



10-1974

## Twentieth Century Music v. Aiken

Lewis F. Powell Jr.

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*d*

DISCUSS

Amplification ~~of~~ by a loudspeaker  
in a restaurant of copyrighted  
music is not a performance  
→ CA 3.

This decision may be contrary  
to Jewel (283 US) but CA 3  
thought subsequent cases diluted  
the force of Jewel

Preliminary Memo

Conf. of Dec. 6, 1974  
List 3, Sheet 4

*Deny -* No. 74-452

*close  
question  
but*

TWENTIETH CENTURY MUSIC  
CORP. and BOURNE

Cert. to CA 3  
(Van Dusen, Hunter,  
Garth)

Timely  
(with extension)

*issues  
arise  
further  
developments*

v.

AIKEN

Federal/Civil

1. Resp owns a chain of fast-food restaurants. Petrs are copy-  
right holders of two musical compositions which were broadcast by a  
radio station, received at one of resp's restaurants, and therein  
played for employees and customers over a loudspeaker system. The  
radio station held an ASCAP license for the broadcast of the works,  
but resp did not. At issue is whether resp's use of the composition

*OK*

*2*

constituted a "performance" for the purposes of § 1 of the Copyright Act, 17 U.S.C. § 1. Petrs rely on Buck v. Jewell-LaSalle Realty Co., 283 U.S. 191 (1931); resp supports CA 3's conclusion that the Jewell test was rejected in the CATV decisions, Fortnightly Corp v. United Artists, 392 U.S. 390 (1968), and Teleprompter Corp v. CBS, 415 U.S. 394 (1974).

2. FACTS: Over 5000 commercial establishments are licensed by ASCAP, at \$5 per month, to entertain their customers and employees with radio music played over loudspeaker systems. The licenses also cover the use of tapes and records. They are not required if the radio music is played over a single standard radio receiver and is not channeled into auxiliary speakers. Fees for these licenses constitute less than 0.4% of ASCAP's revenues. However, ASCAP's ability to require licenses has some unknown effect on the fees it is able to charge such services as Muzak, whose principal competition is in-house radio reception and speaker systems. The latter fees are somewhat over \$2 million per year, or about 3% of ASCAP's total revenues.

The district court (W.D. Pa. Weiss) concluded that Jewell controlled. That case was a unanimous decision authored by Justice Brandeis, and dealt with virtually identical facts (as discussed below, Jewell does differ in that there the radio station was not itself licensed to "perform" the compositions). The DC recognized that Fortnightly cast doubt on the applicability of Jewell. However, it concluded

that this Court would have expressly overruled Jewell had it meant to do so. It also relied on the existence of established business relationships based on Jewell, on the fact that CATV and radio need not necessarily be treated consistently, and on a judicial unwillingness to upset a 30-year status quo in an area subject to congressional control.

CA 3 reversed. It acknowledged that Jewell is on "all fours" with this case. It concluded, however, that Fortnightly and Teleprompter had decreed that Jewell's "quantitative" test (one which focuses on how much the alleged infringer does to bring about the hearing of a copyrighted work) was to be replaced by a "functional" test (one which focuses on whether the alleged infringer functions as a broadcaster or merely as a viewer -- the latter term being broadly used to include those who receive broadcast signals and extensively enhance and redistribute them). CA 3 thought there was no basis for distinguishing between radio and CATV, and noted that in Fortnightly this Court approvingly cited Buck v. Debaum, 40 F.2d 734 (S.D. Cal 1929), a pre-Jewell radio case which held that persons such as resp do not "perform" when they merely actuate electrical instrumentalities which render audible signals which are freely "omnipresent in the air." 392 U.S. at 398, n. 24. CA 3 concluded that no "performance" occurred when resp extended the range of audibility of a broadcast program through equipment much less elaborate and sophisticated than that used in CATV operations.

3. CONTENTIONS: Petrs rely on Jewell, contending that this situation is plainly within its facts even if the CATV cases did serve to limit it to its facts. Resps contend that this is a different case from Jewell, inasmuch as there the broadcaster was not licensed to perform the composition; they note that in Fortnightly this Court said:

"The [Jewell] Court held the hotel liable for infringement but noted that the result might have differed if, as in this case, the original broadcast had been authorized by the copyright holder. 283 U.S. at 199, n.5. The Jewell-LaSalle decision must be understood as limited to its own facts." 392 U.S. at 397, n. 18.

Petrs contend that this difference is irrelevant, for two reasons. First, since 1941 the ASCAP license for broadcasters has expressly negated the grant of an implied license to persons receiving the broadcast; second, the certified question in Jewell was whether certain acts constituted a "performance," and this is a question wholly unrelated to whether there was an implied license.

Petrs contend that the CATV cases are distinguishable in that they concerned systems which merely enhance the ability of private viewers to receive signals on their private TV sets, whereas here the resp functions as an "active" public performer by installing and controlling the radio system; from petr's point of view, resp is no different from a restaurant proprietor who plays tapes or records, or who hires a band. Resp points out that many cable subscribers are not private individuals, but rather are commercial

establishments which use the cablecasts for entertainment purposes similar to those at issue here.

Petrs rely heavily on the patterns of business that have been established in reliance on Jewell. They contend that Flood v. Kuhn, 407 U.S. 258 (1972), is an example of this Court's willingness to vindicate such reliance interests even though subsequently-developed law applicable to similar situations may be in apparent conflict. They also contend that the Jewell formula has been accepted by Congress, by virtue of frequent amendments to the Copyright Act without overruling it, and by incorporating it into various proposals to overhaul the copyright laws.

Resp contends that CA 3's decision does not threaten to disrupt any existing relationships of the importance of those in Flood. The revenues at issue are only a minor portion of ASCAP's total revenues, and presumably much of the loss could be recouped by increased broadcast license fees.

4. DISCUSSION: This is an inevitable problem, in light of Jewell and the CATV cases. To my mind, it can be reasonably resolved in either direction. The strongest argument for the petrs is that while the CATV cases may indicate that the wrong test was applied in Jewell, concern for established business practices suggests that Jewell should not now be directly overruled. See Fortnightly, 390 U.S. at 401, n. 30. As for resp's distinction of Jewell, this Court's above-quoted statement in Fortnightly does give it some weight; however,

Jewell has long been accepted as being applicable to licensed broadcasts. See Society of European Stage Authors & Composers v. New York Hotel Statler Co., 19 F. Supp. 1 (SDNY 1937).

This problem is a creation of this Court, and as a matter of legal principle merits this Court's resolution. However, as a practical matter, the issue is a good candidate for deferral pending further CA consideration or possible Congressional action -- the amount of money involved is fairly small, especially as to any one copyright holder, and CA 3's decision is not an unreasonable interpretation of the effect of the CATV cases.

There is a response.

11/25/74

Jacobs

CA and DC ops in pet app.







*Affirm*

In the amplification by loudspeaker (in a restaurant) of a copyrighted song a "performance" within Copyright law? CA 3 said No.

Q is whether Jewell-LaSalle (tho limited to its facts by Fortnightly & Teleprompter) remain a viable precedent - tho a limited one.

~~\_\_\_\_\_~~  
The entertainment world has relied on Jewell-LaSalle - and other advanced countries have same rule.

But the functional analysis of Fortnightly & Teleprompter emanulate - if not in effect - overrule LaSalle.

The factual distinction made in Fortnightly (that broadcaster was not licensed to broadcast the music) makes some sense - as owner of copyright was receiving no royalties)

### Ripkind (Petr.)

Jewell-LaSalle is ~~undoubtedly~~ understandable - all on its facts. It involved rebroadcasting radio music by a hotel to rooms of its guests. Decision, by Brandis, held this to be a performance.

CA 3 agreed that Jewell-LaSalle would control but for Fortnightly & Teleprompter.

Over 5000 ill. exists which were made in reliance on Jewell-LaSalle

CA 3 mistakenly thought Jewell had been overruled. It has been limited to its facts.

Ripkind said this case presents same facts

Ripkind (cont)

9. Stewart presides Ripkind as

to determine between Barber, Nicks  
or Rent's office in one hand and  
a restaurant on other. Ripkind  
announced that if it is proved or  
agreed that the application is for  
business purposes, same will usually  
apply. First or practical matter, it  
only a single rule not in need without  
certification - no account in need  
to collect together. Here must be  
known immediately. \*

Cohen (Corp)

Copyright owner in trying to exact  
a double payment.  
There are thousands of thousands of  
"Cohen". Only 5000 known subjects  
there has been no will relation in  
Spencer - in Salt.

---

\* Ripkind will present Registration - including  
a list passed by Senate - drawn Eric Hin  
way.

Cohen (cont.)

Agree. You can be distinguished  
from Jones-LaSalle

Agreement to see from Cohen in

~~performing~~ "performing". He does not

know any critical over the program

The "functional concept" test of

Telepresence encompasses the rationale of LaSalle

One of facts in Jones-LaSalle was that

the groundbreaking nature was undeniably

Dr. Stewart Munkin like in a conference

factual agreement.

~~Agree~~ that Cohen proposed was  
nature, Cohen's. Type was would  
be excluded from "performances"

Ripkin's (Reply)

fact that groundbreaking nature in LaSalle  
was not licensed over in relevant to CTS

decision.

Cohen spent money to buy that music

to his customers - this is common

15,000 establishments in Musack.

BENCH MEMORANDUM

TO: Mr. Justice Powell

FROM: Ron Carr

DATE: April 22, 1975

No. 74-452 - Twentieth Century Music Corp. v. Aiken

I recommend that you vote to affirm. It seems to me clear beyond question that, analytically, Buck v. Jewell-LaSalle Realty Co., 283 U.S. 191 (1931), on the one side, and, on the other, Fortnightly Corp. v. United Artists Television, 392 U.S. 390 (1968) and Teleprompter Corp. v. CBS, 415 U.S. 394 (1974), cannot stand together. Moreover, in all points relevant to its rationale, Jewell-LaSalle is squarely controlling in this case and would require reversal here - i.e., a holding of infringement. On the other side, the rationale of Fortnightly and Teleprompter also would seem controlling, there being no salient difference, in point of doctrine, between those cases and this. Fortnightly-Teleprompter would, of course, require affirmance here, and, hence an at least implicit overruling of Jewell-LaSalle.

You could vote, however, to reaffirm the vitality of Jewell-LaSalle, even though it conflicts with Fortnightly-Teleprompter, simply on stare decisis grounds similar to those relied on in Flood v. Kuhn. The argument for this position is that, despite Jewell-LaSalle's obvious inconsistency with

Fortnightly-Teleprompter's rationale, its result should continue to govern the particular problem with which it dealt: use by commercial establishments, i.e., restaurants and hotels, of radio (and presumably television) broadcasts of copyrighted materials. In matters of statutory construction, the role of stare decisis is more powerful than it is with respect to, say, constitutional interpretation, since, if the result in a case is inconsistent with congressional intent, Congress could overrule it by enacting statutory reform. Here Congress has, on several occasions, declined to overrule Jewell-LaSalle. Moreover, the Court's overruling of its previous statutory construction would disrupt long-standing business relationships arranged in justified reliance on the prior decision. This was not the case with respect to the CATV problems presented in Fortnightly-Teleprompter, since those problems involved an entirely new industry and, of necessity, a new application of the Copyright Law. It is the case with respect to the problem presented here. If the Jewell-LaSalle rule needs reform, it should be accomplished by Congress.

The weakness of this argument here, I think, is that Jewell-LaSalle has already, in practical effect, been overruled by Fortnightly. The CATV problem dealt with in Fortnightly is indistinguishable in point of economic dimensions and the purposes of the Copyright Law from the Jewell-LaSalle

hotel problem. Fortnightly, of course, adopts a functional test - whether the copyright use is closer to that of a broadcaster or viewer-listener, and this test is fundamentally inconsistent with Jewell-LaSalle's quantitative test - whether the use, for-profit, increases the number of auditors or viewers of the broadcasted, copyright materials. The functional test was considered, but rejected in Jewell-LaSalle; the quantitative test was considered, but rejected, in Fortnightly, which expressly limited Jewell-LaSalle to its facts, and more specifically to the fact that, there, the original broadcast had not been licensed by the copyright holder. 392 U.S. at 396 n. 18. Congress has allowed Fortnightly, with its obvious limitations on Jewell-LaSalle, to stand for seven years. Hence, it can be argued that after Fortnightly, continued reliance on Jewell-LaSalle was misplaced.

More importantly, however, I think that Fortnightly may have been rightly decided, as an economic matter. As we discussed so extensively with respect to the Williams & Wilkins case, the Copyright Law inevitably involves a trade-off between the widest possible dissemination of the copyright holder's work and the necessity of supplying economic incentives to induce the copyright holder to produce the work in the first place. The Copyright Law mandates that the copyright holder be able to extract a monopoly profit for his work. But there are, economically, more <sup>or</sup> and less efficient ways of extracting such a

monopoly profit; the less efficient the method - in economic terms, the greater the transaction costs - the more costly it will be for the public to gain access to and benefit from the work. Moreover, high transaction costs do not necessarily increase the copyright holder's compensation and, hence, do not advance the legitimate purposes of the Copyright Law. In deciding whether a particular use should be deemed an infringement, the Court's proper focus, it seems to me, should be on the following question: at what point in the process should the copyright holder's monopoly profit be extracted, in order to ensure that the holder gets full advantage of the copyright, but at the lowest possible transaction costs?

*yes* | Fortnightly's functional analysis and, more particularly, its result is consistent with the economic approach outlined above. So long as the full monopoly profit can be extracted at one point, it is more efficient that it be done at that point, rather than at multiple points later in the process. Thus, it is more efficient that, as in Fortnightly and Teleprompter, the monopoly profit be collected from the original broadcaster - and collected in full, its value determined by the predicted number of viewers/auditors - than at a later point in the process from numerous intermediaries who enhance the number of persons in the listening or viewing market. The important point is that, no matter where extracted, the monopoly profit will presumably



be collected in full, but that transaction costs increase in proportion to the number of collections that have to be made.

So, here, it may be that ASCAP's license fee to radio stations is lower because, under Jewell-LaSalle, it can also collect from individual business establishments that use the broadcasts of copyrighted material to entertain their customers. It would, I think, probably be wrong to suggest that by collecting from both the radio stations and individual businesses, ASCAP is collecting two monopoly profits for the same use. There may, however, be some slippage due to information problems, so that the broadcaster-licensees and the individual business establishments do pay somewhat more than a single monopoly profit for the radio licensee's use. The more important problem, however, is transaction costs. Collecting from multiple business establishments costs far more than collecting the full profit from the original broadcaster. If, therefore, it can be said that ASCAP is collecting from both the broadcaster and the business establishments for the same use, then the economically sound course would be for the Court to allow a charge only to the broadcaster, and, in effect, to require ASCAP to increase that charge to the extent necessary to extract the full monopoly profit.

Broadcasters (except in the case of specialized enterprises like Muzak affiliates) are paid by advertisers, and broadcasters are

willing to pay a license fee for use of the copyright because such use enhances the value of their advertisers' product. Thus, to the extent that enterprises like the CATV stations in Fortnightly and Mr. Aiken's restaurant increase the broadcaster's audience - both for the copyrighted work and the advertisement - that fact will be reflected in the amount that advertisers will be willing to pay copyright holders. Moreover, the advertiser will be willing to pay for use by all auditors, including those who, in economic effect, rent their listening equipment from restaurants and hotels, as well as those who listen by means of rented or purchased equipment in their own homes. Since the monopoly profit for use by all auditors can be collected from advertisers, it would be less efficient to allow it to be collected in part from advertisers and in part from equipment renters like Mr. Aiken and most CATV stations.\*

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\* I should point out that, on this analysis, Teleprompter was, on its facts, wrongly decided. Some of the CATV stations in Teleprompter eliminated the local advertisements included in original broadcasts of distant origin and substituted local advertisements of their own. Even had they not done this, however, the original broadcaster's local advertisers would not be willing to pay an increased fee for the market extension caused by CATV. Hence, the copyright holder could not extract the full monopoly profit from the original broadcaster and, I think, should have been allowed to collect from the CATV stations as well. Indeed, because of the local advertiser problem, an argument can be made that the Fortnightly-Teleprompter rule makes more sense in the context of the present case than it did in Fortnightly and Teleprompter themselves.

I think, therefore, that in light of the purposes of the Copyright Law, the Fortnightly approach is probably correct, at least as applied to the circumstances here. First, Mr. Aiken does not attempt to eliminate advertisements from the broadcasts he plays in his restaurant. Second, the consumers served by Mr. Aiken are presumably among those of interest to the broadcaster's advertisers.

Jewell-LaSalle could, of course, be flat-out overruled. But I think the better course is a variant of that taken in Fortnightly itself. As noted above, Fortnightly distinguished Jewell-LaSalle on the ground that, there, the broadcaster was not himself licensed. This distinction relies on a fact that was not at all essential to Jewell-LaSalle's rationale, as Justice Fortas, in his Fortnightly dissent, pointed out. Nonetheless, the distinction makes some sense. If the broadcaster is not licensed, then the copyright holder is receiving no recompense from the use of his work - whether from the broadcaster himself, intermediaries like hotels and restaurants, or, most importantly, from the ultimate consumer. Thus, it is not inequitable to allow the copyright holder to collect at some point in the chain, perhaps on a contributory infringement theory.

But when, as here, it can be assumed that the copyright holder can collect from the broadcaster for all use by all auditors, then it seems to me sensible that Fortnightly should control, and that the copyright holder be required to collect from the broadcaster directly.

Ron

Douglas, J.

The Chief Justice  
 Reverses  
 Agrees with Rappaport  
 arguments that La Salle  
 contract - a valid  
 assignment because  
 have not received  
 La Salle

Not present

Brennan, J. ~~\_\_\_\_\_~~ ~~\_\_\_\_\_~~  
 Affirms

(Wanted to hear from  
 Patterson before voting)

Stewart, J. ~~\_\_\_\_\_~~ ~~\_\_\_\_\_~~  
 Affirms

Not a "performance" to  
 turn on a radio set.  
 We would have to overcome  
 Franchising & Telephonics.  
 See note 18 of Franchising.  
 La Salle has been limited  
 to situation where the  
 franchise was not  
 licensed. Then copyright  
 owner was receiving no  
 royalties. Then was  
 critical distinction.  
 It would be impossible  
 to enforce the rule urged  
 by Pelt. Inmate that  
 this was "public" need not overcome

La. Sale has been  
announced by Fortnightly  
& Telegraph.  
Economic reality in  
contrast with latter  
cases; Banks becoming  
more economically  
sound.

Powell, J. Option

Option with Potter  
Given will  
change fortnightly  
& Telegraph -  
but they are controlling

Option

Blackburn, J. Revenue  
There is a distinction  
between CPT V & Radio  
- but not necessarily controlling

Rehquist, J. Option  
Class 3 - but  
Telegraph & fortnightly  
contrast.

To: The Chief Justice  
Mr. Justice Douglas  
Mr. Justice Brennan  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

LFP

From: Stewart, J.

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1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

                      
No. 74-452  
                    

Twentieth Century Music  
Corporation et al.,  
Petitioners,  
v.  
George Aiken.

On Writ of Certiorari to the  
United States Court of Ap-  
peals for the Third Circuit.

[June —, 1975]

MR. JUSTICE STEWART delivered the opinion of the Court.

The question presented by this case is whether the reception of a radio broadcast of a copyrighted musical composition can constitute copyright infringement, when the copyright owner has licensed the broadcaster to perform the composition publicly for profit.

I

The respondent George Aiken owns and operates a small fast-service food shop in downtown Pittsburgh, Pennsylvania, known as "George Aiken's Chicken." There are no waiters or waitresses in the conventional sense. The food is simple and reasonably priced. Some customers carry out the food they purchase and eat it elsewhere, while others remain in the establishment and eat at counters or booths. Usually the "carry-out" customers are in the restaurant for less than five minutes, and those who eat there seldom remain longer than 10 or 15 minutes.

A radio with outlets to four speakers in the ceiling receives broadcasts of music and other normal radio programming at the restaurant. Aiken usually turns on the

Reviewed  
LFP  
5/30  
Join

radio each morning at the start of business. Music, news, entertainment, and commercial advertising broadcast by radio stations are thus heard by Aiken, his employees, and his customers during the hours that the establishment is open for business.

On March 11, 1972, broadcasts of two copyrighted musical compositions were received on the radio from a local station while several customers were in Aiken's establishment. Petitioner Twentieth Century Music Corporation owns the copyright on one of these songs, "The More I See You"; petitioner Mary Bourne the copyright on the other, "Me and My Shadow." Petitioners are members of the American Society of Composers, Authors and Publishers (ASCAP), an association that licenses the performing rights of its members to their copyrighted works. The station that broadcast the petitioners' songs was licensed by ASCAP to broadcast them.<sup>1</sup> Aiken, however, did not hold a license from ASCAP.

The petitioners sued Aiken in the United States District Court for the Western District of Pennsylvania to recover for copyright infringement. Their complaint alleged that the radio reception in Aiken's restaurant of the licensed broadcasts infringed their exclusive rights to "perform" their copyrighted works in public for profit.

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<sup>1</sup> For a discussion of ASCAP, see *K-91, Inc. v. Gershwin Publishing Corp.*, 372 F.2d 1 (CA9).

ASCAP's license agreement with the Pittsburgh broadcasting station contained, as is customary, the following provision:

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

The District Judge agreed, and granted statutory monetary awards for each infringement. 356 F. Supp. 271. The United States Court of Appeals for the Third Circuit reversed that judgment, 500 F. 2d 127, holding that the petitioners' claims against the respondent were foreclosed by this Court's decisions in *Fortnightly Corp. v. United Artists*, 392 U. S. 390, and *Teleprompter Corp. v. CBS*, 415 U. S. 394. We granted certiorari. — U. S.

## II

The Copyright Act of 1909, 35 Stat. 1075, as amended, 17 U. S. C. § 1 *et seq.*,<sup>2</sup> gives to a copyright holder a monopoly limited to specified "exclusive" rights in his copyrighted works.<sup>3</sup> As the Court explained in *Fortnightly Corp. v. United Artists, supra*:

"The Copyright Act does not give a copyright

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<sup>2</sup>The Constitution gives 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." U. S. Const., Art. I, § 8, cl. 8. See, *e. g.*, *Burrow-Giles Lithographic Co v Sarony*, 111 U. S. 53, 58; *Trade-Mark Cases*, 100 U. S. 82, 94.

<sup>3</sup>17 U. S. C. § 1 provides:

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

"(a) To print, reprint, publish, copy, and vend the copyrighted work;

"(b) To translate the copyrighted work into other languages or dialects, or make any other version thereof, if it be a literary work; to dramatize it if it be a nondramatic work, to convert it into a novel or other nondramatic work if it be a drama; to arrange or adapt it if it be a musical work, to complete, execute, and finish it if it be a model or design for a work of art;

"(c) To deliver, authorize the delivery of, read, or present the copyrighted work in public for profit if it be a lecture, sermon, address or similar production, or other nondramatic literary work, to make or procure the making of any transcription or record thereof



## 4 TWENTIETH CENTURY CORP. v. AIKEN

holder control over all uses of his copyrighted work. Instead, § 1 of the Act enumerates several 'rights' that are made 'exclusive' to the holder of the copyright. If a person, without authorization from the copyright holder, puts a copyrighted work to a use within the scope of one of these 'exclusive rights,' he infringes the copyright. If he puts the work to a use not enumerated in § 1, he does not infringe." *Id.*, at 393-395.

Accordingly, if an unlicensed use of a copyrighted work does not conflict with an "exclusive" right conferred by the statute, it is no infringement of the holder's

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by or from which, in whole or in part, it may in any manner or by any method be exhibited, delivered, presented, produced, or reproduced; and to play or perform it in public for profit, and to exhibit, represent, produce, or reproduce it in any manner or by any method whatsoever. The damages for the infringement by broadcast of any work referred to in this subsection shall not exceed the sum of \$100 where the infringing broadcaster shows that he was not aware that he was infringing and that such infringement could not have been reasonably foreseen; and

"(d) To perform or represent the copyrighted work publicly if it be a drama or, if it be a dramatic work and not reproduced in copies for sale, to vend any manuscript or any record whatsoever thereof; to make or to procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, performed, represented, produced, or reproduced; and to exhibit, perform, represent, produce or reproduce it in any manner or by any method whatsoever; and

"(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 any form of record in which the thought of an author may be recorded and from which it may be read or reproduced . . ." 17 U. S. C. § 1.

rights. No license is required by the Copyright Act, for example, to sing a copyrighted lyric in the shower.<sup>4</sup>

The limited scope of the copyright holder's statutory monopoly, like the limited temporal duration of a copyright monopoly required by the Constitution,<sup>5</sup> reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts.<sup>6</sup> The immediate effect of our copyright law is to secure a fair return for an "author's" creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good. "The sole interest of the United States and the primary object in conferring the monopoly," this Court has said, "lie in the general benefits derived by the public from the labors of authors." *Fox Film Corp. v. Doyal*, 286 U. S. 123, 127. See *Kendall v. Winsor*, 21 How. 322, 327-328; *Grant v. Raymond*, 6 Pet. 218, 241-242. When technological change has rendered its literal

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<sup>4</sup> Cf. *Wall v. Taylor*, 11 W. B. D. 106-107 (1882) (Brett, M. R.): "Singing for one's own gratification without intending thereby to represent anything, or to amuse anyone else, would not, I think, be either a representation or a performance, according to the ordinary meaning of those terms, nor would the fact of some other person being in the room at the time of such singing make it so . . . ."

<sup>5</sup> See M. Nimmer, Copyright § 5 (1974).

<sup>6</sup> Lord Mansfield's statement of the problem almost 200 years ago in *Sayre v. Moore*, 1 East 361n, 102 Eng. Rep. 139n (K. B. 1785) bears repeating:

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

terms ambiguous, the Copyright Act must be construed in light of this basic purpose.<sup>7</sup>

The precise statutory issue in the present case is whether Aiken infringed upon the petitioners' exclusive right, under the Copyright Act of 1909, 35 Stat. 1075, as amended, 17 U. S. C. § 1 (e), "[t]o perform the copyrighted work publicly for profit."<sup>8</sup> We may assume that the radio reception of the musical compositions in Aiken's restaurant occurred "publicly for profit." See *Herbert v. Shanley*, 242 U. S. 591. The dispositive question, therefore, is whether this radio reception constituted a "performance" of the copyrighted works.

When this statutory provision was enacted in 1909, its purpose was to prohibit unauthorized performances of copyrighted musical compositions in such public places as concert halls, theaters, restaurants, and cabarets. See H. R. Rep. No. 2222, 60th Cong., 2d Sess. (1909). An orchestra or individual instrumentalist or singer who performs a copyrighted musical composition in such a public place without a license is thus clearly an infringer under the statute. The entrepreneur who sponsors such a public performance for profit is also an infringer—direct or contributory. See generally M. Nimmer, Copyright §§ 102, 134 (1974). But it was never contemplated that the members of the audience who heard the composition would themselves also be simultaneously

<sup>7</sup> In *Fortnightly Corp. v. United Artists*, 392 U. S. 390, the Court stated:

"[O]ur inquiry cannot be limited to ordinary meaning and legislative history, for this is a statute that was drafted long before the development of the electronic phenomena with which we deal here. In 1909 radio itself was in its infancy, and television had not been invented. We must read the statutory language of 60 years ago in the light of drastic technological change." *Id.*, at 395-396 (footnotes omitted).

<sup>8</sup> See n. 2, *supra*.

“performing,” and thus also guilty of infringement. This much is common ground.

With the advent of commercial radio, a broadcast musical composition could be heard instantaneously by an enormous audience of distant and separate persons operating their radio receiving sets to reconvert the broadcast to audible form.” Although Congress did not revise the statutory language, copyright law was quick to adapt to prevent the exploitation of protected works through the new electronic technology. In short, it was soon established in the federal courts that the broadcast of a copyrighted musical composition by a commercial radio station was a public performance of that composition for profit—and thus an infringement of the copyright if not licensed. In one of the earliest cases so holding, the Sixth Circuit Court of Appeals said:

“While the fact that the radio was not developed at the time the Copyright Act (Comp. St. §§ 9517-9524, 9530-9584) was enacted may raise some question as to whether it properly comes within the purview of the statute, it is not by that fact alone excluded from the statute. In other words, the statute may be applied to new situations not anticipated by Congress, if, fairly construed, such situations come within its intent and meaning. . . . While statutes should not be stretched to apply to new situations not fairly within their scope, they should not be so narrowly construed as to permit their evasion because of changing habits due to new inventions and discoveries.

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<sup>9</sup> Station KDKA, established in Pittsburgh in 1920, is said to have been the first commercial radio broadcasting station in the world. See *Buck v. Jewell-LaSalle Realty Co.*, 283 U. S. 191, 197 n. 2.

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

“That, under the Copyright Act, a public performance may be for profit, though no admission fee is exacted or no profit actually made, is settled by *Herbert v. Shanley*, 242 U. S. 591, 37 S. Ct. 232, 61 L. Ed. 511. It suffices, as there held, that the purpose of the performance be for profit, and not eleemosynary; it is against a commercial, as distinguished from a purely philanthropic, public use of another's composition, that the statute is directed. . . .” *Jerome H. Remick & Co. v. American Automobile Accessories Co.*, 5 F. 2d 411-412 (1925).

See also *M. Witmark & Sons v. L. Bamberger & Co.*, 291 F. 776 (NJ 1923); *Jerome H. Remick & Co. v. General Electric Co.*, 4 F. 2d 160 (SDNY, 1924); *Jerome H. Remick & Co. v. General Electric Co.*, 16 F. 2d 829 (SDNY, 1926); *Associated Music Publishers, Inc., v. Debs Memorial Radio Fund*, 141 F. 2d 852 (CA2, 1944). Cf. *Chappell & Co. v. Associated Radio Co. of Australia, Ltd.*, [1925] Vict. L. R. 350; *Messenger v. British Broadcasting Co., Ltd.*, [1927] 2 K. B. 543, rev'd on other grounds, [1928] 1 K. B. 660, aff'd, [1929] A. C. 151. See

generally Caldwell, *Broadcasting of Copyrighted Works*, 1 J. Air L. 584 (1930); Note, 75 U. of Pa. L. Rev. 549 (1927); Note, 39 Harv. L. Rev. 269 (1925).

If, by analogy to a live performance in a concert hall or cabaret, a radio station "performs" a musical composition when it broadcasts it, the same analogy would seem to require the conclusion that those who listen to the broadcast through the use of radio receivers do not perform the composition. And that is exactly what the early federal cases held. "Certainly those who listen do not perform, and therefore do not infringe." *Jerome H. Remick & Co. v. General Electric Co.*, 16 F. 2d 829. "One who manually or by human agency merely actuates electrical instrumentalities, whereby inaudible elements that are omnipresent in the air are made audible to persons who are within hearing, does not 'perform' within the meaning of the Copyright Law." *Buck v. Debaum*, 40 F. 2d 734, 735 (SD Cal. 1929).

Such was the state of the law when this Court in 1931 decided *Buck v. Jewell-LaSalle Realty Co.*, 283 U. S. 191. In that case the Court was called upon to answer the following question certified by the Eighth Circuit Court of Appeals: "Do the acts of a hotel proprietor, in making available to his guests, through the instrumentality of a radio receiving set and loud speakers installed in his hotel and under the control and for the entertainment of his guests, the hearing of a copyrighted musical composition which has been broadcast from a radio transmitting station, constitute a performance of such composition within the meaning of 17 USC, Sec. 1 (e)?" The Court answered the certified question in the affirmative. In stating the facts of the case, however, the Court's opinion made clear that the broadcaster of the musical composition was not licensed to perform it, and at least twice in the course of its opinion the Court indicated that the

answer to the certified question might have been different if the broadcast itself had been authorized by the copyright holder.<sup>10</sup>

We may assume for present purposes that the *Jewell-LaSalle* decision retains authoritative force in a factual situation like that in which it arose.<sup>11</sup> But, as the Court of Appeals in this case perceived, this Court has in two recent decisions explicitly disavowed the view that the reception of an electronic broadcast can constitute a performance, when the broadcaster himself is licensed to perform the copyrighted material that he broadcasts. *Fortnightly Corp. v. United Artists*, 392 U. S. 390; *Teleprompter Corp. v. CBS*, 415 U. S. 394.

The language of this Court's opinion in the *Fortnightly* case could hardly be more explicitly dispositive of the question now before us:

"The television broadcaster in one sense does less than the exhibitor of a motion picture or stage play; he supplies his audience not with visible images but only with electronic signals. The viewer conversely does more than a member of a theater audience; he provides the equipment to convert electronic signals into audible sound and visible images. Despite these deviations from the conventional situation contemplated by the framers of the Copyright Act, broadcasters have been judicially treated as exhibitors, and viewers as members of a theater audience.

<sup>10</sup> "[W]e have no occasion to determine under what circumstances a broadcaster will be held to be a performer, or the effect upon others of his paying a license fee." 283 U. S., at 198 (emphasis added). See also 283 U. S., at 199 n. 5.

<sup>11</sup> The decision in *Jewell-LaSalle* might be supported by a concept akin to that of contributory infringement, even though there was no relationship between the broadcaster and the hotel company and, therefore, technically no question of actual contributory infringement in that case. 283 U. S., at 197 n. 4.

Broadcasters perform. Viewers do not perform. Thus, while both broadcaster and viewer play crucial roles in the total television process, a line is drawn between them. One is treated as active performer, the other, as passive beneficiary." *Fortnightly Corp. v. United Artists*, 392 U. S., at 398-399 (footnotes omitted).

The *Fortnightly* and *Teleprompter* cases, to be sure, involved television, not radio, and the copyrighted materials there in issue were literary and dramatic works, not musical compositions. But, as the Court of Appeals correctly observed, "[i]f *Fortnightly* with its elaborate CATV plant and *Teleprompter* with its even more sophisticated and extended technological and programming facilities was not 'performing,' then logic dictates that no 'performance' resulted when the [respondent] merely activated his restaurant radio." 500 F. 2d, at 137.

To hold in this case that the respondent Aiken "performed" the petitioners' copyrighted works would thus require us to overrule two very recent decisions of this Court. But such a holding would more than offend the principles of *stare decisis*; it would result in a regime of copyright law that would be both wholly unenforceable and highly inequitable.

The practical unenforceability of a ruling that all of those in Aiken's position are copyright infringers is self-evident. One has only to consider the countless business establishments in this country with radio or television sets on their premises—bars and beauty shops, cafeterias and car washes, dentists' offices and drive-ins—to realize the total futility of any evenhanded effort on the part of copyright holders to license even a substantial percentage of them.<sup>12</sup>

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<sup>12</sup>The Court of Appeals observed that ASCAP now has license



And a ruling that a radio listener “performs” every broadcast that he receives would be highly inequitable for two distinct reasons. First, 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. For even if he secured a license from ASCAP, he would have no way of either foreseeing or controlling the broadcast of compositions whose copyright was held by someone else.<sup>13</sup> Secondly, to hold that all in Aiken’s position “performed” these musical compositions would be to authorize the sale of an untold

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agreements with some 5,150 business establishments in the whole country, 500 F. 2d, at 129, noting that these include “firms which employ on premises sources for music such as tape recorders and live entertainment.” *Id.*, at n. 4. As a matter of so-called “policy” or “practice,” we are told that ASCAP has not even tried to exact licensing agreements from commercial establishments whose radios have only a single speaker.

<sup>13</sup> This inequity, in the context of the decision in *Buck v. Jewell-LaSalle Realty Co.*, 283 U. S. 191, was pointed out by Professor Zechariah Chafee, Jr., 30 years ago:

“A rule which is very hard for laymen to apply so as to keep clear of litigation was established by the *LaSalle Hotel* case. The hotel was heavily liable if it rebroadcast unlicensed music, but how could it protect itself? Must it maintain a monitor always on the job to sit with a list before him pages long showing what pieces are licensed and turn off the master set the instant an unlicensed piece comes from the broadcasting? The dilemma thus created by the Copyright Act was mitigated for a time by the machinery of ASCAP, which was a device entirely outside the statute. The hotel could obtain a blanket license from ASCAP and thus be pretty sure of safety about all the music which came through its master set. . . . [But] if any composer outside the ASCAP has his music broadcast, what is the hotel to do? Besides getting an ASCAP license, must the hotel bargain separately with every independent composer on the chance that his music may come through to the hotel patrons?”

“Such divergences from the ideal . . . are likely to be corrected. . . .” *Reflections on the Law of Copyright*, I, 45 *Colum. L. Rev.* 503, 528-529.

number of licenses for what is basically a single public rendition of a copyrighted work. Such overkill would go far beyond what is required for the economic protection of copyright owners,<sup>14</sup> and the exaction of such multiple tribute would be wholly at odds with the balanced congressional purpose behind 17 U. S. C. § 1 (e):

“The main object to be desired in expanding copyright protection accorded to music has been to give to the composer an adequate return for the value of his composition, and it has been a serious and a difficult task to combine the protection of the composer with the protection of the public, and to so frame an act that it would accomplish the double purpose of securing to the composer an adequate return for all use made of his composition and at the same time prevent the formation of oppressive monopolies, which might be founded upon the very rights granted to the composer for the purpose of protecting his interests.” H. R. Rep. No. 2222, 60th Cong., 2d Sess., at 7 (1909).

For the reasons stated in this opinion, the judgment of the Court of Appeals is affirmed.

*It is so ordered.*

**MR. JUSTICE DOUGLAS** took no part in the consideration or decision of this case.

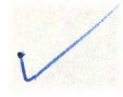
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<sup>14</sup> The petitioners have not demonstrated that they cannot receive from a broadcaster adequate royalties based upon the total size of the broadcaster's audience. On the contrary, the respondent points out that generally copyright holders can and do receive royalties in proportion to advertising revenues of licensed broadcasters, and a broadcaster's advertising revenues reflect the total number of its listeners, including those who listen to the broadcasts in public business establishments.

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

May 30, 1975



RE: No. 74-452 Twentieth Century Music Corp. v. Aiken

Dear Potter:

I agree.

Sincerely,

Mr. Justice Stewart

cc: The Conference

cc: The Conference

lfp/ss

Mr. Justice Stewart

Sincerely,

Please join me.

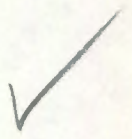
Dear Potter:

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No. 74-452 Twentieth Century Music  
v. Alken

May 30, 1975

Supreme Court of the United States  
Washington, D. C. 20543



CHAMBERS OF  
JUSTICE BYRON R. WHITE

June 2, 1975

Re: No. 74-452 - Twentieth Century Music Corp.  
v. Aiken

Dear Potter:

Please join me.

Sincerely,

Mr. Justice Stewart

Copies to Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

June 2, 1975

No. 74-452 -- Twentieth Century Music Corporation v.  
George Aiken

Dear Potter:

Please join me.

Sincerely,

*TM.*  
T.M.

Mr. Justice Stewart

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

June 2, 1975

Re: No. 74-452 - Twentieth Century Music v. Aiken

Dear Potter:

Please join me.

Sincerely,



Mr. Justice Stewart

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

June 2, 1975

Re: 74-452 - Twentieth Century Music Corp. v. Aiken

MEMORANDUM TO THE CONFERENCE:

In due course I will circulate a brief, mild  
dissent, which may help generate some long overdue  
Congressional action.

Regards,

W E B



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM O. DOUGLAS

June 11, 1975



Re: Twentieth Century Music Corp. v. Aiken, No. 74-452

Dear Chief:

Please join me in your dissenting opinion.

Sincerely,

WILLIAM O. DOUGLAS

Chief Justice Burger

cc: The Conference

