

# Why Congress Should Eliminate the Multiple Performance Doctrine\*

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## 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.<sup>1</sup>

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<sup>1</sup> 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

Under the current copyright law, Kate has a problem.<sup>2</sup>

Dandy Don, like all copyright owners, enjoys five exclusive rights,<sup>3</sup> including the performance right.<sup>4</sup> 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.

<sup>2</sup> 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 . . .”).

<sup>3</sup> 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.

owners the exclusive right "to perform [their] copyrighted work[s] publicly."<sup>5</sup> In other words, copyright owners have the right to exclude all others from performing the owner's copyrighted work in public.<sup>6</sup> 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.<sup>7</sup>

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.<sup>8</sup> 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.

<sup>4</sup> Strictly speaking, not all copyright holders are provided with the performance right. *See infra* note 20 and accompanying text.

<sup>5</sup> 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.

<sup>6</sup> 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.").

<sup>7</sup> 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).

<sup>8</sup> 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.

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."<sup>9</sup> 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.

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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.

<sup>9</sup> 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.

*Id.*

## II. BACKGROUND OF THE PERFORMANCE RIGHT

### A. Brief History of the Performance Right

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

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<sup>10</sup> 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).

<sup>11</sup> 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").

<sup>12</sup> See Act of Aug. 18, 1856, ch. 169, 11 Stat. 138-39 (1856) (repealed 1870).

<sup>13</sup> 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).

<sup>14</sup> 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.

<sup>15</sup> 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)).

## B. *The Performance Right Under the 1976 Copyright Act*

The 1976 Copyright Act supplanted the 1909 Act and is the presiding statutory copyright law in the United States.<sup>16</sup> The 1976 Act continues to provide copyright owners with the performance right<sup>17</sup> by giving them control over performances<sup>18</sup> of their works which are made publicly.<sup>19</sup> The

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Under the 1909 Act, public performance meant performances done for a profit. *See Act of Mar. 4, 1909, ch. 320, 35 Stat. 1075 (1909) (codified as amended at 17 U.S.C. §§ 101-810 (1982))*. The Supreme Court examined the "for profit" requirement in *Herbert v. Shanley Co.*, 242 U.S. 591 (1917). In that case, the Court ruled that when an orchestra employed by the defendant hotel performed in the hotel's dining room for the entertainment of diners, the copyright holder's performance right was violated. The Court ruled that the fact that the hotel did not charge the customers an admission fee to hear the orchestra was no defense for the hotel. *See id.* at 593-94. Finally, in 1952, the 1909 Copyright Act was amended to extend the performance right to nondramatic literary works.

<sup>16</sup> *See Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended at 17 U.S.C. §§ 101-810 (1982))*.

<sup>17</sup> *See 17 U.S.C. § 106(4)*.

<sup>18</sup> To perform a work means "to recite, render, play, dance or act it, whether directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible." 17 U.S.C. § 101 (definition of perform). Thus, one performs when one sings a song or plays a recording of a song on a compact disc or plays a tape of a movie on a video cassette recorder. *See Columbia Pictures Indus., Inc. v. Redd Horne, Inc.*, 749 F.2d 154, 158 (3d Cir. 1984) (holding that the playing of a video cassette in public constitutes a performance). *See generally NIMMER, supra note 3, § 8.14[A]*, at 8-182 to -184.

<sup>19</sup> Only those performances done publicly are under the control of the copyright holder. *See 17 U.S.C. § 106(4)*. Performances "at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered" are public performances. 17 U.S.C. § 101; *see also Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 155 (1975) ("[N]o license is required by the Copyright Act, for example, to sing a copyrighted lyric in the shower.").

While there is substantial dispute over the meaning of "public," it is enough to say here that the copyright holder can control only other people's performances where the performance is of a public nature and that restaurants, bars, and other retail establishments are public places. Columbia Pictures was the plaintiff in three cases which have become an instructive—and intriguing—trilogy. They are the following: *Columbia Pictures Indus., Inc. v. Redd Horne, Inc.*, 749 F.2d 154 (3d Cir. 1984) (holding that when members of the public rent a private showroom in a video-rental store and select a movie which is placed in a VCR outside the showroom by a store employee, the performance of that movie is public); *Columbia Pictures Indus., Inc. v. Aveco, Inc.*, 800 F.2d 59 (3d Cir. 1986) (holding that when members of the public rent a private showroom in a video-rental store and select a movie which is placed in a VCR inside the showroom and operate the VCR themselves, the performance of that movie is public); *Columbia Pictures Indus., Inc. v. Prof. Real Estate Investors, Inc.*, 866

performance right extends only to persons who hold copyrights in works which are capable of being performed.<sup>20</sup> 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.<sup>21</sup>

Finally, and most important to this Note, the 1976 Act adopted the "multiple performance doctrine."<sup>22</sup> 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).

<sup>20</sup> "[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).

<sup>21</sup> 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).

<sup>22</sup> 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

understanding the multiple performance doctrine. First, a transmission from a radio or television broadcaster is termed a "primary transmission."<sup>23</sup> 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."<sup>24</sup> 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,<sup>25</sup> 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.<sup>26</sup> 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.

<sup>23</sup> 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.

<sup>24</sup> This term is not found in the 1976, or any other, Copyright Act.

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

<sup>26</sup> 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).



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”<sup>27</sup>—either a radio or television. The performance is “public”<sup>28</sup> if the establishment is “open to the public.”<sup>29</sup> This is how the 1976 Copyright Act adopted the multiple performance doctrine.<sup>30</sup> 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.<sup>31</sup> Under section 110(5), a proprietor who plays radio or

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

<sup>28</sup> *See also* 17 U.S.C. § 101 (1982) (defining “publicly”).

<sup>29</sup> *See id.*

<sup>30</sup> 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).

<sup>31</sup> *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.

television programming for patrons will be relieved of liability—even though she has publicly performed the work—if the radio or television<sup>32</sup> used in the establishment is a type “commonly used in private homes.”<sup>33</sup> The focus of section 110(5) is the type of equipment used in the establishment.<sup>34</sup> 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.<sup>35</sup> The vagueness of what type of equipment is commonly

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<sup>32</sup> Radios and televisions are referred to in the Copyright Act as “receiving apparatus[es].” See 17 U.S.C. § 110(5).

<sup>33</sup> See *id.*

<sup>34</sup> 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).

<sup>35</sup> 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*

found in private homes, accompanied by lengthy and confusing legislative history,<sup>36</sup> makes section 110(5) protection precarious. Hence, section 110(5) has rightfully been the target of substantial criticism<sup>37</sup> 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"<sup>38</sup> was introduced in Congress to "exempt . . . small business operators from being charged fees for playing radios and televisions in their establishments."<sup>39</sup> The exemption would only apply if the performance is incidental to the main purpose of the establishment.<sup>40</sup> 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<sup>41</sup> 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 . . .").

<sup>36</sup> See PATRY, *supra* note 10, at 917-21.

<sup>37</sup> See *supra* notes 35 and 36.

<sup>38</sup> 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).

<sup>39</sup> 141 CONG. REC. S12079, S12085 (daily ed. Aug. 9, 1995) (statement of Sen. Thomas).

<sup>40</sup> 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.

<sup>41</sup> 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,

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<sup>42</sup> was proposed to increase public access to sports programming.<sup>43</sup> Under the proposal, all "places of public accommodation"<sup>44</sup> 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.<sup>45</sup>

Finally, a fourth proposal was introduced to exempt "small commercial establishments," which the Copyright Office may define according to "specifiable verifiable criteria."<sup>46</sup> Although none of these proposals have become law,<sup>47</sup> 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).

<sup>42</sup> 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.

<sup>43</sup> 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).

<sup>44</sup> "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).

<sup>45</sup> See CONG. REC. S2423 (daily ed. Mar. 20, 1996) (statement of Rep. Brown).

<sup>46</sup> 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).

<sup>47</sup> 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.

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.<sup>48</sup> 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*<sup>49</sup>—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.”<sup>50</sup> To satisfy this purpose,<sup>51</sup> copyright law

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<sup>48</sup> See *supra* note 35.

<sup>49</sup> 422 U.S. 151 (1975).

<sup>50</sup> 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).

<sup>51</sup> “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).

seeks to balance two competing interests.<sup>52</sup> On one hand, the law must encourage and reward creative efforts of authors.<sup>53</sup> 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.”<sup>54</sup> To satisfy the need for public accessibility,<sup>55</sup> copyright law sets limits on the author’s interest.<sup>56</sup> That is, the author’s control over her work is not limitless.<sup>57</sup>

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<sup>52</sup> 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.”).

<sup>53</sup> 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.

<sup>54</sup> 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.”).

<sup>55</sup> 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.”).

<sup>56</sup> A durational limit is constitutionally mandated. U.S. CONST. art. I, § 8, cl. 8.

<sup>57</sup> 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*,

Copyright laws must be analyzed against the backdrop of these interwoven but competing interests. Laws must be geared toward offering sufficient incentive for authors,<sup>58</sup> 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.”<sup>59</sup> 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.”<sup>60</sup>

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.<sup>61</sup> 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;<sup>62</sup> no one will pay the author for use of her work if the public already has cost-free access to it.<sup>63</sup> 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.

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.”).

<sup>58</sup> 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).

<sup>59</sup> 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).

<sup>60</sup> Kreiss, *supra* note 52, at 2–3.

<sup>61</sup> *See supra* note 50–52 and accompanying text.

<sup>62</sup> *See supra* note 59.

<sup>63</sup> *See supra* note 54 and accompanying text.

The current system can be described as “quid pro quo out of balance.”<sup>64</sup> 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.”<sup>65</sup> 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.”<sup>66</sup> A copyright owner is adequately compensated for her work through the licensing fee she receives from the radio or television broadcaster.<sup>67</sup> This fee is enough to encourage and reward creative effort.<sup>68</sup> The “double-dipping [the multiple performance doctrine allows] smacks of unfairness.”<sup>69</sup> Also, because some businesses cannot or will not obtain a license, public availability is sacrificed since radios and televisions will be turned off.<sup>70</sup>

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<sup>64</sup> Kreiss, *supra* note 52, at 20–22.

<sup>65</sup> *Id.* at 22.

<sup>66</sup> *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.

<sup>67</sup> *See Aiken*, 422 U.S. at 163.

<sup>68</sup> *See infra* text accompanying notes 168–71 for discussion of economic ramifications.

<sup>69</sup> This statement was contained in Sen. Brown’s introductory remarks. *See* 142 CONG. REC. S2423 (daily ed. Mar. 20, 1996) (statement of Sen. Brown).

<sup>70</sup> 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.<sup>71</sup> Thus, the license obtained for the primary transmission should eliminate the need for a license for the secondary use of that primary transmission.<sup>72</sup> 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.

<sup>71</sup> 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.").

<sup>72</sup> 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.").

for broadcast, her fee has been paid, her control has been asserted, her rights have been observed, and the law does her no favor by preventing broadcasts of her song from being freely played in commercial establishments.<sup>73</sup>

#### D. "Practical Unenforcibility"

Continuing with the problems of the multiple performance doctrine, "[o]ne has only to consider the countless business establishments in this country with radio or television sets on their premises . . . to realize the total futility of any evenhanded effort on the part of copyright holders to license even a substantial percentage of them."<sup>74</sup> It is simply impractical to require so many businesses, which are constantly opening and closing doors and changing ownership, to enter into licensing agreements.<sup>75</sup>

Furthermore, paraphrasing the Supreme Court,<sup>76</sup> even if a proprietor were to obtain a license to perform copyrighted works, she would have no way of knowing whether a radio or television broadcast she is playing for her customers includes the work of one whose copyright was held by someone other than the licensor.<sup>77</sup> Under the current scheme this scenario is inevitable and leaves even the most cautious proprietor liable for infringement. This

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<sup>73</sup> Copyright owners will in fact benefit financially from allowing proprietors to freely play radio and television programming for customers because, in the end, copyright owner's royalties increase when the expected size of the audience hearing the broadcast increases. The expected number of audience members includes those listeners or viewers in commercial establishments. For a more thorough discussion of this result, see *infra* notes 168-71 and accompanying text.

<sup>74</sup> *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 162 (1975); see also Zechariah Chafee, Jr., *Reflections on the Law of Copyright: I*, 45 COLUM. L. REV. 503, 528-29 (1945) (characterizing the multiple performance doctrine as creating a rule "which is very hard for laymen to apply").

<sup>75</sup> See *Aiken*, 422 U.S. at 162. While § 110(5) would prevent infringement for some of these businesses, proprietors will not know who they are, and even if they did, they would not have the confidence that their receiving sets would pass the ever-changing tests of what are "commonly found in homes." See *supra* text accompanying notes 35-37.

<sup>76</sup> See *Aiken*, 422 U.S. at 162-63.

<sup>77</sup> See *id.*; Marcovitch, *supra* note 72, at 133 ("Granted, the chances are remote that any song would be played which would not fall under the licensing control of either ASCAP or BMI, but nevertheless, all that it would take is *one song* to constitute infringement . . ."). But see *Jewell-LaSalle*, 283 U.S. at 198-99 (holding that when one turns on his radio or television, "he necessarily assumes the risk that in so doing he may infringe the performing rights of another").

scenario also highlights the fact that a business proprietor has no control over what is being played, yet he may be held liable because it was played.<sup>78</sup>

### E. Confusing to Proprietors

The multiple performance doctrine requires that business proprietors obtain a license in order to play radios or televisions for patrons, unless they can qualify for the section 110(5) exemption. However, proprietors are generally unaware of the need for a license<sup>79</sup> or of the need to consult a copyright attorney. Proprietors are unlikely to know<sup>80</sup> that the law distinguishes between equipment commonly used in private homes and other, more elaborate systems. Even if they were informed of the law, they would still question why “a bar with one 27” television does not need a license, while another bar with two 13” televisions does?”<sup>81</sup> To ambush proprietors with charges of copyright infringement under this furtive system is simply unfair.<sup>82</sup>

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<sup>78</sup> Similarly, the Supreme Court reasoned that the proprietor was merely a “passive listener” and not a performer. The “passivity” rationale is that a business proprietor’s secondary transmission is a largely passive act of turning on a radio and is not a performance. This rationale was first seen in *Jerome H. Remick & Co. v. General Electric Co.*, 16 F.2d 829, 829 (S.D.N.Y. 1926) (“Certainly those who listen do not perform, and therefore do not infringe.”). See also *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 398–99 (1968) (“[V]iewers 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.”); *Aiken*, 422 U.S. at 159. In *Aiken*, Justice Stewart, writing for the majority, maintained that one who listened to a broadcast, like a member of a live audience, did not perform the work. See *id.* Also, according to the *Aiken* Court, “picking up radio signals off the air and transmitting them through radio speakers simply did not constitute a ‘performance,’ and hence need not be licensed.” NIMMER, *supra* note 3, § 8.18[A], at 8-203 to -204.

<sup>79</sup> See Litman, *supra* note 2, at 49. “The music performing rights societies have been trying to educate a recalcitrant public for the past eighty years, and the effort has hardly made a dent in the psyches of their customers or the people who patronize them.” *Id.*

<sup>80</sup> Nor is it clear that anyone knows how a court will apply § 110(5). See *supra* note 35.

<sup>81</sup> Litman, *supra* note 2, at 49–50 (quoting 17 U.S.C. § 110(5)). “Copyright lawyers might understand that the reason for this is that the words in section 110(5) say ‘single receiving apparatus of a kind commonly used in private homes,’ but there is nothing intuitively appealing about the distinction.” *Id.*; see also Shipley, *supra* note 1, at 476 (“The law must seem arbitrary to people like Joe,” a fictional business proprietor.).

<sup>82</sup> In 1929, one court prophetically wrote that the adoption of the multiple performance doctrine “would be harmful, unnecessary, and would lead to endless confusion and disorder.” *Buck v. Debaum*, 40 F.2d 734, 736 (S.D. Cal. 1929). There are complaints that “businesses are often threatened with legal action or harassed for doing something they did not realize was against the law.” 141 CONG. REC. S12085 (daily ed. Aug. 9, 1995) (statement of Sen.

### F. *Secondary Uses of Primary Transmissions Are "Remote and Minimal"*

The multiple performance doctrine is bad policy for yet another reason: merely turning on an ordinary receiver in public is an insignificant event.

Congress has already acknowledged that "[t]he basic rationale of [section 110(5)] is that the secondary use of the [primary] transmission by turning on an ordinary receiver in public is so remote and minimal that no further liability should be imposed."<sup>83</sup> Even if a business employs televisions larger or speakers louder than types "commonly used in private homes,"<sup>84</sup> the secondary use is just as "remote and minimal." The audience in commercial establishments is generally small. There is no expense placed on the copyright holder because secondary uses are mere fleeting sounds and images; patrons are seeing or hearing programming that they could see or hear at home, in their cars, or virtually anywhere through portable radios or televisions without any additional payment to the copyright owner. Secondary transmissions are too remote and minimal to really matter.

### G. *Performance Rights Societies Regulate the Industry*

Performance rights societies<sup>85</sup>—which arrived on the scene in 1914—are important players in the economic worth of the performance right. As a practical matter, individual copyright owners are incapable of controlling or

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Thomas); *see also* 7 No. 4 J. PROPRIETARY RTS. 32, 32 (1995) ("In a congressional hearing held last year, witnesses complained of the music licensing practices of performing rights societies . . . [that] used pressure tactics to collect fees.").

<sup>83</sup> H.R. REP. NO. 94-1476, 94th Cong., 2d Sess., at 86 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5700.

<sup>84</sup> *See* 17 U.S.C. § 110(5) (1982).

<sup>85</sup> Performance rights societies are expressly recognized by the 1976 Copyright Act. *See* 17 U.S.C. § 116(e)(3) (1982) (defining performing rights society). For a general account of the role of performance rights societies, *see* NIMMER, *supra* note 3, § 8.19, at 8-267 to -277. The three most prominent performance rights societies are American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music Inc. (BMI), and Society of European Stage Authors and Composers (SESAC). For an explanation of the history of ASCAP and BMI and an discussion of their roles, *see* generally RALPH S. BROWN & ROBERT C. DENICOLA, *CASES ON COPYRIGHT, UNFAIR COMPETITION, AND OTHER TOPICS BEARING ON THE PROTECTION OF LITERARY, MUSICAL AND ARTISTIC WORKS* 470-75 (5th ed. 1990); Kernochan, *supra* note 13, at 333. Also *see* the seminal antitrust case of *Broadcast Music Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 25 (1979) (holding that ASCAP's and BMI's licensing methods are not forbidden by antitrust laws).

tracking unauthorized public performances of their work.<sup>86</sup> Performance rights societies do this for the individual copyright owners. Societies obtain non-exclusive licenses from copyright owners and, in turn, license individual businesses for the right to play the copyrighted works.<sup>87</sup> The performance rights societies are the middlemen<sup>88</sup>—and policemen<sup>89</sup>—between copyright owners and individual licensees.

The current scheme bestows excessive power on performance rights societies.<sup>90</sup> The scheme compels businesses nationwide to either obtain licenses from performance rights societies or keep their radios and televisions off. Because of their expertise<sup>91</sup> and financial resources, when a society representative sits down with a business owner, the society dominates the bargaining table. This disparity has led to unfair practices. Licensing “fees are charged in a confusing or ambiguous manner, without any oversight or control[.]”<sup>92</sup> There are also complaints that “businesses are often threatened with legal action<sup>93</sup> or harassed for doing something they did not realize was against the law.”<sup>94</sup> The current scheme begets this disparity.

<sup>86</sup> See *Broadcast Music*, 441 U.S. at 4–5.

In 1914, Victor Herbert and a handful of other composers organized ASCAP [the first performance rights society] because those who performed copyrighted music for profit were so numerous and widespread, and most performances so fleeting, that as a practical matter it was impossible for the many individual copyright owners to . . . detect unauthorized uses [of their works].

*Id.*

<sup>87</sup> See generally BROWN & DENICOLA, *supra* note 85.

<sup>88</sup> “ASCAP was organized as a ‘clearing-house’ for copyright owners and users to solve [the] problems [associated with the licensing of music].” *Columbia Broad. Sys., Inc. v. American Society of Composers*, 400 F. Supp 737, 741 (S.D.N.Y. 1975).

<sup>89</sup> Employees of the performance rights society typically enter an unlicensed establishment and listen to what music is played. The songs played are then checked against the society’s repertoire of music over which it holds licenses. If a listed song is played and the establishment is not properly licensed, a cause of action for infringement arises.

<sup>90</sup> The Fairness in Musical Licensing Act was aimed at reducing the powers of the performance rights societies. See *supra* notes 38–41 and accompanying text.

<sup>91</sup> In 1984, ASCAP attorneys were involved in 751 actions. The majority of these were “infringement suits against non-broadcaster commercial users (taverns, bars, restaurants, shops, etc.) who resist[ed] licensing.” Kernochan, *supra* note 13, at 373.

<sup>92</sup> 141 CONG. REC. S12085 (daily ed. Aug. 9, 1995) (statement of Sen. Thomas).

<sup>93</sup> “[M]any of those who buy performing rights licenses from [societies] say that they do so only because they are afraid of the copyright police.” Litman, *supra* note 2, at 48.

<sup>94</sup> 141 CONG. REC. S12085 (daily ed. Aug. 9, 1995) (statement of Sen. Thomas); see also 7 No. 4 J. PROPRIETARY RTS. 32, 32 (1995) (“In a congressional hearing held last year,

## H. Fairness for Copyright Owners

The primary argument made by copyright owners in support of the multiple performance doctrine is that the music belongs to them and it is unfair to allow retail establishments to play copyrighted works without paying.<sup>95</sup> It has been asserted that restaurateurs who fail to obtain a license are stealing the music.<sup>96</sup> This argument fails to address the policy behind copyright law's ultimate aim of benefiting the public. Copyright law is not driven by exacting profits from all uses of a copyrighted work; the law's purpose is not to facilitate the sale of the copyright owner's product. Copyright law is driven by the purpose of "promoting the . . . useful arts."<sup>97</sup> The arts are promoted by public access as long as incentives exist for authors, the obligation of encouraging creative efforts is satisfied; therefore, public accessibility must be favored.<sup>98</sup> The copyright inquiry does not ask whether each particular use has been paid for, but whether the author has been adequately compensated.<sup>99</sup> With regard to the performance right, the condition of adequate compensation is met: copyright owners receive licensing fees for the primary transmission and they also benefit from the larger audience created when their works are played in commercial establishments.<sup>100</sup> Also, any indirect profit a proprietor might make from playing her radio is negligible and incalculable. Customers are paying for food, not to hear the music, and to force a proprietor to pay for what she might not be getting is unfair.

## IV. DEFINING "PERFORMANCE": MOVING TOWARDS A SOLUTION

It appears that few, if any, proponents of the status quo remain.<sup>101</sup> The safe haven of section 110(5) is intended to protect proprietors from the application

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witnesses complained of the music licensing practices of performing rights societies . . . that used pressure tactics to collect fees."). For more statements by bar and restaurant owners, see *Music Licensing Practices of Performing Rights Societies: Oversight Hearing Before the Subcomm. on Intellectual Property and Judicial Admin. of the House Comm. on the Judiciary*, 103d Cong., 2d Sess. (Feb. 23–24, 1994).

<sup>95</sup> See HALPERN ET AL., *supra* note 26, at 236.

<sup>96</sup> See Litman, *supra* note 2, at 49.

<sup>97</sup> See U.S. CONST. art. I, § 8, cl. 8; see also *supra* notes 52–67 and accompanying text.

<sup>98</sup> See *supra* notes 50–65 and accompanying text.

<sup>99</sup> While the distinction between facilitating sales and assuring adequate compensation is subtle, it is enough to disavow the view that every use of a copyrighted work requires payment.

<sup>100</sup> See *supra* notes 50–65 and accompanying text; see also *infra* notes 168–71 and accompanying text.

<sup>101</sup> See *supra* notes 35–37 and accompanying text.

of the multiple performance doctrine, but it is actually a dark back alley—unpredictable and unsafe. In working toward a solution, members of Congress<sup>102</sup> and various critics<sup>103</sup> have focused on the section 110(5) exemption to the multiple performance doctrine—suggestions and attempts are constantly made to adjust section 110(5) to make it more user-friendly.<sup>104</sup> Even the most recent congressional proposals are merely attempts to carve yet more exemptions to favor a particular niche of proprietors. Such proposals simply do not reach the heart of the problem.

The real culprit is the rule itself, not the exemption. The problems of the current system<sup>105</sup> have been caused by the implementation of the multiple performance doctrine,<sup>106</sup> and the 110(5) sideshow<sup>107</sup> has become a distraction. Little attention has been given to the fact that the Supreme Court has rejected the multiple performance doctrine.<sup>108</sup> It is frequently written that the Supreme Court created an exemption to the multiple performance doctrine.<sup>109</sup> However, as this Note clarifies, the Court did not create an exemption to the doctrine, but simply rejected it.<sup>110</sup> Also rarely mentioned is the fact that Congress brought the doctrine back to life based on purblind readings of the Court's decisions. The remainder of this Note deals with the Court's rejection of the multiple performance doctrine, Congress's misinterpretation of those decisions, and how those decisions can guide a redefinition of what it means to perform a copyrighted work to solve the problems of the current law.<sup>111</sup>

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<sup>102</sup> See *supra* notes 35–47 and accompanying text.

<sup>103</sup> See *id.*

<sup>104</sup> See *id.*

<sup>105</sup> See *supra* Part III, where the problems of the current system are detailed.

<sup>106</sup> Under the current scheme, Don, as the copyright owner, has the right to control Kate's and other's secondary uses of the primary transmission, because those secondary uses fall within the definition of performance. It is clear then that the breadth of the performance right is determined by the definition of performance. Also important to this analysis is the definition of public. That discussion, though, is beyond the scope of this Note. For helpful sources, see *supra* note 19.

<sup>107</sup> See *supra* note 35.

<sup>108</sup> See *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 160–61 (1975) (“[T]his Court has . . . explicitly disavowed the view that the reception of an electronic broadcast can constitute a performance, when the broadcaster [of the primary transmission] is licensed to perform the copyrighted material that he broadcasts.”). For a thorough discussion of the *Aiken* case, see *infra* notes 119–30 and accompanying text.

<sup>109</sup> See *infra* notes 131–37 and accompanying text.

<sup>110</sup> See *infra* notes 119–30 and accompanying text.

<sup>111</sup> “With the advent of the technological revolution, the courts have had to define and redefine the word ‘performance’ within the context of both the 1909 and 1976 Copyright Acts.” Marcovitch, *supra* note 72, at 129. Copyright owners argue for a broad definition of

## A. Buck v. Jewell-LaSalle Realty Co.

Beginning in 1926, each court which considered the issue of secondary uses of primary transmissions held that the secondary uses were not performances.<sup>112</sup> In *Buck v. Jewell-LaSalle Realty Co.*,<sup>113</sup> though, the Supreme Court appeared to have set aside this earlier line of cases. The accepted rule of *Jewell-LaSalle*<sup>114</sup> was that a secondary use of a primary transmission was a performance.<sup>115</sup> In rejecting the pre-*Jewell-LaSalle* cases, Justice Brandeis reasoned that a broadcast creates inaudible sound waves which travel through the air and are received and made audible by the radio.<sup>116</sup> According to the Court, this was a reproduction of the work and therefore a performance.<sup>117</sup>

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performance, one which includes secondary uses of primary transmissions, usually with a performance rights society representing the litigant. Business owners argue for a narrower definition of performance, one that does not include secondary uses. The current statutory definition of perform is the broader version; it includes secondary uses.

<sup>112</sup> See, e.g., *Buck v. Debaum*, 40 F.2d 734, 735 (S.D. Cal. 1929) (holding that when a restaurant receives a primary transmission from a broadcaster and plays the song for its customers that secondary use is covered under the license obtained by the radio station for the primary transmission); *Buck v. Duncan*, 32 F.2d 366 (W.D. Mo. 1929) (deciding that the mere act of receiving what is in the air cannot be a performance); *Jerome H. Remick & Co. v. General Electric Co.*, 16 F.2d 829, 829 (S.D.N.Y. 1926) (stating that those who listen to a radio broadcast do not perform the work).

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. The performance in . . . [these] case[s] takes place in the studio of the broadcasting station . . . .

*DeBaum*, 40 F.2d at 735. Gene Buck was the president of ASCAP during the 1920s and 1930s.

<sup>113</sup> 283 U.S. 191 (1931).

<sup>114</sup> In a decision in 1975, forty-four years after *Jewell-LaSalle*, the Supreme Court clarified what *Jewell-LaSalle* was meant to stand for. See *infra* notes 119–24 and accompanying text.

<sup>115</sup> See *supra* notes 23–26 and accompanying text.

<sup>116</sup> See *Jewell-LaSalle*, 283 U.S. at 200–01.

<sup>117</sup> See *id.* at 201. As a result of *Jewell-LaSalle*, proprietors of commercial establishments who played radios or televisions became a new class of potential copyright infringers, giving rise to what one author called "multiple copyright liability" theory. See Maslow, *supra* note 8, at 1061. Because the proprietors were now performing when they played radios or televisions for patrons, their acts fell within the copyright owners' control; the copyright owners could exact licensing fees from them.



However, the *Jewell-LaSalle* Court indicated twice in its opinion that the defendant might not have been liable if the primary transmission had been licensed.<sup>118</sup>

### B. Twentieth Century Music Corp. v. Aiken

On its face, *Jewell-LaSalle* may have appeared to have adopted the multiple performance doctrine because both the primary transmission and the secondary uses of that primary transmission were found to be performances.<sup>119</sup> But in 1975,<sup>120</sup> the Supreme Court made it clear that it was improper to read *Jewell-LaSalle* as fully adopting the multiple performance doctrine.<sup>121</sup> The facts of *Aiken* are paradigmatic of secondary use cases.<sup>122</sup> Aiken, the defendant, operated "George Aiken's Chicken," a fast-food restaurant equipped with a radio and four speakers installed in the ceiling. Aiken regularly tuned into local radio stations for the benefit of his employees and customers. A number of the plaintiffs' copyrighted songs<sup>123</sup> were played by a licensed radio station, of which Aiken provided a secondary transmission for his customers and employees. Claiming that Aiken was engaged in a performance, the plaintiffs sued for copyright infringement.<sup>124</sup>

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<sup>118</sup> "[W]e have no occasion," the Court wrote, "to determine . . . the effect upon *others* of [a broadcaster] paying a license fee." *Jewell-LaSalle*, 283 U.S. at 198 (emphasis added). The Court continued: "If the copyrighted composition had been broadcast by [the defendant] with plaintiffs' consent, a license for its commercial [use] might possibly have been implied." *Jewell-LaSalle*, 283 U.S. at 199 n.5.

<sup>119</sup> See *Jewell-LaSalle*, 283 U.S. at 191.

<sup>120</sup> "Despite its analytical inadequacies, the *Jewell-LaSalle* doctrine went unchallenged for many years." NIMMER, *supra* note 3, § 8.18[A], at 8-196.

<sup>121</sup> Many view *Aiken* as virtually overruling *Jewell-LaSalle*. See, e.g., NIMMER, *supra* note 3, § 8.18[A], at 8-204 ("[W]hile *Aiken* almost totally undercut *Jewell-LaSalle*, it did not quite overrule it."); *Aiken*, 422 U.S. at 166 (Blackmun, J., concurring) ("Today . . . the Court . . . effectively overrules *Jewell-LaSalle* . . ."). The proper reading of the two cases, though, reveals that *Aiken* did not overrule or even criticize *Jewell-LaSalle*. Instead, the two are entirely consistent. *Aiken* merely reemphasized what the Court held in *Jewell-LaSalle*; namely, that if the secondary use is of a *licensed* primary transmission, then the multiple performance doctrine does not apply.

<sup>122</sup> All facts are taken from *Aiken*, 422 U.S. at 152-54.

<sup>123</sup> The songs were "The More I See You," copyrighted by Twentieth Century Music Corp., and "Me and My Shadow," copyrighted by Mary Bourne. See *Aiken*, 422 U.S. at 152-53.

<sup>124</sup> The district court found Aiken liable and awarded statutory damages for each infringement. See *Twentieth Century Music Corp. v. Aiken*, 356 F. Supp 271 (W.D. Pa. 1973). On appeal, the Third Circuit reversed, relying on *Fortnightly* and *Teleprompter*. See

In *Aiken*,<sup>125</sup> the Supreme Court made it clear that *Jewell-LaSalle* was not an adoption of the multiple performance doctrine. The Court explained that its opinion in *Jewell-LaSalle* clearly emphasized the fact that the primary transmission in that case was not licensed.<sup>126</sup> Thus, a proper reading of *Jewell-LaSalle* must include the qualification that while a proprietor's secondary use of an *unlicensed* primary transmission will be deemed a performance of the work, a proprietor's secondary use of a *licensed* primary transmission, according to the Court, might not be a performance.<sup>127</sup> In other words, the multiple performance doctrine would only apply where the secondary use was of an *unlicensed* primary transmission.<sup>128</sup> Returning to the introductory hypothetical,

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Twentieth Century Music Corp. v. Aiken, 500 F.2d 127, 133-37 (3d Cir. 1974), *aff'd*, 422 U.S. 151 (1975). For a discussion of these two cases, see *infra* note 125.

<sup>125</sup> The *Aiken* decision was based, in part, on two previous Supreme Court cases: *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 392 (1968) (holding that under the 1909 Act, where members of a community are connected by cable to a powerful antenna, which picked up television signals from local stations and sent the signal to the homes, the transmission from the antenna to the homes through the cable is not a performance) and *Teleprompter Corp. v. Columbia Broad. Sys., Inc.*, 415 U.S. 394 (1974) (holding that where defendants bring distant signals to subscribers' homes by the use of powerful antennas, there is no performance). The *Aiken* Court characterized these two decisions as "disavow[ing] 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." *Aiken*, 422 U.S. at 161. However, the Court wrote, "[t]o hold that . . . Aiken 'performed' the [songs] . . . 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." *Aiken*, 422 U.S. at 162; see NIMMER, *supra* note 3, § 8.18[A], at 8-203 ("[T]he decisions in *Fortnightly* and *Teleprompter* effectively foreclosed application of the multiple performance doctrine . . .").

<sup>126</sup> See *Aiken*, 422 U.S. at 160 (citing *Jewell-LaSalle*, 283 U.S. at 198, 199 n.5); see *supra* note 118 and accompanying text; see also Maslow, *supra* note 8, at 1067 ("[D]ictum in *Jewell-LaSalle* recognized a distinction between authorized and unauthorized broadcasts.").

<sup>127</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." *Aiken*, 422 U.S. at 160; see also NIMMER, *supra* note 3, § 8.18[A], at 8-204 (After *Aiken*, "[a]t most, then, *Jewell-LaSalle* remained authoritative to permit a finding of a multiple performance by a broadcast receiver *only* when the broadcasting station was itself unlicensed to perform the work in question.") (emphasis added). Compare *Fortnightly*, 392 U.S. at 407 n.5 (Fortas, J., dissenting) ("[T]he term 'perform' cannot logically turn on the question whether the material that is used is licensed or not licensed.").

<sup>128</sup> "But even this small residue of *Jewell-LaSalle* became most questionable." NIMMER, *supra* note 3, § 8.18[A], at 8-204. How a proprietor would be able to discern whether a radio or television station was properly licensed would be a major obstacle to application of this rule. Moreover, this situation would rarely arise. Broadcasters are highly sensitive to proper licensing because it is an integral part of their business.

if *Aiken* were the current law, and assuming the radio station, WXYZ, was properly licensed, Kate would not be liable for infringing Don's copyright because Kate's secondary use of WXYZ's licensed primary transmission would not be deemed a performance.

After *Aiken*, the doctrine of multiple performances was for all practical purposes dead;<sup>129</sup> however, the law of the performance right quickly changed from rejection of the multiple performance doctrine in *Aiken* to adoption of the multiple performance doctrine in the 1976 Copyright Act.<sup>130</sup> The two were clearly at odds.

### C. Congress and Jewell-LaSalle

Congress asserted that its adoption of the doctrine of multiple performances was supported by *Jewell-LaSalle*<sup>131</sup> and that the section 110(5) exemption was an answer to *Aiken*.<sup>132</sup> Congress's misunderstanding of what these two cases stood for has led the doctrine down the wrong path—through the doors of commercial establishments.

Congress misread *Jewell-LaSalle* as extending liability to any business establishment that operates a radio or television set for the entertainment of its patrons.<sup>133</sup> That interpretation lacked reference to the important qualification that the *Jewell-LaSalle* Court established and that the *Aiken* Court emphasized.<sup>134</sup> Under *Jewell-LaSalle*, the multiple performance doctrine was alive only when the proprietor's secondary use was of an *unlicensed* primary transmission. The 1976 Act, though, imposes liability on the proprietor without regard to whether or not the primary transmission is licensed. Congress's adoption of the multiple performance doctrine, therefore, cannot be supported

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<sup>129</sup> At the most, the multiple performance doctrine was alive only for secondary uses of unlicensed primary transmissions. The *Aiken* Court "all but sounded the death knell of the multiple performance doctrine." NIMMER, *supra* note 3, § 8.18[A], at 8-203. The *Jewell-LaSalle* situation will rarely arise because performance licenses are so fundamentally a part of the business for radio and television broadcasting. See Shipley, *supra* note 1, at 483 (After *Aiken*, "*Jewell-LaSalle* had become a decision with a very limited impact.>").

<sup>130</sup> See Shipley, *supra* note 1, at 483 ("[T]he demise of *Jewell-LaSalle* was . . . short-lived.>").

<sup>131</sup> When drafting the 1976 Act, Congress purported to "accept[] the traditional, pre-*Aiken*, interpretation of the *Jewell-LaSalle* decision." H.R. REP. No. 94-1476, at 87 (1976), reprinted in 1976 U.S.C.A.N. 5659, 5701.

<sup>132</sup> The 1976 Copyright Act claimed to be incorporating *Aiken* into section 110(5). The House Report states that performances in the particular fact situations in *Aiken* would be exempt under section 110(5), but that this would be the "outer limit of the exemption."

<sup>133</sup> See *supra* note 131.

<sup>134</sup> See *supra* notes 114-28 and accompanying text.

by *Jewell-LaSalle*, particularly in light of the Supreme Court's statements in *Aiken*.

#### D. Congress and Aiken

Section 110(5) has been labeled the "*Aiken* exemption."<sup>135</sup> However, the two are hardly alike.<sup>136</sup> *Aiken* was a complete rejection of the multiple performance doctrine,<sup>137</sup> while section 110(5) is merely a narrow exemption to it.

In addition to the case's and the exemption's very different meanings, Congress's failure to account for *Aiken* can be shown convincingly by examining the legislative history of the 1976 Copyright Act.<sup>138</sup> Despite the extensive judicial and academic ink section 110(5) has harnessed,<sup>139</sup> it is hardly recognized that section 110(5)—the so-called "*Aiken* exemption"—was drafted ten years before *Aiken* was decided.<sup>140</sup> Between the *Aiken* decision on June 17,

<sup>135</sup> See *Little Mole Music v. Mavar's Supermarket*, Nos. C86-3129Y, C87-1865Y, 1988 WL 167243, at \*5 (N.D. Ohio 1988) ("[C]ongress codified the *Aiken* exemption in section 110(5) of the Act."); *Springsteen v. Plaza Roller Dome, Inc.*, 602 F. Supp 1113, 1115 (M.D.N.C. 1985) (stating incorrectly that "[i]n 1976, primarily as a result of [*Aiken*], Congress enacted section 110(5)"); NIMMER, *supra* note 3, § 8.18[C][2], at 8-211; Robert A. Feitel, *Copyright Misuse and Cable Television: Orth-O-Vision, Inc. v. Home Box Office*, 35 FED. COMM. L.J. 347, 368 n.118 (1984) (citing 110(5) as the "statutory codification of the *Aiken* performance exception"); Shipley, *supra* note 1 (referring throughout to 110(5) as the *Aiken* exception); Wilk, *supra* note 35, at 808 (referring to 110(5) as the *Aiken* exemption).

<sup>136</sup> See Maslow, *supra* note 8, at 1094 ("[A]n interpretation of section 110(5) which limits the exemption's application [only] to an establishment like the one in *Aiken's* . . . apparently subverts one of the major policies behind copyright law: the promotion and maximization of public dissemination of information and art for the general public good.").

<sup>137</sup> A ruling that all of those in *Aiken's* position are copyright infringers "would result in a regime of copyright law that would be both wholly unenforceable and highly inequitable." *Aiken*, 422 U.S. at 162; see also NIMMER, *supra* note 3, § 8.18[A], at 8-203 ("[T]he decisions in *Fortnightly* and *Teleprompter* effectively foreclosed application of the multiple performance doctrine . . .").

<sup>138</sup> See PATRY, *supra* note 10, at 917-21.

<sup>139</sup> See *supra* note 35. One writer who did recognize this sequence of events is PATRY, *supra* note 10, at 917. "[A]lthough Section 110(5) is usually discussed in connection with the Supreme Court's 1975 decision in *Twentieth Century Music Corp. v. Aiken*, its origins lie in [Congress]." *Id.*

<sup>140</sup> See S. REP. NO. 89-1006 § 109(4) (1965); H.R. REP. NO. 89-4347, § 109(4) (1965). The 1965 proposed revision stated:

1975 and the enactment of 110(5) on October 19, 1976, Congress made no changes to section 110(5).<sup>141</sup> Despite *Aiken's* rejection of the multiple performance doctrine, section 110(5)'s allegiance to the doctrine, by creating only a narrow exemption to it, remained unchanged.<sup>142</sup> Section 110(5), which pre-dates *Aiken*, ignores, rather than resolves,<sup>143</sup> the policy considerations upon which *Aiken* is bottomed.

Congress also sought to justify its adoption of a much diluted version of *Aiken* by asserting that *Aiken* was based on the narrower definition of perform in the 1909 Copyright Act.<sup>144</sup> However, *Aiken* was based on policy, not statutory interpretation or construction.<sup>145</sup> The policy arguments which persuaded the *Aiken* Court to reject the multiple performance doctrine transgress whichever definition Congress chose to include in the 1976

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

(7) communication of a transmission embodying a performance or exhibition of a work by the public reception of the transmission on a single receiving apparatus of a kind commonly used in private homes, unless:

- (a) a direct charge is made to see or hear the transmission; or
- (b) the transmission thus received is further transmitted to the public.

*Id.*

Except for the use of "display" in the 1976 Act (instead of "exhibition"), this 1965 proposal is identical to section 110(5) of the 1976 Act. Note that section 110(5) was enacted in 1976, a year after *Aiken* was decided.

<sup>141</sup> For additional commentary on this legislative history, see PATRY, *supra* note 10, at 917-21.

<sup>142</sup> See *supra* notes 139-40 and accompanying text.

<sup>143</sup> See *supra* Part III.

<sup>144</sup> H.R. REP. NO. 94-1476, at 86, 87 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5700-01.

<sup>145</sup> The majority opinion in *Aiken* consists of twenty paragraphs. See *Aiken*, 422 U.S. at 152-64. Four of them are devoted to the facts of the case, two are statements of general copyright law, five discuss the apposite law, and nine of those twenty-two paragraphs, including the last four, are devoted to discussing policy issues.

The Court stated that the multiple performance doctrine conflicts with the balanced purpose of the Copyright Act "of securing to the composer an adequate return for [the value] of his composition and at the same time prevent the formation of oppressive monopolies." *Aiken*, 422 U.S. at 164. Also, "the policy reasons which gave birth to *Aiken* still make a great deal of sense." Marcovitch, *supra* note 72, at 136.

Copyright Act.<sup>146</sup> Contrary to what was asserted in Congress,<sup>147</sup> the basis for the *Aiken* decision is not “completely overturned”<sup>148</sup> merely by Congress’s broad definition of perform in the 1976 Act.

### E. Policymaking

Admittedly, Congress is free, and perhaps duty bound,<sup>149</sup> to make its own decisions between competing policy interests, such as the copyright owners’ rights versus the public’s right to access copyrighted works. Congress’s autonomy is to be respected. Congress is not restricted by the principles of stare decisis,<sup>150</sup> nor are congressmen and congresswomen incompetent to decide these issues. This Note’s reliance on *Aiken* as a rejection of the multiple performance doctrine is predicated on the opinion being a clear statement by the country’s high court. While *Aiken* is not a badge of authority that can be used to compel Congress to adopt the Court’s ruling, it is persuasive authority that copyright law cannot afford to ignore.<sup>151</sup>

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<sup>146</sup> The *Aiken* Court was well aware of the proposed copyright revisions adopting the multiple performance doctrine, but the Court nonetheless defined performance narrowly, despite the proposed revisions. See *Aiken*, 422 U.S. at 166 n.2 (Blackmun, J., dissenting) (noting the treatment of secondary transmissions of radio broadcasts by recent congressional proposals).

<sup>147</sup> See H.R. REP. NO. 94-1476, at 87 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5701. “The Copyright Office took the position that the basis for the *Aiken* decision—that no ‘performance’ occurred—‘would be completely overturned by the revision bill,’ and thus there was no necessity for amending the bill.” *Copyright Law Revision: Hearings on H.R. 223 Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the House Judiciary Comm.*, 94th Cong., 1st Sess. 1811 (1975).

<sup>148</sup> See *supra* note 147 and accompanying text.

<sup>149</sup> But see Deanell R. Tacha, *Judges and Legislators: Renewing the Relationship*, 52 OHIO ST. L.J. 279, 284 (1991) (quoting THE FEDERALIST NO. 48, at 343 (James Madison) (B. Wright ed. 1961)). “For Madison . . . separation of powers did not mean complete isolation between the three branches: Unless the departments are connected and blended, the degree of separation . . . essential to a free government . . . can never in practice be duly maintained.” *Id.*

<sup>150</sup> See Michael E. Solimine & James L. Walker, *The Next Word: Congressional Response to Supreme Court Statutory Decisions*, 65 TEMP. L. REV. 425, 426 (1992) (“[W]hen the United States Supreme Court interprets a federal statute in a manner repugnant to Congress, the latter may respond by legislatively modifying the statute in accordance with its intentions.”).

<sup>151</sup> See *supra* notes 144–46 and accompanying text; cf. *Aiken*, 422 U.S. at 168 (Burger, C.J., dissenting) (“[T]he issue presented can only be resolved appropriately by the Congress.”).

Finally, while legislative history reveals scant evidence that Congress considered the issues raised in *Aiken*,<sup>152</sup> even if one were to assume that there was full blown debate on the floors of the House and Senate, the fact is that the result reached by the current system is inadequate. The policy concerns, stridently raised in *Aiken*, remain unresolved under the current scheme.<sup>153</sup> The problems caused by the implementation of the multiple performance doctrine persist.<sup>154</sup>

#### F. *The Solution: Redefine the Term "Perform"*

Commentators, courts, and at least some members of Congress<sup>155</sup> agree that the multiple performance doctrine with today's narrow section 110(5) exemption makes for an inadequate system.<sup>156</sup> Congress can right its wrong readings of the Supreme Court cases, and rectify the problems,<sup>157</sup> by simply doing away with the doctrine of multiple performances.

An adequate result can be achieved by rewriting the statutory definition of performance to exclude a business proprietor's secondary use of a primary transmission.<sup>158</sup> The definition proposed by this Note is the addition of the following underlined language to the current definition of perform at 17 U.S.C. § 101:

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<sup>152</sup> See PATRY, *supra* note 10, at 921 (providing a detailed account of the legislative history); see also *supra* notes 135–48 and accompanying text.

<sup>153</sup> See *supra* Part III.

<sup>154</sup> Congress adopted the very doctrine the Supreme Court deemed unenforceable and inequitable. See *Aiken*, 422 U.S. at 162.

<sup>155</sup> See *supra* notes 35, 38–47 and accompanying text.

<sup>156</sup> See *supra* notes 101–07 and accompanying text. Also, the original “purpose [of the performance right] was to prohibit unauthorized performances of copyrighted musical compositions in such public places as concert halls, theaters, restaurants and cabarets.” *Aiken*, 422 U.S. at 157 (citing H.R. No. 60-2222 (1909)). “But it was never contemplated that the members of the audience who heard the composition would themselves also be simultaneously ‘performing,’ and thus also guilty of infringement.” *Aiken*, 422 U.S. at 157.

<sup>157</sup> See *supra* Part III.

<sup>158</sup> See Kernochan, *supra* note 13, at 362 n.64. Professor Nimmer suggests that the possibility remains that a court, convinced as a matter of policy that secondary uses of primary transmissions should not be subject to copyright, might reject the multiple performance doctrine on the grounds that secondary uses of primary transmissions are not expressly included within the statutory definition of performance, despite the fact that Congress made clear that it intended to include secondary transmissions. A court could reason that legislative history can be used to interpret statutory language, but not to change it. “Such a court might choose to follow . . . the ‘conventional sense’ of the word ‘performance’ which would not include [secondary] uses of primary transmissions.” NIMMER, *supra* note 3, § 8.18[B], at 8-208.

To "perform" a work means to recite, render, play, dance, or act it, either directly or by means of any device or process, other than by a radio or television tuned to a primary transmission.

In other words, a radio or television tuned to a primary licensed transmission<sup>159</sup> is not a performance. Under this narrow definition only the primary transmission would be a performance, thus finally and forever defeating the problematic multiple performance doctrine and the 110(5) sideshow.

With this definition, Kate would be free to tune into radio programming without infringing Don's copyright because by playing the radio she would not be performing his work.<sup>160</sup> This result strikes the proper balance between encouraging creative efforts and assuring public access to copyrighted works. This narrow definition of performance maintains the financial incentive<sup>161</sup> for authors because they would still be paid a licensing fee by broadcasters for the primary transmission.<sup>162</sup> Also, freeing proprietors to play radio and television programming would increase public accessibility, which is the "ultimate aim"<sup>163</sup> of and "of central importance to copyright theory."<sup>164</sup>

Returning to the narrow definition of performance would also make for a more efficient system. It would eliminate proprietors' confusion,<sup>165</sup> the practical problems of requiring so many businesses to obtain licenses,<sup>166</sup> and the strong hold that performance rights societies have on proprietors. Also, the need for application of the vexatious 110(5) exemption<sup>167</sup> would be obviated because proprietors would not be performing when they played radio or television programming.

<sup>159</sup> The term "primary transmission" is defined in the 1976 Copyright Act, see *supra* notes 18–20 and accompanying text.

<sup>160</sup> "[I]f 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 rights." *Aiken*, 422 U.S. at 155. Under my proposed definition, Kate's radio use is not a performance and therefore does not conflict with any of Don's exclusive rights.

<sup>161</sup> See *supra* note 59.

<sup>162</sup> The financial incentive might be increased. See *infra* notes 170–71 and accompanying text.

<sup>163</sup> See *Aiken*, 422 U.S. at 156.

<sup>164</sup> See Kreiss, *supra* note 52, at 3; Marcovitch, *supra* note 72, at 134 (agreeing with the primary significance of public access). "[P]erhaps the greatest public policy reason which justifies *Aiken* is the fundamental purpose of the Copyright Act in promoting the public interest in the development of the arts and sciences." *Id.*

<sup>165</sup> See *supra* notes 79–82 and accompanying text.

<sup>166</sup> See *supra* notes 74–78 and accompanying text.

<sup>167</sup> See *supra* text accompanying notes 35–37.



Finally, returning to the narrow definition will be profitable for copyright owners.<sup>168</sup> At first glance, the economic effect on copyright owner's of returning to the narrow definition of performance—that secondary uses of primary transmissions are not performances—might appear to reduce the authors' compensation because business proprietors would no longer pay them licensing fees. That treasure trove would be shut. However, looking at the method by which stations are licensed, it is clear that authors would benefit financially, not suffer, from implementation of the narrow definition of performance.<sup>169</sup>

The system works like this: the amount of the fee advertisers pay broadcasters is based on the expected number of total listeners or viewers of the broadcast, including those listeners and viewers in public establishments.<sup>170</sup> If licenses were unnecessary, more proprietors would furnish their establishments with radio or televisions and tune into programming. In turn, this would create larger audiences of the broadcasts. The larger the audience, the larger is the radio station's advertising revenues, and the larger the license royalties are for copyright holders.<sup>171</sup> Therefore, copyright owners would benefit financially from freeing business proprietors to play radios and televisions.

One result of adopting the proposed definition would be to exempt large establishments, which traditionally have not been thought to need or deserve such an exemption.<sup>172</sup> The thinking has been that larger establishments are likely to have people who know that the establishment needs a license and to have the resources to be able to afford one. With the rejection of the multiple performance doctrine, which is proposed here, no establishment would be

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<sup>168</sup> See *supra* note 50–65 and accompanying text. However, the benefits that society derives from hearing music or seeing programs in commercial establishments and an artist's reduction or abstention from creative output are not monetary in nature and are, therefore, difficult or impossible to fit into an economic formula. See generally William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325 (1989).

<sup>169</sup> Note that consumers would also benefit financially because another palpable cost to society of the current system is the increased prices of goods and services resulting from businesses passing the license fees to consumers.

<sup>170</sup> See L. James Juliano, Jr., *Performers' Rights Under the General Revision of Copyright Law*, 28 CASE W. RES. L. REV. 766, 780 (1976) (explaining that "the size of the audience determines how much [the radio broadcaster] can charge for advertisers").

<sup>171</sup> For a detailed discussion of the procedure that performing rights societies use to assure the copyright holder accurate compensation, see Herman Finkelstein, *ASCAP as an Example of the Clearing House System in Operation*, 14 BULL. COPYRIGHT SOC'Y 2 (1966); see also *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 158 (1975).

<sup>172</sup> Large businesses are excluded from 110(5) protection because more than ordinary home equipment is needed to make the sounds or images available to customers.

deemed to be performing through the use of radios or televisions, without regard to its size or its main purpose.<sup>173</sup> Nonetheless, all the reasons that work to prevent small businesses from being liable for copyright infringement for simply flicking on the power button to radios or televisions<sup>174</sup> apply to larger establishments who likewise should not be subject to liability. Extending the exemption to larger establishments is justified by the alleviation of the practical and fairness problems detailed above in Part III and by the fact that copyright owners will still be paid for the primary transmission. Extension of the exemption to all establishments without regard to size is also justifiable in light of the favor placed on the public's access over copyright owner's control.<sup>175</sup>

In sum, the legion of ills caused by the multiple performance doctrine can be cured by simply redefining performance so as not to include secondary uses of primary transmissions. Kate's and Don's day could end happily. Kate would be free to play her radio for customers, and Don would benefit from the larger audience<sup>176</sup> that Kate creates.

## V. CONCLUSION

Congress's incorporation of the multiple performance doctrine into the 1976 Copyright Act has led the performance right scheme askew. The doctrine fails to reach the proper balance between encouraging creative efforts of authors and assuring public accessibility. The current system results in an impractical and inequitable system.<sup>177</sup> A solution can be achieved by redefining performance so that a proprietor is not performing works by playing a radio or television for patrons.<sup>178</sup> The problems caused by the current scheme can be alleviated, and the proper balance between the incentive to create and assuring

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<sup>173</sup> For example, even a sports bar with several large screen televisions would be free to play television programming without a need to obtain a license. The argument would be made that the bar is profiting from the games it shows. When placed in constitutional water, though, this view fails to float. *See supra* notes 50–65 and accompanying text.

<sup>174</sup> *See supra* Part III.

<sup>175</sup> *See supra* notes 50–65 and accompanying text.

<sup>176</sup> *See supra* notes 170–71 and accompanying text.

<sup>177</sup> *See supra* notes 50–65 and accompanying text.

<sup>178</sup> *See supra* notes 155–76 and accompanying text for a proposal of a new definition.

public availability can be reached. Congress just needs to finally follow the Supreme Court's lead and eliminate the multiple performance doctrine.<sup>179</sup>

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<sup>179</sup> I am not the first in this area of the law to make this plea. *See, e.g.*, Warenski, *supra* note 35, at 546. *But see* Oman, *supra* note 10, at 98 (stating that copyright clauses "will dog us for another two hundred years, as the 'charter for a living people'").

Finally, the entertainment industry has a great stake in the scope of the performance right. The broader the right is, the more it is worth. Not surprisingly, the entertainment industry is among the top three financial contributors to congressmen and congresswomen. Additionally, of the top four individual contributors, two are from the entertainment industry—Time Warner and Walt Disney Co. *See* LARRY MAKINSON, *OPEN SECRETS: THE ENCYCLOPEDIA OF CONGRESSIONAL MONEY AND POLITICS*, 26–27 (2d ed. 1992).

