note 54, at 530. Congress’ choice of language in the 1976 Act to describe the home-style exemption may imply that Congress assumed that small businesses are unlikely to employ sophisticated commercial equipment. See *id.* However, the language is clear that Congress intended not to exempt sophisticated sound systems.

\(^{224}\) *Muedini,* 55 F.3d at 267.
speakers and hidden speaker wire presented "notable" considerations. Both recessed speakers and hidden speaker wire represent cosmetic, rather than system fidelity considerations. Although previous decisions considered whether a user hid speakers or wiring, neither feature appreciably improves sound quality. Neither the Act, nor the prior cases that considered these factors important, provide any justification for allowing recessed speakers and wiring to influence a sound system's exemption under section 110(5).

A review of the case law and the section 110(5) exemption reveals many creative judicial and legislative attempts to properly balance society's interest in the free flow of ideas, information and commerce, with artists' interests in controlling and exploiting their own works. While both the judicial and legislative branches advance a variety of approaches to help courts strike this balance, neither agree on a bright line rule.

Congress now considers an amendment that preserves only the direct charge prohibition and eliminates both the home-type receiving requirement and further public transmission prohibition. However, early copyright cases reveal the confusion inherent in drawing the line between direct and indirect charges.

An easy, but perhaps over simplified solution would be to focus upon one aspect of background music use. Either a square footage, a maximum wattage, a maximum dB level or a maximum number of speakers test would streamline future commercial background copyright disputes for a number of reasons. First, users, performing rights societies and courts could easily determine whether a particular use infringed upon copyright protections. Second, each test operates independent from profitability determinations and technological advances. Finally, the need to resolve current confusion and judicial disagreement outweighs the obvious arbitrary nature of tests that focus upon any one, or a combination of the above considerations.

225. Id.
226. For a discussion of cases evaluating system components, see supra notes 131-32 and accompanying text.
227. For a discussion of the Act's language and legislative history, see supra notes 98-126 and accompanying text.
228. For a discussion of copyright fundamentals, see supra notes 1-2 and accompanying text.
230. For a discussion of early court attempts to interpret "for profit" rule, see supra notes 56-73 and accompanying text.
VI. Impact

In abandoning the financial size consideration, the Seventh Circuit simplified the section 110(5) analysis in two ways. First, from the standpoint of efficiency, a court that declines to consider financial size avoids the laborious task of interpreting the phrase "sufficient [financial] size to justify . . . a subscription to a commercial background music service."\(^{231}\) Previous decisions used an approach based on the users' revenues or their financial ability to subscribe to a commercial background service, as factors in the section 110(5) analysis.\(^{232}\) However, these courts then face two complex and open-ended questions. First, how profitable must a business be to afford a license?\(^{233}\) Second, how affordable must a commercial background music subscription be before the Act compels a business owner to subscribe or buy a license? Neither the Act's plain language nor its legislative history suggest that a user's liability turns on an ability to pay the cost of either a subscription or a license.\(^{234}\) Moreover, the ability to subscribe to a commercial background music service test inaccurately presupposes that commercial background music services charge fees similar to those charged by licensing organizations.\(^{235}\)

A second advantage offered by the Seventh Circuit's rejection of the financial size test is that it eliminates the prospect that liability will be predicated upon a business owner's economic circumstances. The financial size test potentially authorizes a financially distressed user to publicly perform copyrighted works without a li-
cense, while requiring his or her more profitable competitor to pay a licensing fee for the same use. From a public policy perspective, a more prosperous business owner suffers a penalty because he or she must purchase a license, subscribe to a background music service, or face copyright litigation, while a poorly run competitor may more easily exempt its background music use under section 110(5). 236

Furthermore, a test that considers business revenue encourages litigation and presents an enforceability problem. For instance, if courts based infringement determinations on revenues, licensing societies would possess virtually no way of determining a small business' liability for copyright infringement absent pretrial discovery. As a result, licensing societies would face more costly litigation or risk widespread copyright infringement. Courts would be left to reap this litigation harvest and weed out the meritless claims that this illogical test encourages. 237 To minimize litigation costs, the new test must allow licensing societies to make fairly accurate preliminary determinations of copyright infringement before instituting litigation.

Absent a legislative amendment, the burden of establishing a bright line rule for applying the section 110(5) exemption rests with the courts. Judicial attempts to scrutinize a sound system's every detail and its application, have done little more than lead business owners and licensing organizations down a dark path into copyright confusion. Rather than adding to this confusion, courts must light the way for users and copyright owners alike by establishing a rule against which these groups can prospectively gauge their actions. Unless Congress acts, the Supreme Court should identify a central, but common element in the sound system that can be objectively measured. Once courts identify this central aspect, they


237. For a discussion of ASCAP's method of sending investigators into an establishment to listen to music and observe a sound system, see supra notes 33-35. The likelihood of identifying infringement would considerably diminish if businesses could enjoy the section 110(5) exemption based on low revenues.
can establish the desperately needed bright line rule and uniformly apply section 110(5).

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