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# Copyright Liability For Performances Of Musical Works: Use Of Background Radio Music In The Aftermath Of Twentieth Century Music Corp. V. Aiken

# COPYRIGHT LIABILITY FOR PERFORMANCES OF MUSICAL WORKS: USE OF BACKGROUND RADIO MUSIC IN THE AFTERMATH OF *TWENTIETH CENTURY MUSIC CORP. V. AIKEN*

The promotion of federal copyright protection for the products of creative activity inherently involves conflicts between the interests of creators and the public interest.[1] While the assurance of unrestricted access to creative works is desirable public policy, federal copyright law restricts public access to creative works by granting to creators limited exclusive rights in creative works.[2] Although grants of exclusive rights provide an economic incentive for continued creative activity, the resulting monopoly power of creators over creative works is inconsistent with the classical economic goal of maximum competition.[3] The empowering copyright clause of the Constitution recognizes the inherent conflicts between the interests of creators and the public interest by giving Congress the power "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."[4]

While the Constitution relies entirely on the economic incentive of exclusive rights grants to ensure continued creative activity, the federal

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1. *See* L. SELTZER, EXEMPTIONS AND FAIR USE IN COPYRIGHT: THE EXCLUSIVE RIGHTS TENSIONS IN THE 1976 COPYRIGHT ACT 3 (1978) (discussion of conflicts inherent in federal copyright protection policy). Under federal copyright law, competition between creators' interests and the public interest arises over public access to creative works and the economic cost to the public of creative works. *See id.*

2. *See id.* (tension exists between desirability of unrestricted public access to creative works and effect of federal copyright law to restrict public access to creative works).

3. *See id.* (tension exists between economic goal of maximum competition and monopoly power of creators over creative works).

4. U.S. CONST. art. I, § 8, cl. 8. "Science" in the empowering copyright clause of the Constitution refers to knowledge in general. *See* L. SELTZER, *supra* note 1, at 8 n.25.

The copyright clause implies that Congress should encourage creative activity by granting to creators limited exclusive rights to their work that restrict public access to the creative works. *See* U.S. CONST. art. I, § 8, cl. 8. Proponents of the view that federal copyright policy permits an unwarranted monopoly assert that in restricting competition, copyright creates a "monopoly subsidy" to the copyright owner in the form of higher prices for copyrighted works. *See* L. SELTZER, *supra* note 1, at 4-5. Moreover, the higher cost of copyrighted works outweighs any benefit to the public by way of accessibility to creative works. *See id.* Proponents of the view that copyright creates a monopoly subsidy also advance a microeconomic argument against granting exclusive rights. *See id.* at 5. Like any other good, the argument proceeds, the creative work is subject to the market forces of supply, demand, and price. *See id. See generally* L. SCHWARTZ, J. FLYNN & H. FIRST, FREE ENTERPRISE AND ECONOMIC ORGANIZATIONS: ANTITRUST 935 (1983) (discussing effect on public access to creative works of patent and copyright laws in authorizing Congress to grant monopolies in discoveries and writings). The copyright clause recognizes and attempts to mitigate the effect of the creator's monopoly power by limiting the duration of the creator's exclusive rights in his creative work. *See* U.S. CONST. art. I, § 8, cl. 8.

copyright statutes have not placed complete reliance on limiting grants of exclusive rights in creative works to ensure public accessibility to creative works.[5] Congress provides statutory exemptions from copyright protection when the copyright scheme working alone does not provide adequate public access to creative works.[6] For example, the Copyright Act of 1909[7] (1909 Act) exempted from copyright protection the production of phonograph records of copyrighted music,[8] any nonprofit performances of musical works and nondramatic literary works,[9] and the playing of records on coin-operated machines.[10] Technological advances in communication during the years between enactment of the 1909 Act and enactment of the Copyright Act of 1976[11] (1976 Act) were responsible for a marked increase in exemptions in the 1976 Act.[12] In enacting the 1976 Act, Congress identified thirty-three circumstances that warranted exemptions from copyright protection.[13] Twenty-seven of the 1976 Act exemptions from copyright protection fall either in the category of copying and recording exemptions,[14] or in the category of

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5. *See* L. SELTZER, *supra* note 1, at 12 (discussion of statutory departure from constitutional basis of copyright scheme). The Constitution is unique in its unconditional reliance on the inner workings of the copyright design to ensure public access to creative works. *See id.* The English Statute of Anne, which provided the model for copyright law in the United States, qualified the grant of exclusive rights to authors. *See* 8 Anne, ch. 19 (1709). For example, any Englishman who thought that the price of a book was too high could bring an action before a tribunal. *See id.* The tribunal had the power to lower the price of the book and to fine the bookseller. *See id.* In the United States between 1783 and 1786, the individual states enacted copyright statutes. *See* L. SELTZER, *supra* note 1, at 11. For example, the state legislatures of Connecticut, Georgia, New York, North Carolina, and South Carolina provided for state control of access to copyrighted works or of prices that copyright owners may charge, or of both access and price. *See id.* at 11 n.38. The Constitution has no provision for federal supervision of access or of price beyond the authorization of Congress to grant limited exclusive rights to creators. *See* U.S. CONST. art. I, § 8, cl. 8.

6. *See* L. SELTZER, *supra* note 1, at 1-2 (rationale behind statutory exemptions from copyright liability). Statutory exemptions from copyright liability represent a congressional decision that under certain circumstances, the existing copyright scheme will not produce a result beneficial to the public. *See id.* Thus, Congress exempts certain uses of copyrighted works from the requirement that users make royalty payments to copyright owners or obtain permission from copyright owners to use copyrighted works. *See id.*

7. 35 Stat. 1075 (1909) (current version at 17 U.S.C. §§ 101-914 (1982)).

8. *See id.* § 1(e). The Copyright Act of 1909 (1909 Act) exempted production of phonograph records of copyrighted music only if the parties producing phonograph records had obtained compulsory licenses and had paid the statutory fees. *See id.*

9. *Id.* § 104.

10. *Id.* § 1(e).

11. 17 U.S.C. §§ 101-914 (1982).

12. *See* L. SELTZER, *supra* note 1, at 50 (discussing need for modification of copyright scheme in response to technological change prior to enactment of Copyright Act of 1976 (1976 Act)). For example, photocopying machines and tape recorders have increased the public's copying capability, while the public access to aural and visual forms of copyrighted work has increased by means of retransmission of signals from the air or from recordings. *See id.*

13. *See* Copyright Act of 1976, 17 U.S.C. §§ 107-116, 118 (1982) (1976 Act exemptions from copyright protection).

14. Copyright Act of 1976, 17 U.S.C. §§ 107-113, 115 (1982); *see* L. SELTZER, *supra* note 1, at 53 (categorizing thirty-three 1976 Act exemptions). An example of an exemption in the

performing and displaying exemptions.[15] The remaining 1976 Act exemptions involve issues such as fair use,[16] performing rights in sound recordings,[17] and certain secondary transmissions.[18]

The exemptions for secondary transmissions originated in the litigation in the federal courts prior to enactment of the 1976 Act.[19] Cases arising

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Copyright Act of 1976 (1976 Act) falling into the category of copying and recording exemptions involves libraries with collections available to the public or for specialized research. *See* Copyright Act of 1976, 17 U.S.C. § 108(a)(2).

The libraries may, without paying royalty fees to copyright owners and without obtaining the copyright owners' permission, make copies of damaged or deteriorating works in the libraries' own collections if a new work is not available at a reasonable price. *See id.* § 108(c). The copying, however, must not result in direct or indirect commercial benefit to the libraries. *See id.* § 108(a)(1).

15. Copyright Act of 1976, 17 U.S.C. §§ 107, 109-112, 116, 118 (1982); *see* L. SELTZER, *supra* note 1, at 53 (categorizing thirty-three 1976 Act exemptions). An example of a 1976 Act exemption that falls into the category of exemptions for performances and displays allows governmental bodies or nonprofit agricultural or horticultural organizations to perform non-dramatic musical works at annual agricultural or horticultural fairs. *See* Copyright Act of 1976, 17 U.S.C. § 110(b).

16. Copyright Act of 1976, 17 U.S.C. § 107 (1982); *see* L. SELTZER, *supra* note 1, at 53 (categorizing thirty-three 1976 Act exemptions). The exemptions in the Copyright Act of 1976 (1976 Act) relating to fair use are not technically exemptions, but rather are implied rights to use copyrighted works under certain circumstances without obtaining the permission of copyright owners. *See id.* at 1. Legislative history indicates that Congress intended the fair use doctrine to apply in educational contexts. *See* H.R. REP. No. 1476, 94th Cong., 2d Sess. 65-74 (1976) (congressional discussion of general background of fair use problem, general intention behind fair use provision in 1976 Act, and intention regarding classroom reproduction of copyrighted works), *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5659, 5678-88 [hereinafter cited as 1976 HOUSE REPORT].

17. Copyright Act of 1976, 17 U.S.C. § 114 (1982); *see* L. SELTZER, *supra* note 1, at 53 (categorizing thirty-three 1976 Act exemptions). A sound recording is a purely aural work and is distinguishable from a "musical work," which is the underlying musical material and not a recording of the material. *See* A. LATMAN, THE COPYRIGHT LAW: HOWELL'S COPYRIGHT LAW REVISED AND THE 1976 ACT 62 (5th ed. 1979) (distinguishing musical work and sound recording). The copyright owner of a sound recording does not have the exclusive right to perform the recording. *See* Copyright Act of 1976, 17 U.S.C. § 114 (scope of exclusive rights in sound recordings); *see also* M. NIMMER, A TREATISE ON THE LAW OF LITERARY, MUSICAL AND ARTISTIC PROPERTY, AND THE PROTECTION OF IDEAS § 8.14, at 8-135 (1985) (copyright owner of sound recording does not have exclusive performance right). Thus, the 1976 Act effectively exempts from copyright protection performances of sound recordings. *See* L. SELTZER, *supra* note 1, at 60.

18. Copyright Act of 1976, 17 U.S.C. § 111 (1982); *see* L. SELTZER, *supra* note 1, at 53 (categorizing thirty-three 1976 Act Exemptions). Secondary transmissions are further transmissions of primary transmissions that occur simultaneously with the primary transmissions. *See* Copyright Act of 1976, 17 U.S.C. § 111 (defining transmissions). A transmitting facility makes a primary transmission when it sends broadcast signals to a secondary transmission service for further transmission. *See id.* Transmissions of performances or displays occur when any device or process communicates the performances or displays for reception in the form of images and sounds beyond the place from which a transmitting facility sends broadcast signals. *See id.* § 101 (defining transmission). One 1976 Act exemption relating to secondary transmissions permits a hotel, apartment house, or any similar establishment to retransmit a local Federal Communications Commission licensed radio or television signal to private rooms unless the establishment makes an extra charge for the retransmission. *See id.* § 111(a)(1).

19. *See infra* notes 20-22 and accompanying text (review of case precedent, prior to

under the 1909 Act concerned whether secondary transmissions constituted potentially infringing performances of copyrighted aural and visual works.[20]

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enactment of 1976 Act, relating to secondary transmissions).

20. *See, e.g.,* Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 162-64 (1975) (radio reception of broadcast of copyrighted musical compositions did not constitute performance of compositions); Teleprompter Corp. v. Columbia Broadcasting Sys., Inc., 415 U.S. 394, 408-09 (1974) (cable television system did not perform broadcast of copyrighted material); Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390, 400-01 (1968) (same); Buck v. Jewell-LaSalle Realty Co., 283 U.S. 191, 201 (1931) (hotel proprietor performed copyrighted musical compositions for guests); Society of European Stage Authors and Composers, Inc. v. New York Hotel Statler Co., 19 F. Supp. 1, 4-5 (S.D.N.Y. 1937) (same); *see also* Copyright Act of 1909, § 1(e), 35 Stat. 1075 (1909) (1909 Act did not provide definition of performance). Until Congress enacted the Copyright Act of 1976 (1976 Act), the federal courts struggled to give some meaning to the term "perform." *See generally* Note, *The Meaning of "Performance" Under the Copyright Act,* Twentieth Century Music Corp. v. Aiken, 422 U.S. 151 (1975), 7 U. TOL. L. REV. 705, 710-20 (1976) (discussion of case precedent, prior to enactment of 1976 Act, relating to activities constituting performance under 1909 Act) [hereinafter cited as Note, *The Meaning of "Performance"*]; 80 DICK. L. REV. 328, 329-33 (1976) (same).

In examining certain secondary transmissions to determine whether a performance had occurred, the United States Supreme Court in *Jewell-LaSalle* found that a hotel proprietor, who played copyrighted musical compositions for guests by means of a radio receiving set and loudspeakers, performed the musical compositions. Buck v. Jewell-LaSalle Realty Co., 283 U.S. 191, 201 (1931). Similarly, in *Hotel Statler,* the United States District Court for the Southern District of New York held that a hotel performed a copyrighted musical composition by employing two master radio receiving sets connected to guests' bedrooms. Society of European Stage Authors and Composers, Inc. v. New York Hotel Statler Co., 19 F. Supp. 1, 4-5 (S.D.N.Y. 1937).

In *Fortnightly Corp. v. United Artists Television, Inc.,* however, the United States Supreme Court held that cable television system operators did not perform the programs that the cable systems received and carried. Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390, 400-01 (1968). In another case involving cable television systems, the Supreme Court held that cable television system reception and retransmission of broadcast signals, whether from local or from distant sources, did not amount to a performance of a broadcast or copyrighted material. *See* Teleprompter Corp. v. Columbia Broadcasting Sys., Inc., 415 U.S. 394, 408-09 (1974). In 1975, the Supreme Court found that the owner of a fast food restaurant did not perform copyrighted musical works when the owner played radio music over home-quality equipment for the enjoyment of employees and customers of the restaurant. *See* Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 162-64 (1975).

In determining whether a performance qualifying for copyright protection under the 1909 Act had occurred, the courts traditionally applied either a quantitative or functional test. *See* Note, *The Meaning of "Performance," supra,* at 712-17 (application of quantitative and functional tests to determine occurrence of performance). Courts relying on the quantitative test of performance examined the extent of an alleged copyright infringer's contribution to the ultimate reception of music. *See id.* at 713. For example, the United States Supreme Court in *Jewell-LaSalle* found that by using a radio receiving set with connected loudspeakers, a hotel proprietor had provided all of the equipment necessary for reception and, therefore, had performed copyrighted musical compositions. *See Jewell-LaSalle,* 283 U.S. at 201. Similarly, in *Society of European Stage Authors and Composers, Inc. v. New York Hotel Statler Co.,* the United States District Court for the Southern District of New York found that a hotel using two master radio receiving sets connected to loudspeakers in guests' bedrooms performed a copyrighted musical composition. *See Hotel Statler,* 19 F. Supp. at 4-5.

Courts relying on the functional test of performance examined the activities of alleged copyright infringers and characterized them as either broadcasting or viewing activities. *See*

In *Twentieth Century Music Corp. v. Aiken,*[21] the United States Supreme Court found that the owner of a fast-food restaurant did not perform copyrighted musical works by playing radio music over home-quality equipment in the restaurant.[22] To clarify the status of secondary transmissions under federal copyright law, Congress explicitly defined "performance" in the 1976 Act to include secondary transmissions of sounds or visual images.[23] Nevertheless, Congress recognized the need for an exemption in situations like *Aiken,* in which small commercial establishments use equipment of the type found in private homes to retransmit broadcasts of copyrighted aural or visual works.[24] While section 110(5) of the 1976 Act codifies the "Aiken exemption" of secondary transmissions of copyrighted works over home-quality equipment, the statutory language is vague and imprecise.[25] The legislative history of section 110(5), however, provides insight into the congressional intent concerning the exemption.[26] Congress suggested circumstances relevant to the consideration of whether section 110(5) applies to a particular commercial establishment.[27]

Since enactment of the 1976 Act, only a few cases have arisen involving the section 110(5) exemption.[28] In deciding the few cases that have arisen to date, the federal courts have not been consistent in finding particular

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Note, *The Meaning of "Performance," supra,* at 714-15. Although broadcasting activities constituted performances, viewing activities were not performances within the meaning of the 1909 Act. *See Fortnightly,* 392 U.S. at 398-99. In *Fortnightly,* the Supreme Court found that cable television systems merely were relaying to additional viewers television programs already released to the public. *See id.* at 400-01. The cable systems were not engaging in broadcasting activities and thus, were not performing the television programs. *See id.* The Supreme Court in *Teleprompter Corp. v. Columbia Broadcasting Sys., Inc.* found that even when cable television systems originated programming in addition to providing reception service, the cable systems were not performing. *See Teleprompter,* 415 U.S. at 405. In *Aiken,* the Supreme Court, refusing to overrule the *Fortnightly* and *Teleprompter* decisions, held that radio reception of a broadcast was not a performance. *See Aiken,* 422 U.S. at 162.

21. 422 U.S. 151 (1975).

22. *Aiken,* 422 U.S. at 164; *see infra* notes 33 and accompanying text (discussion of *Twentieth Century Music Corp. v. Aiken).*

23. *See* Copyright Act of 1976, 17 U.S.C. § 101 (1982) (1976 Act provided definition of performance).

24. *See infra* notes 63-64 and accompanying text (1976 Act exempted from copyright infringement liability public reception of transmissions of sound or visual images on home-quality equipment).

25. *See* Copyright Act of 1976, 17 U.S.C. § 110(5) (1982) (codifying *Aiken* exemption); *see also infra* notes 73-126 and accompanying text (demonstrating reasons for uncertainty of certain establishments concerning potential copyright infringement liability).

26. *See infra* notes 65-68 and accompanying text (examining congressional intent regarding § 110(5) exemption from copyright infringement liability).

27. *See* 1976 HOUSE REPORT, *supra* note 18, at 87 (circumstances significant in determining applicability of § 110(5) exemption); *see also infra* notes 69-71 and accompanying text (discussing Congress' suggestions of circumstances relevant to applicability of § 110(5) exemption).

28. *See* Broadcast Music, Inc. v. United States Shoe Corp., 678 F.2d 816, 817-18 (9th Cir. 1982) (chain of stores liable for infringement of exclusive performance right related to copyrighted musical works); Sailor Music v. The Gap Stores, Inc., 668 F.2d 84, 86 (2d Cir.

circumstances as determinative of liability for copyright infringement.[29] In addition, several of the circumstances on which the courts have focused to assess copyright liability required the courts to make arbitrary or subjective determinations.[30] The effect of judicial inconsistency and subjectivity is to force establishments that wish to provide radio music for customer enjoyment to operate under conditions of considerable uncertainty concerning potential copyright liability.[31] The Supreme Court recognized the unique problems of small commercial establishments that feature background music in *Twentieth Century Music Corp. v. Aiken.*[32] In *Aiken,* the defendant George Aiken was the owner and operator of a small fast-service chicken restaurant in downtown Pittsburgh, Pennsylvania.[33] For the entertainment of his employees and customers, Aiken had provided a radio in the restaurant.[34] Aiken had connected to the radio four speakers that he located in the ceiling of the restaurant.[35] Throughout each business day, employees and customers heard radio station broadcasts of music, news, entertainment, and commercial advertising.[36] Aiken tuned the radio to a local station that featured two copyrighted musical compositions during a broadcast.[37] The copyright owners of each of the musical works were members of the American Society of Composers, Authors, and Publishers (ASCAP).[38] The radio station that

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1981) (same), *cert. denied,* 456 U.S. 945 (1982). Laminations Music v. P & X Markets, Inc., 1985 COPYRIGHT L. REP. (CCH) ¶ 25,790 (N.D. Cal. April 24, 1985) (same); Springsteen v. Plaza Roller Dome, Inc., 602 F. Supp. 1113, 1119 (M.D.N.C. 1985) (miniature golf course did not infringe exclusive performance right); *see also infra* notes 126 and accompanying text (review of case precedent relating to § 110(5) exemption and demonstrating federal courts' inconsistency in finding particular circumstances determinative of copyright liability).

29. *See infra* notes 73-108 and accompanying text (review of case precedent relating to § 110(5) exemption and demonstrating federal courts' inconsistency in finding particular circumstances determinative of copyright liability).

30. *See infra* notes 109-126 and accompanying text (review of case precedent relating to § 110(5) exemption and discussion of federal courts' focus on circumstances requiring courts to make arbitrary or subjective determinations).

31. *See infra* notes 73-126 and accompanying text (demonstrating reasons for uncertainty of certain establishments concerning potential copyright infringement liability).

32. 422 U.S. 151 (1975). *See* Copyright Act of 1909, § 1(e), 35 Stat. 1075 (1909) (granting copyright owner of musical work exclusive right to perform work publicly for profit). In addition to the exclusive right to perform the work publicly for profit, the 1909 Act granted to the copyright owner of a musical work the exclusive right to print, reprint, publish, copy, and vend the copyrighted work, and the exclusive right to arrange or to adapt the copyrighted work. *See id.* §§ 1(a), 1(b); *see also infra* notes 56-62 and accompanying text (discussing origins of § 110(5) exemption from copyright infringement liability).

33. *See* Twentieth Century Music Corp. v. Aiken, 422 U.S. at 152 (discussion of *Aiken* factual situation). In *Twentieth Century Music Corp. v. Aiken,* Aiken's fast-service chicken restaurant offered both carry-out and sit-down services. *Id.* Customers who chose to eat in the restaurant never remained longer than fifteen minutes. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* at 152-53.

38. *Id.* at 153. The American Society of Composers, Authors, and Publishers (ASCAP) is a performing rights society. *See* M. NIMMER, *supra* note 18, § 8.19, at 8-238 (discussion of

broadcast the music had obtained a license from ASCAP to perform both musical works, but Aiken had not obtained ASCAP's permission to perform either of the compositions.[39] The copyright owners of the musical works brought suit against Aiken to recover for copyright infringement.[40] The owners alleged that Aiken had violated the owners' exclusive rights to perform the works publicly for profit.[41]

The United States District Court for the Western District of Pennsylvania agreed with the copyright owners and awarded each of the owners the statutory money judgment for infringement.[42] On appeal, the United States Court of Appeals for the Third Circuit reversed the district court judgment.[43] The Third Circuit relied on the United States Supreme Court's holdings in *Fortnightly Corp. v. United Artists Television, Inc.*[44] and *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*[45] that cable television system operators did not perform copyrighted programs within the meaning of the 1909 Act by receiving and retransmitting broadcast signals of the programs.[46] The copyright owners appealed the Third Circuit's decision to the United States Supreme Court.[47] In addressing the issue of performance in *Aiken,* the Supreme Court noted and declined to overrule the *Fortnightly* and *Teleprompter* decisions.[48] The Supreme Court recognized the analogy the Third

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performing rights societies). ASCAP licenses the nondramatic performing rights of its members in musical works. *See id.* A nondramatic performance of a musical work occurs when the musical work does not help to tell a story. *See* Timberg, *The Antitrust Aspects of Merchandising Modern Music: The ASCAP Consent Judgment of 1950,* 19 LAW & CONTEMP. PROBS. 294, 296 n.6 (1954) (examining network television license agreement between ASCAP and ASCAP's licensees). Founded in 1914, ASCAP's function is to enforce collectively the performance rights of songwriters and publishers, whose rights are difficult to enforce on an individual basis due to the extensive performance of musical works. *See* M. NIMMER, *supra* note 18, § 8.19, at 8-238 (discussion of performing rights societies).

39. *Aiken,* 422 U.S. at 153.

40. Twentieth Century Music Corp. v. Aiken, 356 F. Supp. 271, 272 (W.D. Pa. 1973), *rev'd,* 500 F.2d 127 (3d Cir. 1974), *aff'd,* 422 U.S. 151 (1975).

41. *Aiken,* 422 U.S. at 153.

42. *Aiken,* 356 F. Supp. at 275 (awarding statutory money judgment of $250 to each plaintiff). The Copyright Act of 1909 (1909 Act) authorized a court to use discretion in assessing damages for infringements related to musical compositions, but recommended damages of $10 for every infringing performance of copyrighted musical compositions. *See* Copyright Act of 1909, § 101(b), 35 Stat. 1075 (1909).

43. Twentieth Century Music Corp. v. Aiken, 500 F.2d 127, 137 (3d Cir. 1974), *rev'g* 356 F. Supp. 271, 275 (W.D. Pa. 1973), *aff'd,* 422 U.S. 151 (1973).

44. 392 U.S. 390 (1968); *see supra* note 20 and accompanying text (discussion of *Fortnightly* in connection with federal courts' struggle to give meaning to term "perform" prior to enactment of 1976 Act).

45. 415 U.S. 394 (1974); *see supra* note 20 and accompanying text (discussion of *Teleprompter Corp. v. Columbia Broadcasting Sys, Inc.* in connection with federal courts' struggle to give meaning to term "perform" prior to enactment of 1976 Act).

46. *See Teleprompter,* 415 U.S. at 408-09 (cable television system operators did not perform programs received and carried); *Fortnightly,* Corp. v. United Artists Television, Inc., 392 U.S. at 400-01 (same).

47. Twentieth Century Music Corp. v. Aiken, 422 U.S. 151 (1975).

48. *See id.* at 162 (refusing to overrule prior decisions on grounds of stare decisis doctrine);

Circuit drew from the cable television systems decisions.[49] The Third Circuit had asserted that if the cable television systems that employed technologically advanced equipment did not perform the television broadcasts that the systems received and retransmitted, then Aiken did not perform radio broadcasts by receiving transmissions of the broadcasts on home-quality equipment.[50] The Supreme Court advanced the additional argument that a holding in *Aiken* that performance had taken place would apply to numerous small commercial establishments nationwide.[51] The Supreme Court reasoned that enforcement of a licensing requirement against the numerous establishments would be impractical and inequitable.[52] A person in Aiken's position had no control over a radio station's selection of music and, therefore, could not obtain a license for each musical work featured during radio station broadcasts.[53] Moreover, requiring persons in Aiken's position to obtain licenses covering radio broadcasts to avoid copyright liability would result in multiple compensation to the copyright owners of musical works, assuming that the radio stations also had obtained the necessary licenses.[54] Accordingly, the Supreme Court held that Aiken had not performed copyrighted musical works by playing the radio in his restaurant and, therefore, had not violated the copyright owners' exclusive performance rights.[55]

The 1976 Act, which Congress enacted to revise the 1909 Act, reflects congressional response to the Supreme Court's decision in *Aiken* that Aiken had not performed the radio broadcast featuring copyrighted musical works.[56] Congress recognized that if the copyright owner of a musical work had the exclusive right to perform the work, an express statutory definition of performance was necessary to adequately protect the right.[57] The 1976 Act, therefore, explicitly defines performance with language that includes the reception of transmissions of broadcasted musical works.[58] At the same time,

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*see also supra* note 20 and accompanying text (discussion of *Fortnightly* and *Teleprompter* decisions in connection with cases arising under 1909 Act concerning status of secondary transmissions as performances).

49. *See Aiken,* 422 U.S. at 161 (reviewing Third circuit's reasoning for decision that Aiken did not perform broadcasts of copyrighted music).

50. *See Aiken,* 500 F.2d at 137 (comparing cable television systems' receiving and transmitting equipment to radio in Aiken's restaurant).

51. *See Aiken,* 422 U.S. at 162 (noting that *Aiken* holding would be applicable to numerous establishments nationwide).

52. *See id.* (noting impracticality and inequitability of enforcing licensing requirement against numerous small commercial establishments).

53. *See id.* (noting lack of public control over radio station selections of music).

54. *See id.* at 163 (noting that enforcing licensing requirement against small commercial establishments would result in multiple compensation to copyright owners of musical works).

55. *Id.* at 164.

56. *See infra* notes 57-62 and accompanying text (tracing congressional response to Supreme Court holding in *Aiken).*

57. *See* Copyright Act of 1909, § 1(e), 35 Stat. 1075 (1909) (granting copyright owner of musical work exclusive right to perform work publicly for profit, but without providing definition of performance).

58. *See* Copyright Act of 1976, 17 U.S.C. § 101 (1972) (providing definition of performance). The 1976 Act, in providing a definition of performance, has precluded further litigation

however, Congress recognized the validity of the Supreme Court's reasoning in *Aiken* that the enforcement of a licensing requirement against small commercial establishments that played radio music on the premises represented an instance in which the internal mechanisms of the federal copyright scheme restricted public access to musical works.[59] A person in Aiken's position could protect himself against copyright liability only by not using the radio, a result that would be unjustified because radio stations presumably held licenses to perform featured copyrighted musical works.[60] The purpose of the copyright scheme is to provide economic incentives to ensure continued creative activity but not to provide multiple compensation for creative activity.[61] Accordingly, the 1976 Act included an exemption in section 110(5) that applied to the public reception of transmissions of radio broadcasts.[62]

Section 110(5) exempts from copyright infringement liability the public reception of transmissions on equipment comparable to that used in private homes.[63] The section 110(5) exemption does not apply, however, when the public pays to hear or to see a broadcast of aural or visual works, or when the public reception results from a retransmission of a broadcast.[64] The legislative history of the section 110(5) exemption indicates that Congress intended that section 110(5) typically should apply to small commercial establishments using a home-quality receiving set with no more than four ordinary loudspeakers grouped in close proximity to the receiving set.[65] Although section 110(5) effectively codifies the *Aiken* decision, the legislative history emphasizes that the *Aiken* fact situation represents the boundary of the section 110(5) exemption.[66] Congress did not intend that the exemption

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of what constitutes a performance qualifying for federal copyright protection. According to the 1976 Act, a person performs a work by directly or indirectly reciting, rendering, playing, dancing, or acting the work. *See id.* Indirect means of performing include the use of any kind of equipment that reproduces or amplifies sounds or visual images. *See* 1976 HOUSE REPORT, *supra* note 15, at 63.

59. *See supra* notes 52-54 and accompanying text (discussion of Supreme Court's reasoning that enforcement of licensing requirement against small commercial establishments would be impractical and inequitable); *see also supra* notes 1-6 and accompanying text (general discussion of federal copyright scheme).

60. *See Aiken*, 422 U.S. at 162-63 (noting that small commercial establishments must keep radio turned off to avoid potential copyright liability and that licensing requirement would result in multiple compensation to copyright owners of musical works).

61. *See supra* note 3 and accompanying text (grants of exclusive rights in copyrighted works provide economic incentive for continued creative activity).

62. *See* Copyright Act of 1976, 17 U.S.C. § 110(5) (1982) (exemption from copyright liability for public reception of transmissions on home-quality equipment); *see also supra* note 18 and accompanying text (providing definitions of transmissions).

63. *See supra* note 62 and accompanying text (provision in 1976 Act for statutory exemption related to public reception of transmissions).

64. *See* Copyright Act of 1976, 17 U.S.C. § 110(5) (1982) (inapplicability of § 110(5) exemption in specific instances).

65. *See* 1976 HOUSE REPORT, *supra* note 18, at 87 (congressional intent regarding circumstances to which § 110(5) exemption should apply).

66. *See id.* (congressional intent regarding scope of § 110(5) exemption).

apply to establishments in which the proprietor installed a commercial sound system.[67] The exemption also would be inapplicable to establishments in which the proprietor converted a home-quality receiving set into the equivalent of a commercial sound system by employing sophisticated or extensive amplification equipment.[68] The legislative history suggests certain factual circumstances that courts should consider in determining whether section 110(5) applies in a particular instance.[69] Relevant circumstances include the size, physical arrangement, the noise level of the areas within an establishment in which the reception of a broadcast occurs, and the extent to which the proprietor has converted the receiving set to improve the aural or visual quality of the broadcast.[70] Congress, however, did not prioritize or elaborate on the suggested circumstances, or limit determination of exempt status to consideration of the suggested circumstances.[71] Congress thus granted to the federal courts considerable discretion in determining the applicability of the section 110(5) exemption to public receptions of transmissions.[72]

In deciding the few section 110(5) exemption cases that have arisen to date, the federal courts have examined the factual circumstances suggested in the legislative history of section 110(5), but have not indicated clearly the relative significance of any single circumstance to an establishment's exempt status.[73] For example, Congress suggested that the size of the area in which transmission reception occurs within an establishment is significant in determining the applicability of section 110(5).[74] Both the United States Court of Appeals for the Second Circuit and the United States District Court for the Northern District of California have examined the size of the establishments in determining the availability of an exemption under section 110(5).[75] In

67. *See id.* (§ 110(5) exemption does not apply to establishments employing commercial sound systems).

68. *See id.* (§ 110(5) does not apply to establishments employing sophisticated or extensive amplification equipment to convert home-quality equipment into equivalent of commercial sound system).

69. *See* 1976 HOUSE REPORT, *supra* note 18, at 87 (circumstances significant in determining applicability of § 110(5) exemption).

70. *See* 1976 HOUSE REPORT, *supra* note 18, at 87 (circumstances significant in determining applicability of § 110(5) exemption); *see also infra* notes 85 and accompanying text (review of cases arising under § 110(5) in which courts have examined size of establishment to determine exempt status); *infra* notes 89-94 and accompanying text (review of cases arising under § 110(5) in which courts have examined physical arrangement of establishment to determine exempt status); *infra* notes 96-100 and accompanying text (review of case arising under § 110(5) in which court implicitly examined noise level of establishment to determine exempt status).

71. *See* 1976 HOUSE REPORT, *supra* note 18, at 87 (providing no indication of relative significance of suggested circumstances to exemption under § 110(5)).

72. *See infra* notes 73-126 and accompanying text (review of case precedent relating to § 110(5) exemption and demonstrating federal courts' exercise of discretion in determining applicability of § 110(5) to reception of radio broadcasts).

73. *See infra* notes 74-108 and accompanying text (review of case precedent relating to § 110(5) exemption and demonstrating federal courts' inconsistency in finding particular circumstances determinative of copyright liability).

74. *See* 1976 HOUSE REPORT, *supra* note 18, at 87 (suggesting size of establishment as circumstance significant to exemption under § 110(5)).

75. *See* Sail or Music v. The Gap Stores, 668 F.2d at 84, 86 (2d Cir. 1981) (noting square

*Sailor Music v. The Gap Stores, Inc.*,[76] seven owners of copyrighted music brought suit against The Gap Stores, Inc. (The Gap), a chain of about 420 clothing stores.[77] Although the copyright owners alleged that two Gap stores located in New York City had performed copyrighted musical works without authorization, only the performance of copyrighted music at one of the stores was at issue on appeal to the Second Circuit.[78] The store in question had an area of 2769 square feet.[79] The *Gap Stores* Court reviewed the congressional intent underlying the section 110(5) exemption reflected in the legislative history.[80] The *Gap Stores* Court noted that Congress had intended that the restaurant in *Aiken,* with an area of 1055 square feet, represent the outer limit of the section 110(5) exemption.[81] The Second Circuit thus found that the 2769 square foot Gap store exceeded the outer limit of section 110(5), and affirmed the district court's decision that The Gap had infringed the copyright owners' exclusive performance rights.[82] In *Laminations Music v. P & X Markets, Inc.*,[83] the United States District Court for the Northern District of California followed the reasoning of the Second Circuit in *Gap Stores* that Aiken's 1055 square foot restaurant represented the boundary of an exempt establishment.[84] The *P & X Markets* Court found that six grocery stores ranging in size from 10,000 to 145,000 square feet were not small commercial establishments and therefore held that the grocery chain was not exempt from liability under section 110(5).[85]

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footage of area in which radio reception occurred in establishment); Laminations Music v. P & X Markets, Inc., 1985 COPYRIGHT L. REP at ¶ 25,790 (same); *see also infra* notes 76-85 and accompanying text (review of cases in which courts have examined size of establishment to determine exempt status).

76. 668 F.2d 84 (2d Cir. 1981), *cert. denied*, 456 U.S. 945 (1982).

77. *Id.* at 85.

78. *See id.* (indicating that performance at only one store was at issue on appeal to Second Circuit). The district court record in *Sailor Music v. The Gap Stores, Inc.* indicates that performances of copyrighted musical works at two stores were in question in the lower court. *See* Sailor Music v. The Gap Stores, Inc., 516 F. Supp. 923, 923-24 (S.D.N.Y. 1981) *aff'd*, 668 F.2d 84 (2d Cir. 1981). The Second Circuit did not indicate a reason for the change. *See Gap Stores*, 668 F.2d at 85-86.

79. *Gap Stores*, 668 F.2d at 86. In *Sailor Music v. The Gap Stores, Inc.*, the sound system of the store in question consisted of four speakers recessed behind wire grids in the store's ceiling and connected to a receiver by built-in wiring. *See id.* at 85-86.

80. *See id.* at 86 (noting congressional intent regarding scope of § 110(5) exemption reflected in legislative history).

81. *See id.* (noting congressional intent that Aiken's restaurant represented boundary of § 110(5) exemption).

82. *Id.*

83. 1985 COPYRIGHT L. REP. (CCH) ¶ 25,790 (N.D. Cal. April 24, 1985). In *Laminations Music v. P & X Markets, Inc.*, a group of copyright owners brought an action against a chain of small grocery stores and a stockholder who was the principal corporate officer of the chain. *See id.* The copyright owners alleged that six of the chain's stores had performed copyrighted musical works without a license from ASCAP, the performing rights society of which all the owners were members. *See id.*

84. *See id.* (noting congressional intent regarding scope of § 110(5) exemption).

85. *Id.*

In addition to the size of the area in which transmission reception occurs within an establishment, Congress also indicated the importance of the physical arrangement of the equipment in the area in which the transmission reception takes place.[86] The legislative history of section 110(5), in describing the fact situation in *Aiken,* provides some insight into the physical arrangement to which the section 110(5) exemption should apply.[87] Congress noted that Aiken had connected the receiving set in his restaurant to four ordinary loudspeakers grouped in close proximity to the receiving set.[88] The United States Court of Appeals for the Ninth Circuit and the United States District Court for the Northern District of California have examined the location of loudspeakers with respect to a receiving set and have indicated that certain arrangements of equipment resulted in the equivalent of a commercial sound system.[89] For example, in *Broadcast Music, Inc. v. United States Shoe Corp.,*[90] the Ninth Circuit found that an arrangement of equipment consisting of four or more speakers mounted in the ceiling and connected to a single radio receiver amounted to a commercial quality sound system as a matter of law.[91] Accordingly, the United States *Shoe* Court held that the quality of the sound system placed the stores involved beyond the scope of the section 110(5) exemption, and affirmed the district court's grant of injunctive relief for unauthorized performance of copyrighted music.[92] After examining the sound systems in the six grocery stores, the United States District Court for the Northern District of California in *Laminations Music v. P & X Markets, Inc.,*[93] held that a receiver connected to six to ten ceiling-mounted speakers spread widely throughout the public selling area resulted in a sound system comparable to a commercial sound system.[94] The *P & X Markets* Court also

86. *See* 1976 HOUSE REPORT, *supra* note 18, at 87 (circumstances significant to exemption under § 110(5)).

87. *See* 1976 HOUSE REPORT, *supra* note 18, at 87 (implying physical arrangement of sound system to which § 110(5) exemption should apply).

88. *See supra* note 87 and accompanying text (legislative history implied physical arrangement of sound system to which § 110(5) exemption should apply); Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 152 (1975). (Aiken's restaurant featured radio with outlets to four speakers in ceiling).

89. *See* Broadcast Music, Inc. v. United States Shoe, 678 F.2d 816, 817-18 (9th Cir. 1982). (arrangement of sound equipment in establishment constituted commercial sound system); *P & X Markets,* 1985 COPYRIGHT L. REP. at ¶ 25,790 (same); *see also infra* notes 89-94 and accompanying text (review of cases in which courts have examined physical arrangement of sound system in establishment to determine exempt status).

90. 678 F.2d 816 (9th Cir. 1982). In *Broadcast Music, Inc. v. United States Shoe Corp.,* a performing rights society brought an action against a chain of more than 600 women's apparel stores doing business as Casual Corner. *See id.* at 817; *see also supra* note 38 and accompanying text (discussion of performing rights society). Broadcast Music, Inc. (BMI) alleged that unauthorized performances of copyrighted music had taken place in four Casual Corner stores. *See United States Shoe,* 678 F.2d at 817.

91. *See United States Shoe,* 678 F.2d at 817-18 (affirming district court's grant of summary judgment in favor of Broadcast Music, Inc.).

92. *Id.*

93. 1985 COPYRIGHT L. REP. (CCH) ¶ 25,790 (N.D. Cal. April 24, 1985).

94. *See id.* (district court held that arrangement of equipment in six grocery stores amounted to commercial sound system).

noted that the brand names of the equipment used in the grocery stores indicated that the equipment was not the type commonly used in private homes and therefore placed the stores beyond the scope of section 110(5).[95]

While the United States District Court for the Middle District of North Carolina also considered the size and the physical arrangement of the premises in *Springsteen v. Plaza Roller Dome, Inc.*,[96] the *Plaza Roller Dome* Court distinguished the miniature golf course involved in the case from the commercial establishments involved in the *Gap Stores* and *United States Shoe* decisions.[97] The *Plaza Roller Dome* Court found that the outdoor setting of the miniature golf course, together with the poor quality of the speakers, contributed to sound distortion uncharacteristic of a sophisticated sound system.[98] Based on the notion that the quality of radio reception was equally as important as the size and physical arrangement of the miniature golf course, the *Plaza Roller Dome* Court found that the owners of the miniature golf course were not liable for copyright infringement because of the poor quality of the music played.[99] Thus, the *Plaza Roller Dome* Court first considered the effect of the outdoor setting of the miniature golf course on the quality of radio reception and then determined the applicability of

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95. *See id.* (finding that "Vocall" and "Radio Shack" brand receivers and speakers did not constitute home-quality equipment).

96. 602 F. Supp. 1113 (M.D.N.C. 1985). In *Springsteen v. Plaza Roller Dome, Inc.*, ten copyright owners alleged that an outdoor miniature golf course, which was adjacent to and part of a roller rink complex, had performed copyrighted musical compositions without authorization. *See id.* at 1114. The dispute with the copyright owners was the result of a misunderstanding between the roller rink complex and ASCAP, which licensed the musical compositions in question. *See id.; supra* note 38 and accompanying text (discussion of ASCAP). The roller rink complex had entered into a written agreement with ASCAP that gave the roller rink complex the privilege of performing the musical compositions of ASCAP members for a payment of $300.00 per year. *See* 602 F. Supp. at 1114. Plaza Roller Dome, Inc. (Plaza Roller Dome) believed that the agreement permitting performance of the musical compositions covered both the roller rink and the miniature golf course areas of the Plaza Roller Dome complex. *See id.* ASCAP claimed that the agreement covered only the roller rink. *See id.* When ASCAP demanded an additional fee to license the miniature golf course, Plaza Roller Dome refused to pay. *See id.* The copyright owners brought an infringement action, and the roller rink complex filed a counterclaim against ASCAP alleging state law causes of action for fraud, deceit, intentional harassment, and unfair trade practice. *See id.*

97. *See Plaza Roller Dome,* 602 F. Supp. at 1118 (finding that outdoor setting of miniature golf course and poor quality of speakers resulted in distorted sound). *Cf. United States Shoe,* 678 F.2d at 817-18 (chain of stores liable for infringement of exclusive performance right related to copyrighted musical works); Sailor Music v. The Gap Stores Inc., 668 F.2d 84, 86 (same) (2d Cir. 1981), *cert. denied,* 456 U.S. 945 (1982).

98. *Plaza Roller Dome,* 602 F. Supp. at 1118. In *Plaza Roller Dome,* the miniature golf course had played music for its customers over a radio and speaker system, consisting of a radio receiver wired to six separate speakers, each mounted on a light pole. *See id.* at 1114. The light poles covered 7500 square feet of outdoor area. *See id.* The six speakers covering 7500 square feet of area were not in close proximity to the receiving set. *See id.* The United States District Court for the Middle District of North Carolina noted that the 7500 square foot area of the miniature golf course and the physical arrangement of the sound system would place the establishment outside the literal scope of the § 110(5) exemption. *See id.* at 1117.

99. *See id.* at 1119 (granting summary judgment in favor of Plaza Roller Dome, Inc.).

the section 110(5) exemption based on the quality of the radio reception.[100] Although Congress did not suggest the quality of transmission reception among the circumstances to consider in applying the section 110(5) exemption, the reference in the legislative history of section 110(5) to the noise level of the area within an establishment in which transmission reception occurs indicates some congressional concern with the quality of radio reception.[101]

In elaborating on the type of commercial establishments to which the section 110(5) exemption should apply, Congress indicated that the establishment should not be able to afford a subscription to a commercial background music service.[102] Accordingly, the courts in every case arising under section 110(5) have examined the feasibility of an establishment's subscription to a commercial background music service.[103] In *Sailor Music v. The Gap Stores, Inc.*, the Second Circuit agreed with the district court that the clothing store

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100. *See supra* notes 96-99 and accompanying text (*Plaza Roller Dome* court considered effect of physical arrangement of sound system on quality of radio reception at miniature golf course).

101. *See* 1976 HOUSE REPORT, *supra* note 18, at 87 (suggesting noise level of establishment as circumstance significant to exemption under § 110(5)).

102. *See* H.R. REP. No. 1733, 94th Cong., 2d Sess. 75 (reflecting congressional intent expressed in 1976 House Report regarding scope of § 110(5) exemption), *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5659, 5816 [hereinafter cited as 1976 CONFERENCE REPORT]. The Conference Report on the 1976 Act generally reflected the congressional intent expressed in the 1976 House Report. *See id.* The 1976 Conference Report explained that § 110(5) would exempt from liability small commercial establishments, such as Aiken's restaurant, which employed home-quality receiving equipment; but the Conference Report added that the establishments must be unable to afford a subscription to a commercial background music service. *See id.*

A background music service pays the copyright owners of musical works a license fee to obtain the right to perform the musical works. *See* Note, *The Meaning of "Performance," supra* note 17, at 707 n.11 (explaining function of background music service). The background music service in turn receives fees from subscribing establishments to provide an uninterrupted program of music. *See id.* The Muzak Corporation (Muzak) is probably the best-known background music service. *See id.* During the *Aiken* case, after arguing Aiken's cause as amicus curiae in the district court, Muzak provided legal representation for Aiken in his appeal to the Third Circuit. *See* Korman, *Performance Rights in Music Under Section 110 and 118 of the 1976 Copyright Act,* 22 N.Y.L. SCH. L. REV. 521, 529 (1977) (noting Muzak's involvement in *Aiken).* A decision in Aiken's favor would reinforce Muzak's argument in pending litigation concerning the allegedly unreasonable amount of the licensing fees that Muzak paid to the copyright owners of musical works. *See id.* at 529-30. Muzak wished to argue that because Muzak had to compete with the free commercial performance of music in small establishments, Muzak was entitled to a reduction in the licensing fees paid to the copyright owners. *See* M. NIMMER, *supra* note 18, § 8.18, at 8-204 (explaining Muzak's interest in outcome of *Aiken).*

103. *See* Broadcast Music Inc. v. United States Shoe Corp., 678 F.2d 816, 817 (9th Cir. 1982) (noting that subscription to commercial background music service was justified). Sailor Music v. The Gap Stores, Inc. 668 F.2d 84, 86 (2d Cir. 1981) (same); *cert. denied,* 456 U.S. 945 (1982). Laminations Music v. P & X Markets, Inc. 1985 COPYRIGHT L. REP. (CCH) 25,790 ¶ (N.D. Cal. April 24, 1985) (same); Springsteen v. Plaza Roller Dome, Inc. 602 F. Supp. at 1113, 1118-19 (M.D.N.C. 1985) (finding subscription to commercial background music service infeasible); *see also infra* notes 104-108 and accompanying text (review of cases in which courts examined feasibility of subscription to commercial background music service).

in question was of a sufficient size to justify subscription to a commercial background music service.[104] In *Broadcast Music, Inc. v. United States Shoe Corp.*, the Ninth Circuit also held that the size and nature of the chain operation involved in the case justified subscription to a commercial background music service.[105] Noting that two stores in the chain already had employed a background music service, the United States District Court for the Northern District of California in *Laminations Music v. P & X Markets, Inc.* held that the chain of small grocery stores was of a sufficient size to justify subscription to a background music service for the six remaining stores in the chain.[106] The inability to subscribe to a background music service was a reinforcing circumstance in the United States District Court for the Middle District of North Carolina's finding of no copyright infringement liability in *Springsteen v. Plaza Roller Dome, Inc.*[107] In holding that the miniature golf course was exempt under section 110(5), the *Plaza Roller Dome* Court had noted that the establishment's total annual revenues prohibited subscription to a background music service.[108]

In addition to giving no clear indication of the relative significance of any given circumstance to an establishment's possible exempt status, the federal courts have made arbitrary and subjective determinations in connection with several of the circumstances suggested in the legislative history of section 110(5).[109] For example, the legislative history of section 110(5) stated that Congress intended Aiken's restaurant to represent the outer limit of the section 110(5) exemption, but made specific reference only to the number of speakers in an establishment's sound system.[110] The *Gap Stores* Court and the *P & X Markets* Court noted the congressional intent behind section 110(5), compared the square footages of the public selling areas in the respective establishments to the square footages of Aiken's restaurant, and

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104. *See Gap Stores*, 668 F.2d at 86 (finding that clothing store was of sufficient size to justify subscription to background music service).

105. *See United States Shoe*, 678 F.2d at 817 (finding that size and nature of women's apparel chain justified presumption that chain could subscribe to background music service).

106. 1985 COPYRIGHT L. REP. at ¶ 25,790 (noting that two stores in grocery chain employed background music service).

107. 602 F. Supp. 1113, 1119 (M.D.N.C. 1985).

108. *See id.* at 1119 (comparing annual revenues of miniature golf course to presumably substantial annual revenues of Aiken's fast food business). In *Springsteen v. Plaza Roller Dome, Inc.*, the district court for the Middle District of North Carolina noted that the miniature golf course operated for only six months of every year at maximum monthly revenues of $1000 per month. *See id.* The *Plaza Roller Dome* Court looked only at the revenues of the miniature golf course and not at the revenues of the entire Plaza Roller Dome complex. *See id.* the *Plaza Roller Dome* court reasoned that if ASCAP sought to treat the miniature golf course separately for licensing purposes, the court also would adopt separate treatment to determine the applicability of § 110(5). *See id.* at 1119 n.6.

109. *See infra* notes 110-26 and accompanying text (review of case precedent demonstrating circumstances requiring courts to make arbitrary and subjective determinations).

110. *See* 1976 HOUSE REPORT, *supra* note 18, at 87 (implying that radio with outlets to four speakers in ceiling represented outer limit of § 110(5) exemption).

concluded that the establishments were not exempt under section 110(5).[111] Because the *Gap Stores* and *P & X Markets* courts findings regarding size do not reflect express congressional intent, the findings represent little more than arbitrary determinations of square footages that place an establishment beyond the scope of section 110(5).[112] In addition, the result of the *Gap Stores* and *P & X Markets* holdings is to create a wide range of objectionable square footages that does not provide a reliable indication of potential copyright infringement liability.[113]

In examining the physical arrangement of the equipment in the area in which radio reception occurred within an establishment, the courts have provided another example of an arbitrary determination.[114] The legislative history of section 110(5) suggested that Aiken's restaurant, which employed four speakers connected and located in close proximity to a single receiving set, represented the boundary of the section 110(5) exemption.[115] The *P & X Markets* and *United States Shoe* courts examined the number of ceiling-mounted speakers located in the respective establishments, but the courts gave no consistent indication of the number of speakers that placed an establishment beyond the scope of section 110(5).[116] While the *P & X Markets* Court found that a receiver connected to six to ten ceiling-mounted speakers spread widely throughout a public selling area resulted in a sound system comparable to a commercial system, the *United States Shoe* Court, found that as a matter of law a single radio receiver connected to only four ceiling-mounted speakers resulted in a commercial system.[117] Thus, the courts also have failed to provide a reliable indication of possible copyright liability relative to the physical arrangement of equipment in an establishment.[118]

The feasibility of subscription to a commercial background music service represents yet another example of a circumstance involving arbitrary deter-

111. *See Gap Stores,* 668 F.2d at 86 (size of establishment placed establishment beyond scope of § 110(5) exemption); *P & X Markets,* 1985 COPYRIGHT L. REP. at ¶ 25,790 (same).

112. *See supra* notes 110-11 and accompanying text (suggesting that *Gap Stores* and *P & X Markets* courts findings based on examination of establishment size may be inaccurate reflection of congressional intent).

113. *See supra* note 112 and accompanying text (arbitrary determinations of square footages prevent certainty regarding potential copyright infringement liability).

114. *See infra* notes 116-18 and accompanying text (review of cases demonstrating arbitrary determination related to circumstance of physical arrangement).

115. *See* 1976 HOUSE REPORT, *supra* note 18, at 87 (stating congressional intent regarding scope of § 110(5) exemption and implying physical arrangement to which exemption should apply).

116. *Compare P & X Markets,* 1985 COPYRIGHT L. REP. at ¶ 25,790 (grocery stores' use of six to ten ceiling-mounted speakers placed stores beyond scope of § 110(5) exemption) *with United States Shoe,* 678 F.2d at 817-18 (clothing store's use of four ceiling-mounted speakers placed store beyond scope of § 110(5) exemption).

117. *See supra* note 116 and accompanying text (P *& X Markets* and *United States Shoe* courts provided notably different views of physical arrangement of sound system to which § 110(5) did not apply).

118. *See supra* notes 89-94 and accompanying text (arbitrary determinations related to physical arrangement of equipment prevent certainty regarding potential copyright infringement liability).

mination.[119] The *Gap Stores, United States Shoe,* and *P & X Markets* courts indicated merely that the respective establishments had the financial resources to subscribe to a background music service.[120] The *Plaza Roller Dome* Court, while suggesting that $6000 annual revenues placed the miniature golf course within the scope of section 110(5), gave no indication of the level of revenues beyond which an establishment would not be exempt.[121]

In addition to the arbitrary determination regarding speaker numbers and annual revenues, the consideration of a sound system's commercial quality involves a subjective evaluation.[122] The district court record in *Gap Stores* demonstrates the subjective nature of the consideration.[123] In *Gap Stores,* both parties to the litigation offered expert testimony in the district court concerning the likelihood of the sound system's use in a private home.[124] Because the parties' experts disagreed about the possible use of the *Gap Stores* equipment in a home, the district court refused to grant either party's motion for summary judgment regarding copyright infringement liability.[125] In focusing on the quality of the radio reception at the miniature golf course, the *Plaza Roller Dome* Court also engaged in a subjective determination when the court found that the radio music at the miniature golf course had a distorted sound.[126] For example, while the quality of the sound might be poor in circumstances where music is a central feature, where the same music is merely background music, the quality might be rather good due to decreased listener expectations. The quality of sound is therefore subject to changing standards.

The lack of specificity in the legislative history of section 110(5) has forced courts to determine the applicability of the exemption based on any circumstance on a case by case basis.[127] Until legislative action clarifies the specific circumstances that are determinative of exempt status under section

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119. *See supra* notes 103-08 and accompanying text (review of cases demonstrating arbitrary determinations related to feasibility of subscription to background music service.

120. *See supra* notes 107-12 and accompanying text (review of cases that provided no specific indication of revenue level at which subscription to background music service becomes feasible).

121. *See Plaza Roller Dome,* 602 F. Supp. at 1119 (noting that total annual revenues of miniature golf course prohibited subscription to background music service).

122. *See infra* notes 123-25 and accompanying text (discussion of subjective nature of considerations related to commercial quality of equipment).

123. *See Gap Stores,* 516 F. Supp. at 925 (refusing to grant motions for summary judgment because of experts' disagreement regarding quality of sound system).

124. *Id.*

125. *See id.* (recognizing subjective nature of considerations related to commercial quality of equipment). The United States Court of Appeals for the Second Circuit subsequently affirmed the district court's refusal to grant either party's motion for summary judgment. *Gap Stores,* 668 F.2d at 86.

126. *See Plaza Roller Dome,* 602 F. Supp. at 1118 (finding that outdoor setting of miniature golf course and poor quality of speakers at course resulted in distorted sound).

127. *See supra* notes 73-108 and accompanying text (review of case precedent relating to § 110(5) exemption and demonstrating case by case determination of applicability of § 110(5) to radio broadcasts).

110(5), federal courts should strive to identify common circumstances in cases arising under section 110(5) that would minimize arbitrary or subjective determinations of the applicability of the exemption.[128] For example, a common characteristic of the section 110(5) cases decided to date is the tendency of the courts to find that section 110(5) did not apply to establishments that are part of a chain.[129] Both the *Gap Stores* and *United States Shoe* courts found that section 110(5) did not apply to chains of clothing stores, and the *P & X Markets* Court held that a chain of small grocery stores was not exempt under section 110(5).[130] Although consideration of whether an establishment is part of a chain might represent a simplistic approach to determining an establishment's exemption under section 110(5), the approach is appealing in several respects.[131] Most significantly, the chain store approach would effectuate the congressional intent that the section 110(5) exemption apply to small commercial establishments.[132] The chain store approach also may reflect the position of the performing rights societies that the use of radio broadcasting in small "Mom and Pop" establishments is insignificant and does not require licensing when only a home-quality radio receiver and no additional loudspeakers are in use.[133] In addition, the chain store approach would incorporate several of the suggested circumstances significant to section 110(5) determinations.[134] For example, an establishment that is part of a chain presumably has access to sufficient funds to provide for a sound system of greater sophistication than home-quality equipment or, alternatively, to subscribe to a commercial background music

128. *See infra* notes 129-37 and accompanying text (discussion of approach to copyright liability under § 110(5) that would not involve arbitrary and subjective determinations).

129. *See United States Shoe,* 678 F.2d at 817-18 (affirming district court's grant of summary judgment against chain of women's apparel stores); *Gap Stores,* 668 F.2d at 86 (chain of clothing stores had infringed exclusive performance right of copyright owners of musical works); *P & X Markets,* 1985 COPYRIGHT L. REP. at ¶ 25,790 (holding that chain of small grocery stores was not exempt from copyright liability under § 110(5)).

130. *See supra* note 129 and accompanying text (discussion of tendency of courts to find § 110(5) exemption inapplicable to establishments belonging to chain).

131. *See infra* notes 132-37 and accompanying text (discussion of advantages to adopting chain store approach in determining exemption under § 110(5). Although adoption of the chain store approach in determining exempt status under § 110(5) would offer several advantages, the approach would not address effectively all of the possible circumstances to which § 110(5) is applicable. For example, an establishment that is not associated with a chain might employ a sophisticated sound system and might generate sufficient revenues to justify subscription to a commercial background music service.

132. *See* 1976 HOUSE REPORT, *supra* note 18, at 87 (reflecting congressional intent that § 110(5) exemption apply to small commercial establishments).

133. *See* Korman, *supra* note 102, at 528 n.32 (citing Brief for Petitioners at 8-9, *Aiken,* 422 U.S. 151 (1975)) (suggesting ASCAP's position opposing potential copyright liability of small commercial establishments).

134. *See infra* note 135 and accompanying text (suggesting circumstances significant to § 110(5) that chain store approach incorporates). Whether an establishment employed a sound system of greater sophistication than home-quality equipment or whether the establishment subscribed to a background music service are circumstances that also would affect the resulting quality of the radio reception.

service.[135] Finally, the issue of whether a given establishment is part of a chain involves an objective determination and therefore, the applicability of section 110(5) using the chain store approach would not require determination on a case by case basis.[136] Thus, if the federal courts were to adopt the chain store approach, commercial establishments that wished to provide background music for customer enjoyment easily could determine potential copyright liability for infringement of the exclusive performance right.[137]

Despite judicial inconsistency and subjectivity concerning the circumstances that are determinative of copyright infringement liability, the decisions in the few cases relating to section 110(5) have been equitable.[137] Thus, a judicial decision has not prompted Congress to amend section 110(5) of the 1976 Act with more specific language regarding circumstances determinative of exempt status.[138] Only a decision with the impact of *Twentieth Century Music Corp. v. Aiken* in revealing a flaw in the federal copyright scheme is likely to trigger further legislative action concerning the section 110(5) exemption.[139]

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135. *See* 1976 CONFERENCE REPORT, *supra* note 102, at 75 (suggesting inability to subscribe to background music service as circumstance significant to exemption under § 110(5)).

136. *See supra* note 127 and accompanying text (asserting that vagueness of legislative history of § 110(5) forces case by case determination of exemption).

137. *See supra* note 31 and accompanying text (asserting that judicial inconsistency and subjectivity in determining exemption contribute to uncertainty in determing potential copyright liability).

138. *See supra* notes 129-30 and accompanying text (noting that courts did not apply § 110(5) exemption to establishments having alternatives other than turning off radio to avoid potential copyright infringement liability); Twentieth Century Music Corp. v. Aiken, 422 U.S. at 151, 162-63 (1975) (noting that small commercial establishments must keep radio turned off to avoid possible infringing performance of copyrighted musical work).

139. *See supra* 32-62 and accompanying text (tracing congressional response to Supreme Court holdings in *Aiken).*

* This note has been submitted to the 1986 Nathan Burkan Memorial Competition.