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Why Congress Should Eliminate the Multiple Performance Doctrine

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Copyright laws must be analyzed against the backdrop of these interwoven but competing interests. Laws must be geared toward offering sufficient incentive for authors,[58] while maintaining an adequate amount of public accessibility. In the end, though, "the primary object in conferring the [copyright] lie[s] in the *general benefits derived by the public* from the labors of authors."[59] Unfortunately, though, "[w]hile the accessibility of a work should be of central importance to copyright theory, its role in that theory is more often assumed than carefully discussed by courts or commentators."[60]

The current law is an example of assuming the accessibility of a work. The current law fails to establish the delicate equilibrium between encouraging creative endeavors and assuring public access to creative works, especially in light of copyright law's ultimate aim.[61] Under the current scheme, the public's access is too limited. This criticism is not intended to assert that authors do not deserve compensation. To deny authors financial compensation would stifle the arts by drying up a substantial incentive to create;[62] no one will pay the author for use of her work if the public already has cost-free access to it.[63] To force the members of the public to make payments to authors, the public's access must be limited. Nevertheless, the current law overcompensates the author in the form of an overbroad public performance right that greatly reduces public access far below the level needed to ensure sufficient compensation.

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392 U.S. 390, 393 (1967)); Oman, *supra* note 10, at 93 ("[C]ongress has whittled away at the exclusivity of the right."); Shipley, *supra* note 1, at 515 ("[C]opyright is not . . . a complete monopoly.").

[58] It is acknowledged that authors create for reasons other than money. *See generally* ENCYCLOPEDIA BRITANNICA *Art Exhibitions and Art Sales* 131 (15th ed. 1991) (citing sociological, psychological, political, economic, and aesthetic factors which urge artistic creativity).

[59] Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932) (emphasis added); *see also Aiken*, 422 U.S. at 156 ("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."); Mazer v. Stein, 347 U.S. 201, 219 (1954) ("The economic philosophy behind the [copyright] clause is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare . . . ."); Kendall v. Winsor, 62 U.S. 322 (1858); Grant v. Raymond, 31 U.S. 217 (1832); Kreiss, *supra* note 52, at 6 (The primary goal of copyright is "to encourage the widest possible production and dissemination of literary, musical and artistic works."). *See generally* L. RAY PATTERSON & STANLEY W. LINDBERG, THE NATURE OF COPYRIGHT: A LAW OF USERS' RIGHTS (1991); Margaret Chon, *Postmodern "Progress": Reconsidering the Copyright and Patent Power*, 43 DEPAUL L. REV. 97 (1993).

[60] Kreiss, *supra* note 52, at 2–3.

[61] *See supra* note 50–52 and accompanying text.

[62] *See supra* note 59.

[63] *See supra* note 54 and accompanying text.

Why Congress Should Eliminate the Multiple Performance Doctrine*

DAVID M. LILENFELD**

I. INTRODUCTION

Dandy Don is a music lover. He listens to and composes music constantly; occasionally his songs are even broadcast over the radio. One evening Don went for dinner at Kate's Cajun Kitchen, a small local eatery. At the restaurant, Don was pleased to hear Kate's radio tuned to his favorite station, WXYZ. Don became even happier when the station played "I'm No Greenhorn," a song he had written and held the copyright in. Don had his drink, his meal, and his music—he was delighted.

But Don's mood soon changed as he remembered that the copyright he holds in "I'm No Greenhorn" gives him control over all public performances of that song. Realizing that his song was being performed publicly, Don immediately demanded to speak to Kate·

> Don asked her, "Do you have a license?"
> "Excuse me. A license for what?" she replied.
> "Well, you just publicly performed my song, where is your license?" he said.
> "A license? A performance? All I did was turn on the radio!" Kate cried.[1]

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[1] Many restaurants, bars, and other commercial establishments have radios and televisions that provide entertainment for customers. Although this hypothetical uses the radio as an example, also within the scope of this Note is a business proprietor who shows a sporting event or other programming on a television.

A closely related issue is the legal effect of a business proprietor playing a purchased copy of a work, such as a videocassette or a compact disc, for patrons. This activity is considered a primary transmission, and there is currently little, if any, debate that it requires a license. *See* Irving Berlin Inc. v. Daigle, 31 F.2d 832, 835 (5th Cir. 1929) ("[T]he provision conferring . . . the exclusive right of publicly performing . . . contains nothing which can be given the effect of excepting a public performance for profit by means of a phonograph record."); *see also* David E. Shipley, *Copyright Law and Your Neighborhood Bar and Grill: Recent Developments in Performance Rights and the Section 110(5) Exemption*, 29 ARIZ. L. REV. 475, 514 (1987) ("Congress clearly provided a discrete exemption for small commercial establishments . . . to freely provide standard televisions and radios . . . . It is equally clear, however, that this exemption has no application to records or videocassette tapes performed

seeks to balance two competing interests.[52] On one hand, the law must encourage and reward creative efforts of authors.[53] On the other hand, the law must assure public access to creative works. Encouraging creative efforts of authors is achieved "by granting [authors] the right to exclude others from certain uses of the copyrighted work."[54] To satisfy the need for public accessibility,[55] copyright law sets limits on the author's interest.[56] That is, the author's control over her work is not limitless.[57]

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[52] Also, Congress noted:

> [T]he 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 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. 60-2222, at 7 (1909).

See also Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) ("[T]he limited scope of the copyright holder's statutory monopoly, like the limited copyright duration required by the Constitution, reflects a balance of competing claims upon the public interest."); Robert A. Kreiss, *Accessibility and Commercialization in Copyright Theory*, 43 UCLA L. REV. 1, 4 (1995) ("[T]o function properly, copyright law must strike a balance between the rights given to copyright authors and the access given to copyright users.").

[53] The term "author," taken from the Copyright and Patent Clause of the U.S. Constitution, is given extremely broad meaning: "An author in [the constitutional] sense is 'he to whom anything owes its origin; originator; maker; one who completes a work of science or literature.'" *Burrow-Giles*, 111 U.S. at 57–58.

[54] Janice E. Oakes, Comment, *Copyright and the First Amendment: Where Lies the Public Interest?*, 59 TUL. L. REV. 135, 135 (1984); *see also* Kreiss, *supra* note 52, at 14 ("[T]he economic rewards of the marketplace are offered to authors in order to stimulate them to produce and disseminate new works. The mechanism is the granting of exclusive rights to authors with regard to their works.").

[55] The requirement of access to creative works by the public is important to this Note. In the end, the Note should make it clear that the current law fails to adequately satisfy this requirement. For a consistent but broader view of contemporary copyright law's failure to consider public accessibility to copyrighted works, see Kreiss, *supra* note 52, at 2–3 ("[W]hile the accessibility of a work should be of central importance to copyright theory, its role in that theory is more often assumed than carefully discussed by courts or commentators.").

[56] A durational limit is constitutionally mandated. U.S. CONST, art. I, § 8, cl. 8.

[57] *See Aiken*, 422 U.S. at 155 ("[T]he Copyright Act does not give a copyright holder control over all uses of his copyrighted work.") (citing Fortnightly Corp. v. United Artists,

Under the current copyright law, Kate has a problem.[2]

Dandy Don, like all copyright owners, enjoys five exclusive rights,[3] including the performance right.[4] This performance right gives copyright

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publicly in such establishments."). Although this issue is not discussed in this Note, the imposition of liability against the proprietor for copyright infringement in this situation is not beyond attack.

[2] This hypothetical is used throughout the Note to illustrate various points of law and policy. The hypothetical is also intended to show that the law involved here might not be what most people would expect or what they would think is fair. *See* Jessica Litman, *The Exclusive Right to Read*, 13 CARDOZO ARTS & ENT. L.J. 29, 50 (1994) ("[S]ome prospective licensees fail to buy licenses because they believe the law could not possibly have been intended to apply to their situation . . . .").

[3] *See* 17 U.S.C. § 106 (1982). Generally, the exclusive rights are the reproduction right (§ 106(1)), the right to prepare derivative works (§ 106(2)), the right to distribute (§ 106(3)), the right to perform the work publicly (§ 106(4)), and the right to display the work publicly (§ 106(5)).

The reproduction right involves the exclusive right of the copyright owner to make copies of his or her copyrighted work. *See* Arnstein v. Porter, 154 F.2d 464 (2d Cir. 1946), (holding that for the plaintiff to show that the defendant infringed this right, the copyright owner must demonstrate that the defendant copied the work and that the copying amounted to an improper appropriation); *see also* the leading commentary on copyright law, MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8.02, at 8-28 (1995).

The right to prepare derivative works gives the copyright owner the exclusive right to make works that derive themselves from the copyrighted work. For example, a movie based on a play is a derivative work of that play. Under § 106(2), the right to create such a derivative work belongs exclusively to the copyright owner. *See* Mirage Editions, Inc. v. Albuquerque A.R.T. Co., 856 F.2d 1341 (9th Cir. 1988), (holding that when defendant purchases a book that contains plaintiff's paintings, removes the paintings from the book, pastes the paintings on ceramic tiles, and offers the tiles for sale, defendant infringes the plaintiff's exclusive right to prepare derivative works); *see also* NIMMER, *supra*, § 8.09, at 8-123.

The copyright owner's exclusive right to distribute the work publicly gives him control over whether he will sell, rent, lease, or lend the work to another. However, once a particular work, whether it is a copy or the original, is distributed by the copyright owner, the "first sale doctrine," 17 U.S.C. § 109 (1982), curtails the copyright owner's control of further distribution of that particular copy or original. For example, a copyright owner only has the exclusive right to release a manuscript—he cannot be forced to sell it. Once the copyright owner distributes that manuscript, the subsequent owner has the right to further distribute that copy of the manuscript. However, the subsequent owner has no right to make copies of the manuscript just because he owns a copy of it. *See* C.M. Paula Company v. Logan, 355 F. Supp. 189 (N.D. Tex. 1973) (discussing the interaction between the distribution right and the right to prepare derivative works); *see also* NIMMER, *supra*, § 8.11, at 8-135 to -141 (1995).

For a discussion of the right to perform the work publicly, *see infra* notes 4–7 and accompanying text; *see also* NIMMER, *supra*, § 8.14, at 8-186 to -192.5.

Congress are ready to respond to the problem presented by the multiple performance doctrine and the troublesome section 110(5) exemption.

III. PROBLEMS CAUSED BY THE CURRENT LAW: WHY CHANGE IS NEEDED

This Part of the Note discusses the problematic results of adoption of the multiple performance doctrine. The problems resulting from the multiple performance doctrine are distinguishable from the problems of section 110(5), which have been extensively discussed elsewhere.[48] While the problems arising from the multiple performance doctrine have been explored by the Supreme Court, neither Congress nor commentators have made the multiple performance doctrine itself the subject of criticism. This Note follows the Supreme Court's lead in identifying the multiple performance doctrine—not section 110(5)—as the root of the problem. Many of the difficulties discussed in this Part were highlighted by the Supreme Court in *Twentieth Century Music Corp. v. Aiken*[49]—the case in which the Court rejected the multiple performance doctrine.

A. *The Constitutional Balance*

According to the United States Constitution, copyright law must "promote the progress of . . . useful Arts."[50] To satisfy this purpose,[51] copyright law

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[48] *See supra* note 35.

[49] 422 U.S. 151 (1975).

[50] The Patent and Copyright Clause states: "[The Congress shall have 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. For a discussion of the etiology of the copyright clause, see Oman, *supra* note 10, at 85.

Congress and the courts have given "writings" extremely broad meaning. "[C]ongress very properly has declared [writings] to include all forms of writing, printing, engraving, etching . . . by which the ideas in the mind of the author are given visible expression." Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 56 (1884); *see also* STAFF OF SENATE SUBCOMM. ON PATS., TRADEMARKS, AND COPYRIGHTS, 86TH CONG. 1ST SESS., THE MEANING OF "WRITINGS" IN THE COPYRIGHT CLAUSE OF THE CONSTITUTION 61 (Subcomm. Print 1960) (stating that the terms of the clause were intentionally left vague so that Congress would be free to expand the common law).

[51] "To promote the progress of science and useful arts" must be read as a preamble indicating the purpose of the power. *See* Williams & Wilkins Co. v. United States, 172 U.S.P.Q. 670 (Ct. Cl. 1972), *rev'd on other grounds*, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by an equally divided court per curiam*, 420 U.S. 376 (1975).

owners the exclusive right "to perform [their] copyrighted work[s] publicly."[5] In other words, copyright owners have the right to exclude all others from performing the owner's copyrighted work in public.[6] Contrary to what the label might suggest, the performance right is not concerned with the copyright owner's right to perform his or her own work.[7]

The question then becomes, what constitutes a "public performance"? It is well established that a radio or television station performs a work publicly when it broadcasts a signal.[8] Thus, WXYZ publicly performed Don's song by

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The display right is the copyright owner's exclusive right to display the copyrighted work publicly. This right is provided to copyrighted works, other than sound recordings and works of architecture. *See* Mura v. Columbia Broad. Sys., Inc., 245 F. Supp. 587 (S.D.N.Y. 1965) (explaining that where defendant displayed plaintiff's puppets on the television show "Captain Kangaroo" for thirty seconds there is no infringement); Streeter v. Rolfe, 491 F. Supp. 416 (W.D. La. 1980) (discussing what is a "public" display); *see also* NIMMER, *supra*, § 8.20, at 8-278 to -283.

[4] Strictly speaking, not all copyright holders are provided with the performance right. *See infra* note 20 and accompanying text.

[5] 17 U.S.C. § 106, which is titled "*Exclusive* Rights in Copyrighted Works" (emphasis added). Therefore, while a broadcast of *x* in your home is a performance, it does not violate any right of a copyright holder because it is not a public performance.

[6] The right to exclude is common in the law of property. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (establishing that the right of exclusion flows naturally from the ownership of property and is nearly absolute); Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8, 12 (1927) ("[T]he essence of private property is always the right to exclude others.").

[7] The copyright owner is free to perform his copyrighted work, not to perform it, or to license another to perform it, but she cannot be compelled to do any of these. Compare this to the patent system, in which nonuse of the subject of a potential patent will result in forfeiture of the right to obtain a patent. *See generally* Electric Storage Battery Co. v. Shimadzu, 307 U.S. 5 (1939).

[8] This rule developed very soon after the advent of radio. *See* Susan A. Maslow, Comment, *"Watts" the Perimeter of the Doctrine of the Communication of a Radio Broadcast Under Section 110(5) of the 1976 Copyright Act?*, 55 TEMP. L.Q. 1056, 1064 (1982) ("The American Society of Composers, Authors, and Publishers (ASCAP) had little difficulty holding radio broadcasters accountable for copyright infringement."); *see also* M. Witmark & Sons v. L. Bamberger & Co., 291 F. 776 (D.N.J. 1923) (stating that a radio station's broadcasting is public and for profit); Jerome H. Remick & Co. v. American Auto. Accessories Co., 5 F.2d 411, 412 (6th Cir. 1925) ("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.").

It is also undisputed that the owner of a radio or television who invites friends into her home to listen to a radio or watch a television broadcast does not violate any right of the copyright holder because the performance is not public. *See, e.g.*, Buck v. Jewell-LaSalle Realty Co., 283 U.S. 191, 196 (1931); Sony Corp. v. Universal City Studios, Inc., 464 U.S.

The proposed Fairness in Musical Licensing Act awaits further congressional action.

A second recent congressional proposal is the Right to View Professional Sports Act, in which a compulsory license scheme [42] was proposed to increase public access to sports programming.[43] Under the proposal, all "places of public accommodation"[44] that provide television broadcasts of professional sports games would be exempt from copyright infringement if a set fee was paid to the copyright owner.

A third recent congressional proposal would allow businesses to play music on televisions and radios without copyright infringement liability if their establishments are smaller than 5,000 square feet, do not exceed certain income limits, and use fewer than ten speakers.[45]

Finally, a fourth proposal was introduced to exempt "small commercial establishments," which the Copyright Office may define according to "specifiable verifiable criteria."[46] Although none of these proposals have become law,[47] their conception indicates that at least some members of

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originally introduced in Congress on February 1, 1995, was removed from consideration. The bill was removed while representatives of the copyright owners and of the restaurant industry attempted to negotiate an extra-legislative solution to the licensing dilemma. The negotiations failed to produce an agreement and the bill was reintroduced, again by Rep. Sensenbrenner, on February 5, 1997 (Sen. Strom Thurmond will introduce the bill in the Senate).

[42] A "compulsory license" is a "license[] created under the Copyright Act to allow [payors] to make certain uses of copyrighted material without the explicit permission of the copyright owner, on payment of a specified royalty." BLACK'S LAW DICTIONARY 288 (6th ed. 1993). It compels copyright owners to grant a license in exchange for a mandatory, set fee. For a critique of the use of compulsory licenses, *see* Cote, *supra* note 9, at 219.

[43] *See* 139 CONG. REC. H230 (daily ed. May 5, 1993) (statement of Rep. Lipinski, House sponsor, introducing the Right to View Professional Sports Act of 1993). For a summary of the bill, see *Legislation: Bill Would Create Compulsory Licensing System for TV Sports in Public Places*, 46 PAT. TRADEMARK & COPYRIGHT J. 32 (BNA 1993). *See also* National Football League v. McBee & Brunno's, Inc., 792 F.2d 726 (8th Cir. 1986) (deciding that sporting events are copyrightable if a recording is made by the copyright owner simultaneous to the telecast).

[44] "Places of public accommodation" are defined broadly as any "inn, hotel, motel, or other place of lodging, or a restaurant, bar, or other commercial establishment serving food or drink." 139 CONG. REC. E1173 (daily ed. May 6, 1993) (statement of Rep. Lipinski).

[45] *See* CONG. REC. S2423 (daily ed. Mar. 20, 1996) (statement of Rep. Brown).

[46] *See* CONG. REC. S1619 (daily ed. Feb. 16, 1993) (statement of Sen. Hatch). This proposal was introduced by Sen. Orrin Hatch (R-Utah). *See* 49 PAT. TRADEMARK & COPYRIGHT J. 731 (BNA 1995).

[47] *See supra* note 40 and accompanying text for the Fairness in Musical Licensing Act and *supra* notes 42–44 and accompanying text for the Right to View Professional Sports Act.

broadcasting it. But should Kate be deemed to have *performed* Don's song when she tuned to WXYZ and played the radio for her customers? The current law answers the question affirmatively. As the law now stands, "any individual is performing whenever he or she . . . communicates the performance by turning on a receiving set."[9] Therefore, Kate performed Don's song by turning on her radio and performed it publicly by playing it for her customers. Because Don has the exclusive right to perform his song publicly, under the current law, Kate has violated Don's copyright.

Looking at the current law, this Note examines the liabilities of business proprietors in Kate's position and discusses why change is needed and how that change can be achieved. Part II presents background of the performance right, discusses the current law, and presents recent proposals in Congress to change the law. In Part III, this Note details the inadequacies of the current scheme, revealing why change is needed. Part IV turns towards finding a solution by examining how the word "performance" has been defined. This Part details the Supreme Court's definitions of performance and how Congress has interpreted the Court's decisions. Additionally, Part IV proposes a new definition of performance that would alleviate the problems of the current system. By following the proposed change set forth in this Note, the law would allow business proprietors to freely play radio and television programming for patrons while maintaining the integrity and value of the copyright.

417, 469 (1984) (Blackmun, J., dissenting) (holding that turning on a television set in the privacy of one's home also results in a "performance," although not a public performance). Whether a performance at a quasi-public gathering, such as a wedding, is "public" within the terms of the copyright law is unclear.

[9] H.R. REP. NO. 94-1476, at 63 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5677. Receiving sets are radios or televisions. Thus, any act that transmits an initial performance is a performance under the 1976 Act; a performance is transmitted when it is communicated "by any device or process whereby images or sound are received beyond the place from which they are sent." *Id.*; *see also* 17 U.S.C. § 101 (definition of transmit); Darlene A. Cote, *Chipping Away at the Copyright Owner's Rights: Congress' Continued Reliance on the Compulsory License*, 2 J. INTELL. PROP. L. 219, 219 (1994).

> A maze of copyright regulations and substantial royalty fees paid to the copyright owners of the broadcasts make public performances more than a simple flick of the power button. In order to present these copyrighted broadcasts to the public the [proprietor] must receive permission from . . . the copyright owners—and pay the market price for this use.
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> *Id.*

found in private homes, accompanied by lengthy and confusing legislative history,[36] makes section 110(5) protection precarious. Hence, section 110(5) has rightfully been the target of substantial criticism[37] and has spurred Congress to act. Changes that would replace or supplement section 110(5) have recently been proposed in Congress.

The "Fairness in Musical Licensing Act of 1995"[38] was introduced in Congress to "exempt . . . small business operators from being charged fees for playing radios and televisions in their establishments."[39] The exemption would only apply if the performance is incidental to the main purpose of the establishment.[40] When a restaurant plays a radio for customers, it would apparently be considered "incidental" to the main purpose of the establishment since the purpose of the restaurant is to provide food and drink. This is compared to a sports bar in which showing sporting events on televisions might not be incidental to the bar's main purpose[41] but rather central to its operation.

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note 8, at 1058–59 ("[I]n spite of the 1976 legislative efforts, however, recent judicial decisions under the new law indicate that this area of copyright law remains unclear."); HALPERN ET AL., *supra* note 26, at 263 (1992) ("[L]itigation over the application of the section 110(5) is fairly common . . . .").

[36] *See* PATRY, *supra* note 10, at 917–21.

[37] *See supra* notes 35 and 36.

[38] H.R. 789, 103d Cong. (1995). The bill was introduced in the House on February 1, 1995 by Rep. James Sensenbrenner (R-Wis.), who is a member of Congress's subcommittee on intellectual property. For a summary of the bill, see 7 No. 4 J. PROPRIETARY RTS. (1995). The bill was introduced in the Senate by Sen. Craig Thomas (R-Wyo.). *See generally* 49 PAT. TRADEMARK & COPYRIGHT J. 442, 452 (BNA 1995); 50 PAT. TRADEMARK & COPYRIGHT J. 421 (BNA 1995).

[39] 141 CONG. REC. S12079, S12085 (daily ed. Aug. 9, 1995) (statement of Sen. Thomas).

[40] In section 2 of the bill, the "communication . . . of a transmission . . . of a work [where the] reception [is from a] broadcast, cable, satellite, or other transmission" is exempted. The proposal would severely limit the rights of the performance rights societies. Performance rights societies are discussed *infra* notes 87–96 and accompanying text. The amendment also would cut many of the current rights of the performance rights societies. In section 3, the proposed amendment would subject performance rights societies to binding arbitration over the fees they charge, would require fee disclosure by the performance rights societies, and would require that the societies offer licenses on a limited basis in addition to the blanket, more expensive license it offers now. The proposed amendment would also require the societies to make annual reports to its licensees and would limit the vicarious liability of the typical deep-pocket defendants, such as facility owners who merely leased their property to those who infringed the copyright.

[41] Also, "[r]ecords, tapes[,] jukeboxes[,] or video recordings are not covered by [the] bill." 141 CONG. REC. S12079, S12085 (daily ed. Aug. 9, 1995) (statement of Sen. Thomas referring to section 2, subsection 5, subpart B of the proposed amendment). The bill,

II. BACKGROUND OF THE PERFORMANCE RIGHT

A. *Brief History of the Performance Right*

The performance right is by no means a recent development.[10] The right existed at common law[11] and was first codified in the United States in the 1856 Copyright Act for dramatic works.[12] Forty years later the performance right was extended to copyright holders in musical works.[13] In 1909, Congress completely revised the copyright law, adding a "for profit" requirement to the performance right.[14] The for profit requirement restricted copyright owners' control only to those performances by others which were done for profit.[15]

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[10] *See* Ralph Oman, *The Copyright Clause: A Charter for a Living People*, *in* CELEBRATING THE BICENTENNIAL OF THE UNITED STATES CONSTITUTION 85, 85 (ABA 1988) ("[I]n the United States, we made copyright a part of the organic law of the land, and it has been with us every step of the way."). For a more thorough discussion of the performance right, see generally NIMMER, *supra* note 3, at §§ 8.14–.19 at 8-182 to -277; 2 WILLIAM F. PATRY, COPYRIGHT LAW AND PRACTICE, 875–904 (1994).

[11] *See* PATRY, *supra* note 10, at 878–80 (tracing the original performance right to the French revolutionary laws of 1791 and to the United States, where "the common law granted authors a right to prohibit the unauthorized public performance of their unpublished works").

[12] *See* Act of Aug. 18, 1856, ch. 169, 11 Stat. 138–39 (1856) (repealed 1870).

[13] *See* Act of Jan. 6, 1897, ch. 4, 29 Stat. 481 (1897). The performance right under the 1897 statute, though, was rarely enforced by copyright holders because many of them believed that performances would encourage listeners to purchase their sheet music, the sale of which would ultimately be to their benefit. Also, enforcement of the performance right was difficult since an effective enforcement mechanism was not available until ASCAP was formed in 1914. *See* John Kernochan, *Music Performing Rights Organizations in the United States of America: Special Characteristics, Restraints, and Public Attitudes*, 10 COLUM.-VLA J.L. & ARTS 333, 336 (1986). Whether public performances of a work benefit the copyright holder by popularizing the work is a debate which continues today. *See* ALAN LATMAN, THE COPYRIGHT LAW: HOWELL'S COPYRIGHT LAW REVISED AND THE 1976 ACT 182 (5th ed. 1979); PATRY, *supra* note 10, at 880; Bernard Korman, *Performance Rights in Music Under Sections 110 and 118 of the 1976 Copyright Act*, 22 N.Y.L. SCH. L. REV. 521, 523–24 (1977).

[14] *See* Act of Mar. 4, 1909, ch. 320, 35 Stat. 1075 (1909) (codified as amended at 17 U.S.C. §§ 101–810 (1982)); *see also* PATRY, *supra* note 10, at 881.

[15] *See* Act of Mar. 4, 1909, ch. 320, 35 Stat. 1075 (1909) (codified as amended at 17 U.S.C. §§ 101–810 (1982)). Owners of copyright in dramatic works, however, were granted in section 1(d) of the act the exclusive right to control any public performance, regardless of whether or not it was for profit. *See id.*; *see also* NIMMER, *supra* note 3, § 8.15[A], at 8-192.14 to -15 (explaining the rationale for the distinction between the scope of the performance right for dramatic works in section 1(d) and for nondramatic musical and literary works in sections 1(c) and (e)).

television programming for patrons will be relieved of liability—even though she has publicly performed the work—if the radio or television[32] used in the establishment is a type "commonly used in private homes."[33] The focus of section 110(5) is the type of equipment used in the establishment.[34] Essentially, under the section 110(5) exemption, if the radio Kate employs in her restaurant is the type commonly used in private homes—for example a basic stereo with a few speakers—she would likely be free of liability. On the other hand, if she were to use an elaborate system with extraordinarily powerful amplifiers, receivers, and speakers, she would not fall within the section 110(5) exemption. Under the current law, if Kate cannot qualify for the section 110(5) exemption, she will be liable for infringing Don's exclusive performance right.

D. *Recent Congressional Activity*

Contrary to what was intended, it is now clear that section 110(5) does not provide effective relief for proprietors from application of the multiple performance doctrine.[35] The vagueness of what type of equipment is commonly

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[32] Radios and televisions are referred to in the Copyright Act as "receiving apparatus[es]." *See* 17 U.S.C. § 110(5).

[33] *See id.*

[34] Considerations have included square footage, physical arrangement, noise level of the establishment, and the extent the receiving apparatus is augmented. *See* Sailor Music v. Gap Stores, Inc. 668 F.2d 84 (2d Cir. 1981) (holding that the size of defendant's establishment was held to justify withholding the exemption even if the nature of the receiving apparatus did not). Courts have also considered whether the defendant is an individual store or a chain, *see* Broadcast Music, Inc. v. Claire's Boutiques, Inc., 754 F. Supp. 1324 (N.D. Ill. 1990), *aff'd*, 949 F.2d 1482 (7th Cir. 1991), and the amount of the establishment's revenue, *see* Edison Bros. Stores, Inc. v. Broadcast Music, Inc., 954 F.2d 1419 (8th Cir. 1992) (stating that consideration of the amount of revenue runs the risk of violating constitutional principles against vagueness).

[35] Section 110(5) has created extensive problems of statutory interpretation. *See* Springsteen v. Plaza Roller Dome, Inc., 602 F. Supp. 1113, 1115 (M.D.N.C. 1985) (speaking of § 110(5), "[t]he meaning of this statutory language is far from clear . . . ."); NIMMER, *supra* note 3, § 8.18[C], at 8-216 (referring to 110(5) as "vague" and the application of 110(5) as "speculative"); Paul Warenski, *Copyrights and Background Music: Unplug the Radio Before I Infringe Again*, 15 HASTINGS COMM. & ENT. L.J. 523, 532, 546 (1993) ("[F]rom its inception, the section 110(5) exemption generated an ongoing stream of litigation" and "[m]ore than fifteen years after its enactment, section 110(5) remains shrouded in confusion."); John Wilk, *Seeing the Words and Hearing the Music: Contradictions in the Construction of 17 U.S.C. 110(5)*, 45 RUTGERS L. REV. 783, 841 (1993) ("[S]ection 110(5)'s statutory and legislative history provisions are expressed in ambiguous and undefined terms. Consequently, over a decade of litigation has not produced any consensus on what the factors mean. As interpreted by the courts, the statutory factors are illogical . . . ."); Maslow, *supra*

performance right extends only to persons who hold copyrights in works which are capable of being performed.[20] For example, the copyright holder of a sculptural work is provided with the exclusive right to display the work, but not with a performance right. Also, the 1976 Act eliminated the 1909 Act's for profit requirement.[21]

Finally, and most important to this Note, the 1976 Act adopted the "multiple performance doctrine."[22] Two important terms are critical to

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F.2d 278 (9th Cir. 1989) (explaining that when members of the public rent a hotel room in which there is a television and VCR, rent videocassettes of movies from the hotel, and play the movies in their room, the performance is not a public performance). For more extensive coverage of the public component of the performance right, see NIMMER, *supra* note 3, § 8.14[C], at 8-186 to -192.4; Korman, *supra* note 13, at 521 (extensive discussion of legislative history); Alan J. Hartnick, *Performances at Schools and Colleges Under the 1976 Copyright Act*, 8 SETON HALL L. REV. 667 (1977).

[20] "[L]iterary, musical, dramatic, and choreographic works, pantomines, and motion pictures and other audiovisual works" are categories of works which are capable of being performed. *See* 17 U.S.C. § 106(4). Pictorial, graphic, or sculptural works, while copyrightable, are not capable of being "performed," and therefore no performance right is provided. Instead, these creators are provided with the exclusive right to display the work. *See* 17 U.S.C. § 106(5). For extensive coverage of the display right, see NIMMER, *supra* note 3, § 8.20, at 8-278 to -283.

There is an anomaly in this distinction: the "sound recording" is capable of being performed, yet a holder of a copyright in a sound recording does not have a performance right. "'Sound recordings' are works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied." 17 U.S.C. § 101. A copyright in a "sound recording," distinct from the copyright in the notes or lyrics of a song, protects a "series of musical, spoken, or other sounds." *See* 17 U.S.C. § 101. There is substantial debate over whether the sound recording copyright should include the performance right; however, the inertia seems to be heading towards recognition of the performance right for sound recording copyright owners. *See* BRUCE A. LEHMAN, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE 221 (publication of the Commissioner of Patents and Trademarks 1995).

[21] *See supra* note 15 and accompanying text. Two reasons are generally cited for the 1976 Copyright Act's abandonment of the "for profit" requirement. First, the distinction between commercial organizations and nonprofit organizations was often not clear. Second, many non-profit groups who would be exempt from the need to obtain a license were able to afford the cost of the license. Nevertheless, the "for profit" limitation is embraced, to an extent, by the first four subsections of section 110 of the 1976 Copyright Act, which exempts certain public performances, such as those by religious and educational institutions. *See* 17 U.S.C. § 110 (1982).

[22] *See* H.R. REP. NO. 94-1476, at 87 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5700-01; *see also* Supplementary Report of the Register of Copyrights in the General

performance right. Therefore, the multiple performance doctrine requires that business proprietors obtain licenses for secondary uses of primary transmissions.

Under the 1976 Act, "any individual is performing whenever he or she . . . communicate[s] the performance by turning on a receiving set"[27]—either a radio or television. The performance is "public"[28] if the establishment is "open to the public."[29] This is how the 1976 Copyright Act adopted the multiple performance doctrine.[30] Thus, under the current law, Kate publicly performed Don's song because she played it on a radio in an establishment open to the public. Because the right to publicly perform Don's copyrighted work belongs exclusively to Don, a performance by Kate without Don's permission leaves her liable for infringing his copyright.

C. *The Section 110(5) Exemption*

The current law provides an exemption to the application of the multiple performance doctrine.[31] Under section 110(5), a proprietor who plays radio or

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[27] H.R. REP. NO. 94-1476, at 63 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5669.

[28] *See also* 17 U.S.C. § 101 (1982) (defining "publicly").

[29] *See id.*

[30] Under the current law, "any individual is performing whenever he or she . . . communicate[s] the performance by turning on a receiving set." H.R. REP. NO. 94-1476, at 63 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5669.

The House Report explains:

> Under the definitions . . . the concepts of public performance and public display cover not only the initial rendition or showing, but also any further act by which that rendition or showing is . . . communicated to the public. Thus, for example, any individual is performing whenever he or she plays a phonorecord embodying the performance or *communicates the performance by turning on a receiver set.*

Id. (emphasis added).

[31] *See* 17 U.S.C. § 110(5) (1982). Under § 110(5), the "communication of a transmission embodying a performance or display of a work by the public reception of the transmission on a single receiving apparatus of a kind commonly used in private homes" is not a violation of the copyright. *See id.* The § 110(5) exemption is limited to certain performances on radio or television, so long as there is no direct charge to see or hear the performance.

In addition to § 110(5), the performance right is subject to several highly specific statutory exemptions and compulsory licenses. For a discussion of these exemptions, see generally NIMMER, *supra* note 3, §§ 8.15[B]–[H], 8.18[C], at 8-192.16 to -192.42, -208 to -221, and of compulsory licenses, see generally NIMMER, *supra* note 3, §§ 8.16, 8.17, 8.18[E]–[F], at 8-192.45 to -192.68, -227 to -266.

understanding the multiple performance doctrine. First, a transmission from a radio or television broadcaster is termed a "primary transmission."[23] For example, WXYZ's broadcast of Don's song was a primary transmission. Second, the reception and communication of a primary transmission through a radio or television to listeners or viewers of those particular sets is termed a "secondary use of a primary transmission."[24] For example, Kate's act of tuning her radio to WXYZ to play programming for her customers was a secondary use of a primary transmission. Under the multiple performance doctrine,[25] both primary transmissions and secondary uses of primary transmissions are deemed to be performances. The primary transmission is deemed by law to be one performance, and a secondary use of that transmission is deemed a second, multiple performance.[26] Because secondary uses are deemed to be performances, they fall within the copyright owner's control through the

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Revision of the U.S. Copyright Law: 1965 Revision Bill, 89th Cong., 1st Sess. 22 (House Comm. Print 1965) ("[P]erformance" is defined to "make clear that any further act by which that initial performance . . . is transmitted or reproduced constitutes an additional performance.").

But, curiously, Congress failed to explicitly include "secondary uses of primary transmissions" within the definition of "performance." *See* NIMMER, *supra* note 3, at § 8.18[B], at 8-206 to -207.

> [T]he definition of what it is to "perform" does not by its terms appear to go beyond the "conventional sense" of [perform] so as to include secondary transmissions. . . . The definition does not purport to go counter to the "conventional sense" whereby "perform" does not include the act of picking up a signal off the air, and retransmitting it.

Id.

Nevertheless, the House Report clearly indicates legislative intent to include secondary transmissions in the definition of "performance." *See* H.R. REP. NO. 94-1476, at 87 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5676-78; *see also supra* note 9.

[23] This is the same definition as the statutory definition, which states that a "primary transmission" is "a transmission made to the public by the transmitting facility whose signals are being received and further transmitted by the secondary transmission service." 17 U.S.C. § 111(f) (1982). The House Report explains that "the primary transmitter is the one whose signals are being picked up and further transmitted by a 'secondary' transmitter." H.R. REP. NO. 94-1476, at 87, *reprinted in* 1976 U.S.C.C.A.N. 5659, 5705. *See generally* NIMMER, *supra* note 3, § 8.18[C][2], at 8-211.

[24] This term is not found in the 1976, or any other, Copyright Act.

[25] *See* NIMMER, *supra* note 3, § 8.18[A], at 8-194 to -205.

[26] Thus, under the multiple performance doctrine, a single rendition of a work can give rise to more than one performance. The multiple performance doctrine also has been stated as follows: "transmission and retransmission of broadcasts [are] 'performances'." SHELDON W. HALPERN ET AL., COPYRIGHT: CASES AND MATERIALS 231 (1992).

The current system can be described as "quid pro quo out of balance."[64] This unwanted result is reached when "the author obtains the economic benefit that the copyright system was designed to give to authors, but the public does not receive the public benefit that was intended."[65] Using the hypothetical, Don obtained the intended economic benefit from the licensing fee he received from WXYZ. However, the public does not receive the full benefit it was intended to receive because Kate may choose to keep her radio turned off instead of paying for a license that would allow her to play the radio for her patrons. This limits public availability for those who are in Kate's restaurant, or any other establishment, despite the economic benefit the copyright system has already provided Don.

B. *Collecting Fees: Once Is Enough*

The multiple performance doctrine can also be attacked from a purely economic perspective. The Supreme Court concluded that the multiple performance doctrine, which requires that business proprietors obtain licenses for secondary uses of primary transmissions, "authorize[s] the sale of an untold number of licenses . . . [and] [t]he exaction of such multiple tribute . . . go[es] far beyond what is required for the economic protection of copyright owners."[66] A copyright owner is adequately compensated for her work through the licensing fee she receives from the radio or television broadcaster.[67] This fee is enough to encourage and reward creative effort.[68] The "double-dipping [the multiple performance doctrine allows] smacks of unfairness."[69] Also, because some businesses cannot or will not obtain a license, public availability is sacrificed since radios and televisions will be turned off.[70]

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[64] Kreiss, *supra* note 52, at 20–22.

[65] *Id.* at 22.

[66] Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 162–63 (1975). The Court observed that copyright owners received royalties from broadcasters in proportion to the listening audience and were, therefore, adequately compensated. *See id.* at 163 n.14. For more extensive discussion of the licensing arrangement, *see infra* text accompanying notes 168–76.

[67] *See Aiken*, 422 U.S. at 163.

[68] *See infra* text accompanying notes 168–71 for discussion of economic ramifications.

[69] This statement was contained in Sen. Brown's introductory remarks. *See* 142 CONG. REC. S2423 (daily ed. Mar. 20, 1996) (statement of Sen. Brown).

[70] The broadcasters are also paying the cost of this double-licensing scheme. Radio broadcasters pay the performance rights societies based on the expected size of their audiences. *See infra* notes 172–77 and accompanying text. The expected audience size includes those people who are in commercial establishments which are playing the broadcast. Let us say the expected audience is 150,000, 10,000 of whom are in commercial

C. *It Is Already Public*

The multiple performance doctrine fails to make a distinction between a primary transmission—which typically reaches an extremely large audience—and a secondary use of that transmission in a commercial establishment, which typically reaches only a few people. Under the 1976 Act's multiple performance doctrine, they are treated equally, despite the much more extensive scope of the primary transmission.

Recognizing that primary transmissions do have much greater reach, courts prior to the 1976 Act reasoned that by licensing the primary transmission the copyright owner willingly offers her work to the entire public, including those in commercial establishments.[71] Thus, the license obtained for the primary transmission should eliminate the need for a license for the secondary use of that primary transmission.[72] Once a copyright owner agrees to license her work

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establishments spread throughout the geographic area. Under the current scheme, each establishment's proprietor pays the copyright owner a licensing fee to allow the proprietor to play the broadcast for its patrons—a total of 10,000 of them. Therefore, 10,000 of the station's 150,000 listeners are already "paid for." Nevertheless, the station must count those 10,000 listeners among its audience when calculating the performance rights society's royalty. For a more thorough discussion of the system of licensing and royalties, see *infra* text accompanying notes 168–71.

[71] *See* Jerome H. Remick & Co. v. American Auto. Accessories Co., 5 F.2d 411, 412 (6th Cir. 1925) ("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.").

[72] One court observed that when a copyright holder licenses a broadcaster to play a song, she impliedly "sanction[s] and consent[s] to any [reception] that [is] possible." Buck v. Debaum, 40 F.2d 734, 735 (S.D. Cal. 1929). The defendant in another case argued that "since the transmitting of a musical composition by a commercial broadcasting station is a public performance . . . control of the [primary transmission] exhausts the monopolies conferred." Buck v. Jewell-LaSalle, 283 U.S. 191, 197 (1931). These cases and others are discussed more fully below. *See infra* Part IV.

Courts have also expressed this concept in terms of a "sublicense." The license the copyright holder grants the broadcaster has an "implied in law" sublicense. The sublicense permits secondary uses of the primary transmission. The Supreme Court acknowledged the possible acceptance of this argument. *See Jewell-LaSalle*, 283 U.S. at 199 n.5. "[W]e have no occasion," the Court wrote, "to determine . . . the effect upon *others* of [a broadcaster] paying a license fee." *Id.* at 198 (emphasis added). The Court continued: "If the copyrighted composition had been broadcast by [the defendant] with plaintiff's consent, a license for its commercial [use] might possibly have been implied." *Id.* at 199 n.5; *see also* Sid Marcovitch, *On* Aiken, *Performance and the 110(5) Exemption: Is There a Gap in the Court's Thinking?*, 11 W. ST. U. L. REV. 129, 136 (1983) ("If *Aiken* has any chance of making a comeback, it will be on the basis of this special breed of sublicense.").