

Stop the Music, I Want My Royalty — The Public Playing of Music in Restaurants and  
Businesses

Robert B. Goss, J.D., LL.M. Candidate IPIL

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Professor Craig Joyce (Advisor)

University of Houston Law Center

## **ABSTRACT**

In 1790, the founding fathers originally did not provide specific copyright protection in the United States to musical works, musical compositions, or sound recordings. However, as the technological and political developments occurred in the United States the original copyright protection provided in Article I, § 8, cl. 8 expanded to include music.

The first protection for music occurred with the enactment of the 1831 Act. Over time, Congress and the Courts supplied additional factors for copyright protection of musical compositions culminating in the 1976 Copyright Act. The Fairness in Music Licensing Act made further revisions in 1998.

The passage of the Fairness in Music Licensing Act drew an immediate attack from both United States musical composition and sound recording copyright owners and a unified European Community. At stake was the copyright owners' individual exclusive right for a royalty and their ability to collect royalties. The Fairness in Music Licensing Act created a business exception that provided the exemption for any business under 2,000 square feet and any restaurant under 3,750 square feet when copyrighted works were played as a public performance over a sound system connected to a radio.

This paper examines the conflict between the U.S. Copyright Act with its homestyle and business exceptions and the obligations created between the European Community and other international trading partners through the Trade-Related Aspects of Intellectual Property (TRIPS) agreement. Further, the U.S. copyright law has to catch up to the technological changes in the music industry. Inclusion of these changes may provide a solution to the U.S. liability imposed by the World Trade Organization (WTO) regarding the present U.S. Copyright Act.

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# STOP THE MUSIC, I WANT MY ROYALTY: THE PLAYING OF MUSIC IN PUBLIC RESTAURANTS AND BUSINESSES

## I. INTRODUCTION

Copyright protection in the United States started almost immediately after the original 13 states signed the Constitution. Section II of this paper will trace the music copyright development from the 1790 Act through the 1909 Act. Section III provides an analysis of the 1976 Copyright Act and later revisions. Section IV provides a discussion of the prima facie copyright elements and the exclusive rights of the copyright owner. Section V is a discussion of the music safe harbors and other limitations to those exclusive rights. Section VI is a discussion of enforcement and administration of music copyright. Section VII discusses the international dispute with the U.S. as litigated through the WTO DS160 Understanding of Dispute Settlement. Finally, summaries of U.S. case law developing the homestyle and business exemptions provide a basis for recommending suggestions for terminating the U.S. liability for violating TRIPS.

## II. MUSIC COPYRIGHT DEVELOPMENTS: THE BEGINNINGS THROUGH 1909

Section II provides the framework for understanding copyright protection development in relation to musical compositions and sound recordings. Discussion in this section begins with the signing of the U.S. Constitution and concludes with the 1909 Copyright Act.

### A. The U.S. Constitution and Copyright Development

On September 17, 1787, forty-two of the fifty-five delegates meeting in Independence Hall located in Philadelphia, Pennsylvania, signed a document entitled the U.S. Constitution.<sup>1</sup>

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<sup>1</sup> Library of Congress, Today in History: September 17 U.S. Constitution, *available at*: <http://memory.loc.gov/ammem/today/sep17.html>.

Although, the original forty-two members of the Constitutional Delegation had signed the Constitution, each of the thirteen separate states had to ratify the Constitution. Therefore, it was against this backdrop that James Madison, the future President, as one of the principal drafters of the Constitution, set out from Philadelphia to explain and gather support among states for the ratification of the Constitution.<sup>2</sup> Ratification was important and required to enact the Constitution. The Constitution presented to the states set forth the initial guiding principles for leading and governing the newly independent nation. The Constitutional Delegates understood that the Constitution would need to be flexible and adaptable if future Congresses were to govern effectively. Thus, the First Congress provided the authority in the Constitution for Congress to create laws as necessary to govern the nation.<sup>3</sup> This enumerated right, article I, § 8, clause 18, provides Congress the authority to write and adapt the laws of the United States. In conjunction with clause 18, the Congressional Delegation provided protection to an area of law hallmarked by invention and political development and judicial change. The First Congress provided for the advancement of the sciences and useful arts. Clause 8 of the Constitution states the enumerated right to protect inventors and their inventions along with protecting authors and their writings by creating the protection for patents and copyrights.<sup>4</sup> This article, known as the copyright and patent clause, reads:

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.<sup>5</sup>

The inclusion of the copyright clause is evidence that the First Congress sought to protect inventions and writings as a desire to foster economic and technological growth in the fledgling

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<sup>2</sup> *Id.*

<sup>3</sup> U.S. Const. art. 1, §8, Cl. 18 (“To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.”).

<sup>4</sup> U.S. Const. art. 1, §8, Cl. 8.

<sup>5</sup> *Id.*

Republic. The copyright clause enumerated in the Constitution was just the beginning. As the nation grew and new technologies evolved, copyright protection would similarly evolve over the passing years. The Constitutional Delegation understood the nation needed flexibility to respond to future developments. Therefore, Congress included the Constitutional clause found in article I, section 8, cl. 18, providing future Congresses the right to pass and modify laws to govern the new nation. New technologies developed, not all of the works by authors and inventors received protection. An example of technology outpacing copyright protection is seen when looking at music. Copyright protection was not specified in the Constitution for intangible property only writings.

### **1. Copyright law development immediately after winning Independence from England**

Following the Revolutionary War, and prior to ratification of the Constitution, the thirteen original Colonies formed a loose central government with thirteen separate state governments and sets of laws.<sup>6</sup> The new nation did not forgo everything English after winning independence. Instead, the drafters of the state constitutions and the U.S. Constitution modeled the State and Federal laws on English laws, selecting what was good and appropriate for the new nation. For instance, after the conclusion of the Revolutionary War twelve of the states passed copyright acts modeled after the Statute of Anne.<sup>7</sup> This adoption of English laws immediately established intellectual property protection. Tracing the development and evolution of copyright illustrates the incremental response to the changing technological and political needs that occurred after signing of the U.S. Constitution. In response to these changes, the United States

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<sup>6</sup> Library of Congress, *supra* note 1.

<sup>7</sup> ROGER REES SCHECHTER ET AL, INTELLECTUAL PROPERTY THE LAW FOR COPYRIGHTS, PATENTS AND TRADEMARKS, 15 (West Group 2003).

Congress passed the 1790 Copyright Act creating federal copyright protection.<sup>8</sup> In fact, “James Madison submitted to the framers of the Constitution a provision ‘to secure to literary authors their copyright for a limited time.’”<sup>9</sup> However, the future President had to wait until 1790 when this separate act passed providing authors and writings the protection set forth in the Constitution. From this humble beginning the Copyright Act as we know it today was a series of legislative acts in response to evolving technology and needs of the nation over 200-plus years.<sup>10</sup>

## **B. Legislation Prior to the 1976 Copyright Act**

Since 1787, Congresses have steadily, although at times slowly, discussed and enacted acts and laws. These laws evolved in response to the growth of the nation and the technological developments affecting authors and their works. Congressional incremental response provided protection to writings and authors as the need arose.<sup>11</sup> As with every national law, there must be a beginning. The initial federal U.S. groundwork for copyright laws started in 1787, when James Madison attempted to include the above-quoted copyright protection for authors.<sup>12</sup> However, federal protection had to wait a few years, until enactment of the first U.S. copyright law on May 31, 1790. This first copyright law was the 1790 Copyright Act.

### **1. 1790 Copyright Act**

Although the future third President, James Madison, had proposed copyright protection in 1787, the nation and Mr. Madison’s wait for a copyright law was relatively short. This “first bill

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<sup>8</sup> *Id.*

<sup>9</sup> U.S. Copyright Office, *A Brief Introduction in History Circular 1a*, available at: <http://www.copyright.gov/circs/circ1a.html>.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

relating to copyrights [was] presented to the First Congress” on June 23, 1789.<sup>13</sup> Enactment of this “first copyright law [provided for] under the new U.S. Constitution” passed on May 31, 1790.<sup>14</sup> The nation now had a law that protected authors and their writings.

#### **a. 1790 Copyright Act Specifics**

The nation’s first copyright law resembles the present copyright law in name only. The 1790 copyright act comprised only seven sections beginning with this preamble:

An Act for the encouragement of learning, by securing the copies of maps, Charts, [a]nd books, to the authors and proprietors of such copies, during the times therein mentioned.

Enactment of the 1790 Copyright Act breathed life into the Constitution’s article I, § 8, cl. 8, keeping authors and proprietors as the sole protected group. Additionally, the act defined writings as the subject matter encompassing maps, Charts, and books.<sup>15</sup> One formality of early copyright law, Congress specified the protection applied only to citizens or residents of the United States.<sup>16</sup>

The 1790 act directed other specific formalities and requirements for registering writings in order to receive copyright protection.<sup>17</sup> These requirements began with the author providing the clerk of the court of the county where the author resided \$.60 and a printed copy of the writing.<sup>18</sup> The author was then required within six months of this submission to submit an

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<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> 1 Stat. 126, 1<sup>st</sup> Congress, (May 31, 1790).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

additional printed copy to the Secretary of State.<sup>19</sup> The Secretary of State within six months of receiving a printed copy had to forward notice of copyright approval or denial to the author.<sup>20</sup>

Congress established the term of copyright protection as an initial term of 14 years beginning once the author, assignee, or administrator recorded the title in the clerk's office. The Act provided copyright infringement protection by prohibiting the copying of a registered subject matter without the author's prior consent. Congress specified the remedy for infringement to be that the "... offender or offenders shall forfeit all and every sheet and sheets, being part of the same, or either of them, to the author or proprietor of such map, chart, book or books, who shall forthwith destroy the same ... [and the] offender and offenders shall also forfeit and pay the sum of fifty cents for every sheet which shall be found in his or her possession...."<sup>21</sup> Additionally, Congress established the statute of limitations for filing a cause of action against an infringement as one year "beginning when the cause of action shall arise, not afterwards."<sup>22</sup> These formalities were humble beginnings to the U.S. copyright law.

Thus, the first Copyright Act became law only a year after the signing of the U.S. Constitution.<sup>23</sup> This 1790 Act remained faithful to the constitutional terms specifying that authors and their writings receive copyright protection. The term "writings" cited by the Constitution was defined in the 1790 Act to be maps, charts, and books; thereby providing the courts the initial copyright subject matter.<sup>24</sup> Significant to this paper, the first copyright law did not provide any protection for music. Music was not mentioned in either the Constitution or the 1790 Copyright Act. As the nation grew, so did the demand for changes to the U.S. copyright laws.

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<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

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

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

## 2. 1831 Copyright Act

Beginning in 1802 a crescendo slowly increased in tempo seeking copyright change, the drumbeat came from those without protection for expanding the copyright laws. For musicians and the owners of musical rights 1831 was a good year. This year “writings” expanded to include music as a protected subject matter. Thus, enactment of the 1831 copyright act expanded the copyright evolution to provide protection against infringement of music copyright as it also included music as a “useful art.”<sup>25</sup>

### a. 1831 Copyright Act specifics

Copyright law in the United States was an evolutionary process that responded to technological changes and economic demands. Following the passage of the first copyright law in 1790, the evolution started on April 29, 1802, when Congress added prints as protected works.<sup>26</sup> Copyright progress was slow at first, after 1802, the first major revision and passage to the copyright law only occurred on February 3, 1831.<sup>27</sup> This revision occurred during the second session of the 21<sup>st</sup> Congress. The 1831 act amended “the several acts respecting copyrights.”<sup>28</sup> The new copyright law repealed the previous acts of “May 31, 1790, chapter 15 ... [and] April 29, 1802, chapter 36.”<sup>29</sup> The resulting copyright law expansion was a modest increase to copyright law. This expansion increased the copyright law from seven sections to sixteen, with music compositions now prominently added in section 1.<sup>30</sup> Section 1 of the act now read:

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<sup>25</sup> RICHARD SCHULENBERG, *LEGAL ASPECTS OF THE MUSIC INDUSTRY, AN INSIDER'S VIEW*, 494 (Watson-Guptill 2005).

<sup>26</sup> See U.S. Copyright Office, *supra* note 9.

<sup>27</sup> *Id.*

<sup>28</sup> 4 Stat. 436, 436-9, 21<sup>st</sup> Congress, Sess. II, Ch. 16 (February 3, 1831).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

... That from and after the passage of this act, any person or persons, being a citizen or citizens of the United States, or resident therein, who shall be the author or authors of any book or books, map, chart, *or musical composition*, which may be now made or composed ... shall have the sole right and liberty of printing, reprinting, publishing, and vending such book or books map, chart, musical composition ... for the term of twenty-eight years from the time of recording of the title thereof, in the manner hereinafter directed.<sup>31</sup> [*Italics mine*].

This simple addition of the words “musical composition” expanded the constitutional Article I, § 8, clause 8 definition of writing and useful arts to include musical compositions. The 1832 copyright act did not disburse with formalities to obtain copyright protection. The author was still required to “deposit a printed copy of the title of such book, or books, map, chart, musical composition” ... “in the clerk’s office of the District Court of the district wherein the author or proprietor shall reside...”<sup>32</sup> Remarkably after almost 42 years the fee remained at sixty cents for an author to file for copyright protection. Nevertheless, the 1832 act did include a procedural change:

...the duty of the clerk of each District Court, at least once in every year, to transmit a certified list of all such records of copyright and including the titles so recorded, and the dates of record, and also all the several copies of books or other works deposited in his office according to this act, to the Secretary of State, to be preserved in his office.<sup>33</sup>

Copyright protection was still obtained by filing musical compositions with the clerk of the district court who in turn shouldered the responsibility of sending a list to the Secretary of State of any “writings” filed in the outlying districts. This revision also brought another change to the copyright law. The penalty for infringement rose to one dollar for every “sheet of such map,

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<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 437.

<sup>33</sup> *Id.*

chart, musical composition, print, cut, or engraving, which may be found in his or her [the infringer's] possession.”<sup>34</sup> The inclusion of “musical compositions” enabled the authors of musical compositions to protect their musical works against unauthorized sales. Therefore, it was in 1845 that the U.S. courts heard the first lawsuit for infringement of a musical composition. The song at the center of the lawsuit was a very popular song of the day, “The Old Arm Chair.”<sup>35</sup>

### **b. Music Infringement Case — the Nation’s First**

*Reed v. Carusi* is the first case that involved musical copyright infringement. The alleged infringement involved a very popular song of the day, “The Old Arm Chair.”<sup>36</sup> The specifics of the case involved two versions of the same song and a charge of plagiarism.<sup>37</sup> Mr. Reed was the assignee of the musical composition that traces its origin to England. Whereas, Mr. Carusi set the words of the English poem “The Old Arm Chair” to music that Carusi owned the rights thereof.<sup>38</sup> The trial judge, Judge Taney, conducted a jury trial. He charged the jury with determining if the plaintiff owned the rights as the assignee to the song and therefore owned the rights of the author. Or, in the alternative charge, did the jury find the defendant composed his song with “circumstance of its corresponding with older musical compositions, and belonging to the same style of music, [if so, then the defendant’s song version] does not constitute plagiarism, provided the error in question was, in the main design, and in its material and important parts, the

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<sup>34</sup> *Id.* at 438.

<sup>35</sup> *Reed v. Carusi*, 20 F. Cas. 431 (U.S. App. 1845).

<sup>36</sup> *Id.*

<sup>37</sup> Frank McCormick, *George P. Reed v. Samuel Carusi: A Nineteenth Century Jury Trial Pursuant to the 1831 Copyright Act*, (Digital Commons@University of Maryland School of Law) (Jan 10, 2005) available at [http://digitalcommons.law.umaryland.edu/mlh\\_pubs/4/](http://digitalcommons.law.umaryland.edu/mlh_pubs/4/).

<sup>38</sup> *Id.*

effort of his own mind.”<sup>39</sup> The jury found for the plaintiff, and subsequently determined damages for infringement. The jury awarded a penalty of \$200 when assessing the defendant’s liability for infringement.<sup>40</sup> The holding in *Reed* is “an example of a jury measuring statutory damages pursuant to the 1831 Copyright Act [quoting] the majority opinion of the United States Supreme Court in *Feltner v. Columbia Pictures Television*, 523 US 340, (1998).”<sup>41</sup> This two-page Maryland Circuit Court opinion in *Reed* set the precedent for future music copyright cases. In the years following the *Reed* decision, Congress continued to enact further legislative enactments in a continuing shaping of copyright laws.

### **c. Additional 19<sup>th</sup> Century Developments**

On August 18, 1856, Congress added dramatic compositions as protectable subject matter under copyright laws.<sup>42</sup> The list of subject matter protected by federal copyright law expanded with the inclusion of photographs on March 3, 1865.<sup>43</sup> Just as the first major revision occurred due to changes, national needs and technologies, Congress passed the second general revision of the copyright law on July 8, 1870 in response to these changes.<sup>44</sup> Congressional revisions to the copyright law included establishing the Library of Congress as the central depository of all copyrighted works, and expanded the subject matter of copyright protection to include art and derivative works.<sup>45</sup> Additionally, “indexing of the record of registrations began.”<sup>46</sup> The next significant copyright development occurred on March 3, 1891, when copyright protection

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<sup>39</sup> See *Reed v. Carusi*, *supra* note 35 at 432.

<sup>40</sup> *Id.*

<sup>41</sup> See McCormick, *supra* note 37 at 4.

<sup>42</sup> See *Reed v. Carusi*, *supra* note 9.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> See U.S. Copyright Office, *supra* note 9.

<sup>46</sup> *Id.*

extended to the “establishment of copyright law relations with foreign countries.”<sup>47</sup> The evolution of copyright law derived from Congressional intent and action again expanded music protections. On January 6, 1897, Congress included protection “against unauthorized public performances.”<sup>48</sup> The winter of 1897 appears to have been a busy time in the copyright development, when less than six weeks later on February 19, 1897, Congress established the Copyright Office as “a separate department of the Library of Congress.”<sup>49</sup> This was the last major revision of the copyright laws for the 19<sup>th</sup> century.

The 19<sup>th</sup> century saw significant expansion to copyright law including important evolutions to the protection of music. Congress defined musical composition as a protected “writing” and stated that music was “a useful art” in accordance with the Constitution. Additionally, music protection provided by Congress guarded against unauthorized public performances. The Supreme Court held in *Feltner*, that *Reed* established the precedent that juries would enforce the statutory damages for musical infringement.<sup>50</sup> This was the status of musical copyright development at the beginning of the 20<sup>th</sup> century.

### **3. 1909 Act**

One hundred and nineteen years after the initial copyright act and thirty-nine years after the second major revision to the copyright law, Congress was again ready to update the U.S. laws. The third general copyright law revision became effective on July 1, 1909.<sup>51</sup> This act remains important today since works copyrighted before January 1, 1978, that have “entered the

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<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Feltner v. Columbia Pictures Television*, 523 US 340, (1998).

<sup>51</sup> *Id.*

public domain” could not be revived under later acts such as the 1976 Copyright Act.<sup>52</sup> Those works that had not entered the public domain may retain copyright protection based on the 1909 act. The 1909 Act was important for other reasons. This act “expanded [copyright protection] to include ‘all the writings of an author’” and provided copyright protection to written musical works, such as sheet music in response to *White-Smith v. Apollo Co.*, 209 U.S. 1.<sup>53</sup> Significantly, the Act made copyright protection instantaneous beginning the moment of publication.<sup>54</sup>

The 1909 Act also expanded the provisions discussing musical compositions and incorporated some of the Supreme Court’s decisions in *White-Smith*<sup>55</sup> regarding the fixation requirement of copyright law. The 1909 Act also gave exclusive rights to musical works and to musical compositions performed for profit.<sup>56</sup> Additionally, under section 1, a foreign composer could not receive copyright unless there was a reciprocal grant to U.S. citizens by their government.<sup>57</sup> In addition to expanding the classes of works, the act listed musical compositions or dramatic or dramatico-musical compositions as a classification of works that were eligible for copyright registration.<sup>58</sup> The act also provided an exclusive right to copyright owners of sound recordings to reproduce and distribute those recordings. Coin-operated machines were not deemed to be “public performances for profit unless a fee is charged for admission to the place where such reproduction or rendition occurs.”<sup>59</sup>

In summary, the 1909 Copyright Act expanded copyright protection to dramatic or dramatico- musical compositions, and musical compositions clarified the right to perform

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<sup>52</sup> CRAIG JOYCE ET AL., COPYRIGHT LAW SEVENTH ED. 22 (Matthew Bender 2006) (1974).

<sup>53</sup> *Id.* at 20.

<sup>54</sup> *Id.*

<sup>55</sup> *White-Smith Music Publishing Co. v. Apollo Co.* 209 U.S. 1 (1908). (The Supreme Ct. held that player-piano roll music was not readable and thus not protectable copyright material.)

<sup>56</sup> ADAM V. FLOYD ET AL., FEDERAL INTELLECTUAL-PROPERTY CODES PLUS (2007 – 08), 350 (Jones McClure (2007). (See §1(a)).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at §1(e).

musical compositions in terms of public performance for profit.<sup>60</sup> This clarification to music copyright protection was the last major change to the copyright law until July 30, 1947, when the “copyright law [was] codified into positive law as Title 17 of the U.S. Code.”<sup>61</sup>

Five and one half years later on January 1, 1953, Congress extended “recording and performing rights [...] to nondramatic literary works.”<sup>62</sup> The effective date of the Universal Copyright Convention for the original signatory states was September 6, 1952, began and came into force in the United States as declared by President Eisenhower on September 16, 1955.<sup>63</sup> Congress’s next action regarding copyright law extended limited copyright protection to sound recordings on February 15, 1972.<sup>64</sup> A little over a year later, the next major musical copyright development occurred on April 18, 1973, when the United States “became a member of the Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of Phonograms on March 10, 1974.”<sup>65</sup> Four short months later on July 10, 1974, the United States “became a party to the 1971 revision of the Universal Copyright Convention (UCC).”<sup>66</sup> After accepting the UCC, the United States Congress sent to President Ford the fourth general revision to the copyright law, which he signed on October 19, 1976.

Historically, in the first 200 years of the United States (prior to October 19, 1976), the United States had only twenty notable legislative actions regarding copyrights.<sup>67</sup> Therefore, Copyright protection in 1976, evolved and extended protection to musical compositions, dramatic or dramatico-musical compositions, and defined musical compositions as “a writing” in conformity with the copyright clause of the Constitution. The relatively slow pace of copyright

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<sup>60</sup> See FLOYD, *supra* note 56.

<sup>61</sup> See U.S. Copyright Office, *supra* note 9.

<sup>62</sup> *Id.*

<sup>63</sup> See U.S. Copyright Office, *supra* note 9.

<sup>64</sup> *Id.*

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

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

development was soon to dramatically change. The United States matched the number of notable copyright acts in the next thirty years compared to the first 200 years of copyright development.<sup>68</sup> The 1976 Copyright Act began this rapid expansion of copyright protection. This Act will be presented in sections IV to VI of this paper. However, other significant musical copyright developments occurring during these 30 years affecting music copyright are presented immediately below.

### **III. MUSIC COPYRIGHT DEVELOPMENTS FROM 1976 TO 2007: AN OVERVIEW**

Besides the 1976 Copyright Act, nineteen other statutes were enacted providing significant annotations and evolution to U.S. copyright laws that addressed the technological changes facing authors, musical composers, and copyright owners of musical works and sound recordings. A few of the statutes affecting musical copyright include the Digital Performance Right in Sound Recordings Act (DPRSR) of 1995, the Digital Millennium Copyright Act (DMCA) of 1999, and the Copyright Term Extension Act containing the Fairness in Music Licensing Act (FMLA) of 1998. The Fairness in Musical Licensing Act has important ramifications to the 1976 Copyright Act and compliance with international obligations of the United States. However, the first of these nineteen statutory enactments presented in this paper is the Digital Performance Right in Sound Recordings Act.

#### **A. The Digital Performance Right in Sound Recordings Act of 1995 (DPRSR)**

The issue of the paper is whether the playing of music received from radio stations in businesses or restaurants is an infringement of the copyright owner's exclusive rights. The

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<sup>68</sup> *Id.*

DPRSR is the first act affecting the 1976 Copyright Act discussed. Nimmer explains the importance of this act on music and sound recording:

The Digital Performance Right in Sound Recordings Act of 1995, as its name implies, creates a performance right limited to the digital realm.<sup>69</sup> Whatever rights it creates supplement, rather than supplant, rights previously granted under the Copyright Act. It therefore becomes relevant to inquire whether antecedent law created any type of performance right in recorded performances.

The basic answer is that sound recordings were excluded from the corpus of works to which the public performance right of the 1976 Act applied. But that basic exclusion does not mean that, no circumstances can give rise to an ersatz performance right. Consider one of the major sources of heartburn to record companies - when radio stations perform albums in their entirety. That practice often serves the express or implied purpose of permitting listeners at home to engage in off-the-air taping. As such, it forms part of the calculus for the 1995 amendments.

Radio broadcasting of albums does not infringe the copyright in the music recorded therein to the extent, as is almost invariably the case, that the radio station is licensed by the appropriate performing rights society. Nor does it infringe the sound recording copyrights, as to which performance rights are lacking. But there is another category of copyright, often owned by the record companies, which may be infringed by the broadcast of entire record albums in substantially their original sequence. When a record company creates an album consisting of a number of different songs all contained on a single disc or tape, it is not only entitled to a copyright in the resulting sound recording, but also to a separate copyright in the collective of songs contained in the album.<sup>70</sup>

Although, a radio station playing a song is a public performance, the DPRSR should not create an obligation to a business or restaurant for receiving and playing this performance because the radio station is licensed to broadcast the song. However, businesses or restaurants may incur liability if playing the music is deemed a public performance and this performance does not fall

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<sup>69</sup> MELVILLE B. NIMMER ET AL, NIMMER ON COPYRIGHT, § 2.03, at 2-8, §8.21, fn 87 (Matthew Bender 2007). (stating: “Even in that regard, it is far from comprehensive. *See* [Nimmer] §8.22[B].”).

<sup>70</sup> *Id.*, at 2-8, §8.21.

within an allowable copyright exemption. Section 101 defines “perform” as “means to recite, render, play, dance, or act it, either 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.”<sup>71</sup> The radio station transmission of the performance is in analog format. The DPRSR Act legislates digital formats not analog broadcasts. Therefore, just as the DPRSR will not apply to FM and AM radio station broadcasts neither will the Digital Millennium Copyright Act.

### **B. The Digital Millennium Copyright Act (DMCA) of 1999**

The Digital Millennium Copyright Act (DMCA) will not be applicable to business or restaurant proprietors based upon the analog transmission of FM and AM radio. The DMCA is applicable only to digital transmissions. Nevertheless, the roar from the technological evolution with XM, Sirius, and other satellite radios may create liability for businesses and restaurants receiving and performing such broadcast for their customers. To determine if liability exists from the DMCA, the analysis begins with three basic elements for this “limited performance right in sound recordings: the performance must be: (1) digital, (2) audio, and (3) a transmission.”<sup>72</sup> AM and FM radio transmissions are analog transmissions; as such, the first limitation of the DMCA is not present with analog radio transmissions. Therefore, the DMCA does not apply to the analog transmissions, which comprise all FM and AM radio broadcast of sound recordings.<sup>73</sup> The first element, digital format, fails because it is not applicable for analog FM and AM radio transmissions. The DMCA will not be applicable to the radio transmissions received by the business or restaurant proprietors for the issue in this paper.

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<sup>71</sup> 17 U.S.C. § 101.

<sup>72</sup> AL KOHN ET AL., KOHN ON MUSIC LICENSING THIRD ED., 1302 (Aspen 2002) (1992).

<sup>73</sup> *Id.*

### C. The Fairness in Music Licensing Act (FMLA) of 1998

On January 27, 1998, the second session of the 105<sup>th</sup> Congress of the United States amended the “provisions of Title 17, United States Code, with respect to the duration of copyright, and for other purposes.”<sup>74</sup> Title I is the Copyright Term Extension Act also known as the “Sonny Bono Copyright Term Extension Act” which increases the term of copyright protection. Title II is entitled Music Licensing Exemption for Food Service or Drinking Establishments with the Short Title of Fairness in Music Licensing (FMLA). FMLA is pivotal in determining if infringement occurs when businesses or restaurants play radio music in their establishments within both the United States and the World Trade Organization (WTO) countries. United States congressmen and congresswomen represent people. The question is which people. The legislative history concerning the manner of passage of FMLA is instructive and important to the dispute between the U.S. and the WTO over FMLA. Representative Sensenbrenner “drafted the legislation that eventually became enacted as the ‘Fairness in Music Licensing Act’ at the behest of small-business owners.” The proposed legislation was strongly opposed by the performance rights societies and musical copyright owners.<sup>75</sup> Additionally, passage of this bill came in spite of the United States Register of Copyrights testifying on July 17, 1997:

... the Copyright Office believes that several of the expanded exemptions, if past in their current form, would lead to claims by other countries that the United States was in violation of its obligations under the Berne convention for the protection of literary and artistic works, incorporated into the Agreement on Trade related Aspects of Intellectual Property Rights (‘TRIPS’).<sup>76</sup>

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<sup>74</sup> 105 Congress, S. 505 (Jan. 27 1998).

<sup>75</sup> Anne Haring, *Fish or Fowl? The Nature of WTO Dispute Resolution Under TRIPS*, 12 Ann. Surv. Int’l & Comp. L 269, 282 (2006).

<sup>76</sup> WTO Doc. WT/DS160/5/R, 75 (April 16, 1999).

This very quote was cited by the European Commission to the Dispute Settlement Body of the World Trade Organization. The WTO argued §110(5) as amended by the Fairness in Music Licensing Act violated the TRIPS agreement.<sup>77</sup> This international dispute with the FMLA’s amendment of the 1976 Copyright Act will be discussed in section VII.

Domestic opposition arose from the copyright owners and the performance rights societies in the Supreme Court case of *Eldred v. Ashcroft*, 537 U.S. 186. The plaintiffs opposed FMLA based upon the loss of licensing fees and royalties under the broad exemptions found in FMLA. The Court stated “Title II of the Copyright Term Extension Act, known as the Fairness in Music Licensing Act of 1998 (FMLA), exempts small businesses, restaurants, and like entities from having to pay performance royalties on music played from licensed radio, television, and similar facilities.”<sup>78</sup> This Act is also discussed in the §110(5)(B) section of this paper. According to Schulenberg, this Act produced a huge benefit to the business and restaurant owners, as the Fairness in Music Act yielded “a reduction of about 75% in fees paid to ASCAP and BMI” after the passage of this Act.<sup>79</sup> This dramatic reduction in fees and royalty payments is exactly the result the EU argued violated TRIPS.

#### **D. Summary of Other U.S. Laws Applicable to Businesses and Restaurants**

The Fairness in Music Licensing Act (FMLA) is the major statutory provision amending and creating the exceptions in U.S. copyright laws enabling businesses and restaurants to avoid paying music licensing fees to the copyright owners. The DMCA and DPRSR do not apply to FM and AM radio analog format broadcast over the airwaves and received by FM and AM radio

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<sup>77</sup> *Id.* at 70.

<sup>78</sup> *Eldred v. Ashcroft*, 537 U.S. 186, 220 (U.S. 2003).

<sup>79</sup> See SCHULENBERG, *supra* note 25 at 525.

receivers. Thus the DPRSR is not applicable to the issue of whether a business or restaurant must pay for playing music received from FM and AM radio stations.

In summary, the laws applicable to the issue of whether a business or restaurant owner is responsible for paying a licensing fees or royalties for playing music received from radio waves are derived from the 1976 Copyright Act as amended by the Fairness in Music Licensing Act. Prior to 1998, the American Performing Rights and Performance Rights Societies had the responsibility for collecting royalties for “material being performed, e.g., musical compositions,” or enforcing the “rights in the performance itself on behalf of the performer” respectively.<sup>80</sup> Before the FMLA amended the 1976 copyright law, copyright owners had the right to payment when their musical compositions or musical works are publicly performed in businesses and restaurants playing radio music as interpreted by the courts.<sup>81</sup> After the enactment of the FMLA, the business exemption greatly reduced these royalties and licensing fees.

#### **IV. TITLE 17 TODAY: MUSIC PROTECTIONS**

Title 17 as amended by the 1976 Copyright Act defines terms in §101 and states what is allowable to be copyrighted in §102. Section 103 is important to musical works or sound recordings that are compilations or derivative works. The exclusive rights afforded authors are specified in section 106. Just as Congress provides exclusive rights to authors in §106, Congress also provides limitations in §§107-122 to the author’s exclusive rights. The remaining sections of this paper present and analyze the copyright protection afforded music played in a business or restaurant when received from a radio broadcast. A particular focus of the paper is on the

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<sup>80</sup> *Id.* at 406.

<sup>81</sup> Todd Hagins, *Robbing Peter Gabriel to Pay Paul’s Diner: Plunder, the Free Market, and the Fairness in Music Licensing Act*, 7 Tex. Rev. Law & Pol. 385, 387 (Spring 2003).

protection and liability of playing music received over a radio in a U.S. restaurant or business and the evaluation of U.S. copyright law to the WTO commitments.

### **A. Congressional Purpose of Act**

How copyright law grew in the first 217 years! The initial copyright law began from the few lines written in the Constitution promoting the progress of science and useful arts and protecting authors and their writings. Those few paragraphs in the 1790 Copyright Act establishing copyright law grew, surpassing hundreds of pages by 2007. The previous revisions of the copyright law, prior to the 1976 copyright act, were easily read and were less than 25 pages. To put the 1976 growth in perspective, the 1976 Copyright Act is the result of twenty-one years of hearings and legislative work begun in 1955. Simply, the expansion of the copyright laws reflects the expansion of technology in the United States. In 1909, the year of the third major revision to U.S. copyright law the airplane, automobile and hundreds of other technological inventions were only a few years old. The 1976 Copyright Act incorporated the writings that describe these inventions and other subject matter now protected. The 1976 act also expanded provisions in all parts of the copyright law including preempting state copyright law. It also added a definitions section within the federal law for the first time.<sup>82</sup> Provisions expanding the exclusive rights and limitations to musical compositions and sound recordings were included, these music rights and exclusions are discussed below.

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<sup>82</sup> M. WILLIAM KRASILOVSKY, THIS BUSINESS OF MUSIC THE DEFINITIVE GUIDE TO THE MUSIC INDUSTRY 10<sup>TH</sup> ED., 91 (Watson-Guptill 2007) (although listed as the 10<sup>th</sup> edition, the book states first published in 2007).

## **B. 1976 Copyright Code: 17 U.S.C.**

### **1. § 102 — Subject Matter of Copyright: in General**

First, codifying copyright law as Title 17 of the U.S. Code, Congress specifically stated, “works of authorship include the following categories” including §102(a)(2) that specified a category for “musical works, including any accompanying words” as copyrightable works.<sup>83</sup>

An important addition and clarification to copyrightable subject matter was specified in §102(a):

Copyright protection subsists, in accordance [with title 17], in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.<sup>84</sup>

This provision established clear elements required to obtain the copyright to a work. The 1976 Copyright Act specified three elements to obtain copyright protection for the author and his work.<sup>85</sup> These required elements were (1) authorship (the work had to actually be originally<sup>86</sup> created by an author),<sup>87</sup> and to be (2) fixed<sup>88</sup> in a (3) tangible medium of expression.<sup>89</sup>

### **2. Prima Facie Copyright Elements**

These three elements must be present before any work receives copyright protection. Therefore, musical works also must meet these elements to receive copyright protection. This section discusses the prima facie elements and introduces musical cases that clarify copyright protection for musical works.

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<sup>83</sup> See FLOYD, *supra* note 56, at 135, §102(a)(2).

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 136.

<sup>88</sup> *Id.* at 135.

<sup>89</sup> *Id.*

**a. Authorship and Originality**

An attorney or author preparing a copyright application will have to state that the work is original to the author. Additionally, the copyright office also requires works be identified by the category most representative of the work. Musical works or sound recordings are examples of such categories. The subject matter categories are intentionally broad as discussed in *Nimmer on Copyright*:

Congress has elected not to exercise its full authority to provide for copyright protection of all ‘writings.’ On the other hand, it is also clear that ‘works of authorship’ are not necessarily limited to the eight broad categories of works listed under Section 102(a). The House Report explicitly states that these categories are ‘illustrative and not limitative,’ and ... do not necessarily exhaust the scope of ‘original works of authorship’ that the bill is intended to protect.<sup>90</sup>

The authorship element means that the musical author must have written either the lyrics or the music.

Additional clarification is found in *Elrod v. Ashcroft*:

In addition to spurring the creation and publication of new expression, copyright law contains built-in First Amendment accommodations. First, it distinguishes between ideas and expression and makes only the latter eligible for copyright protection. Specifically, 17 U.S.C. § 102(b) provides: ‘In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.’<sup>91</sup>

This is the idea-expression dichotomy. Songs normally are not a list of facts. A song may have an author for the music and / or the lyrics and, in some cases, the producer may own the

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<sup>90</sup> MELVILLE B. NIMMER, *supra* note 69 at § 2.03 (Matthew Bender 2007).

<sup>91</sup> *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003).

copyright of the work.<sup>92</sup> The author may be the person who performed the musical work but copyright contributors may include guest artist and those responsible for producing the recording.<sup>93</sup>

The importance of authorship for this paper is that, before one can claim a royalty, a valid copyright must exist that allows a remedy for the infringement for playing the song or music. Without a valid copyright, no royalties will be due from any business or restaurant that plays music; this includes music or songs that have entered the public domain and those that never had a copyright. Musical works must have a degree of originality. Luckily, the Supreme Court defined the originality needs for musical works. Beginning with the seminal statement of originality from *Feist v. Rural Tel. Serv. Co.*:

To qualify for copyright protection, a work must be original to the author. *See Harper & Row*, [471 U.S. 539], at 547-549. Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity. 1 M. Nimmer & D. Nimmer, *Copyright* §§ 2.01[A], [B] (1990) (hereinafter Nimmer). To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark, ‘no matter how crude, humble or obvious’ it might be. *Id.*, § 1.08[C][1]. Originality does not signify novelty; a work may be original even though it closely resembles other works so long as the similarity is fortuitous, not the result of copying.<sup>94</sup>

This is the basic requirement of originality; an author must produce a work that is more than a copy of a previous work. However, *Feist* is distinguishable as a case about a written document, a telephone book listing numbers to be exact. Looking elsewhere, originality relating to §102(a)(2) in musical works may be shown through *Swirsky v. Carey*, 376 F.3d 841 stating:

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<sup>92</sup> See KRASILOVSKY, *supra* note 82, at 64.

<sup>93</sup> *Id.*

<sup>94</sup> *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (U.S. 1991).

No Federal Court has stated that a musical motive is not protectable because it is an idea. Nor does the ‘musical idea’ of the first measure of [plaintiff’s] courts lack protection because of its brevity. Although it is true that a single musical note would be too small, a unit to attract copyright protection..., and arrangement of a limited number of notes can garner copyright protection. This court has stated that ‘[e]ven if a copy portion the relatively small in proportion to the entire work, if qualitatively important, the finder of fact may properly find substantial similarity.’<sup>95</sup>

Thus, the Ninth Circuit decision setting limits in musical works stated the originality element requires more than a single note reflected that limited notes might be all that is required.<sup>96</sup> The last element required for musical works or sound recordings to receive copyright protection is fixation.

#### **b. Fixation in a Tangible Form**

In 1908, the Supreme Court held in *White-Smith* that copyright protection did not exist with player piano rolls because a human could not read the musical composition. This was the copyright law pertaining to mechanically read songs for most of the 20<sup>th</sup> century. Sixty-eight years later, the House Report on the Copyright Act of 1976 addressed a Congressional concern over *White-Smith* stating the fixation in tangible form “is intended to avoid the artificial and largely unjustifiable distinctions, provide from [that] cases ... under which statutory copyrightability in certain cases has been made to depend upon the former medium in which the work is fixed.”<sup>97</sup> The 1976 Copyright Act includes “... fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”<sup>98</sup>

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<sup>95</sup> See FLOYD, *supra* note 56 at 138 (See *Swirsky v. Carey*, 376 F.3d 841, 851-52 (9<sup>th</sup> Cir. 2004).

<sup>96</sup> *Id.*

<sup>97</sup> H.R. Rep. No. 94-1476, 94<sup>th</sup> Congress, 2<sup>nd</sup> Sess., (1976).

<sup>98</sup> See FLOYD, *supra* note 56 at 136, §102(a).

As a result of this provision, music today can be fixed in many tangible forms, unlike the song “The Old Arm Chair” in *Reed*,<sup>99</sup> which was fixed in the tangible form of sheet music. After the 1976 Act, a musical work recorded on many different mediums will receive copyright protection. Two additional sections, §§ 103 and 101, from the copyright act, clarify the copyright requirements for musical works.

### **3. §103, Subject Matter of Copyright: Compilations & Derivative Works**

As previously noted in the authorship section, one of the unique features of a musical work is that many people may hold various copyrights on a single song.<sup>100</sup> Copyright exists for the lyrics, musical composition, and even those who produce the song. Additionally, compilations of songs and musical works are common and these compilations may receive copyright protection.<sup>101</sup> Examples of compilations of musical works may be in the form of “Greatest Hits.” If significantly altered the works may be new works.<sup>102</sup> These compilations are original works of authorship, although the songs have been previously recorded, the compilation is original in how it is arranged or produced. In contrast, European producers license different artist to compile or couple works to form a new record.<sup>103</sup> Understanding the European copyright rules and protections is important to ascertain if a business or restaurant would be required to pay a royalty or licensing fee for performing the music if the TRIPS and Berne treaties were enforced. Prior to 1995, when the U.S. became a World Trade Organization member these compilations may not have received U.S. copyright protection. Thus, section 103

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<sup>99</sup> See *Reed v. Carusi*, *supra* note 35.

<sup>100</sup> See KRASILOVSKY, *supra* note 82.

<sup>101</sup> *Id.* at 68.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 47.

provides copyright protection for compilations and derivative works. One of the best additions to the Copyright laws was the addition of a definitions section.

#### 4. §101, Definitions

Section 101 significantly clarifies musical works and sound recordings copyrights through defining terms applicable to these works. These definitions become particularly important when comparing U.S copyright laws to international treaties later in this paper. The differences between the United States copyright law and international copyright treaties look to the different perceptions of what constitutes performing music in restaurants and businesses. The following definitions are from Section 101 and are applicable to the issue of this paper:

The “Berne Convention” is the Convention for the Protection of Literary and Artistic Works, signed at Berne, Switzerland, on September 9, 1886, and all acts, protocols, and revisions thereto.<sup>104</sup>

A “collective work” is a work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole.<sup>105</sup>

Musical collective works may be albums that are produced using numerous individual performers, such as the Time Life “Best of the 70s, 80s, and 90s” albums, or the “best of” and the “greatest hits” type of albums.

A “compilation” is a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship. The term “compilation” includes collective works.<sup>106</sup>

Referring to compilations, Nimmer on Copyright states:

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<sup>104</sup> 17 USCS § 101.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

A musical album would seem to qualify precisely as such a compilation or, more precisely, a collective work. For example, one case held that “an original selection and grouping” by the plaintiff of six public domain musical works was entitled to copyright (*See Consolidated Music Pub., Inc. v. Ashley Pub., Inc.*, 197 F. Supp. 17, 18 (S.D.N.Y. 1961)). Although the individual musical works in that case were in the public domain, whereas most albums contain songs protected by copyright, that circumstance is irrelevant with respect to whether copyright can be claimed in the compilation per se.<sup>107</sup>

It follows, then, that a record company is entitled to a musical work compilation copyright in an album to the extent that such company has made (or is the assignee of one who has made) the selection and grouping of the particular songs contained in the album.<sup>108</sup>

Compilations and their right to receive copyright protection are discussed in the preceding section of this paper.

“Copies” are material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term “copies” includes the material object, other than a phonorecord, in which the work is first fixed.<sup>109</sup>

“Copyright owner”, with respect to any one of the exclusive rights comprised in a copyright, refers to the owner of that particular right.<sup>110</sup>

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<sup>107</sup> See NIMMER, *supra* note 69, 2-8, §8.21, fn 101 (“17 U.S.C. § 103(b). Likewise irrelevant to the copyrightability of the compilation is the fact that in an album, the compilation is fixed in ‘phonorecord’ form rather than in a printed ‘copy.’ Works of authorship are protected by copyright if fixed ‘in any tangible medium of expression.’ 17 U.S.C. § 102(a). See § 2.03[B] *supra*.”).

<sup>108</sup> *Id.* (“In fact, the record company may be entitled to two compilation copyrights: a musical work compilation copyright and a separate sound recording compilation copyright, assuming that its acts of selection and arrangement pertained to both musical works and to (previously recorded) sound recordings. But given the absence of a general sound recording performance right, any putative sound recording compilation is unhelpful in this regard - unless one could posit that sound recording compilations are somehow vested with a public performance right lacking as to individual sound recordings. Therefore, it is the musical work compilation copyright that is at issue in broadcasting the record albums.”).

<sup>109</sup> 17 USCS § 101.

<sup>110</sup> *Id.*

A work is “created” when it is fixed in a copy or phonorecord for the first time; where a work is prepared over a period of time, the portion of it that has been fixed at any particular time constitutes the work as of that time, and where the work has been prepared in different versions, each version constitutes a separate work.<sup>111</sup>

A “derivative work” is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a “derivative work.”<sup>112</sup>

“[A] musical arrangement constitutes a form of derivative work, and as such is itself subject to copyright, regardless of whether the underlying music is the subject of copyright or has entered the public domain.”<sup>113</sup>

A “device”, “machine”, or process” is one now known or later developed.<sup>114</sup>

A “digital transmission” is a transmission in whole or in part in a digital or other non-analog format.<sup>115</sup>

To “display” a work means to show a copy of it, either directly or by means of a film, slide, television image, or any other device or process or, in the case of a motion picture or other audiovisual work, to show individual images nonsequentially.

An “establishment” is a store, shop, or any similar place of business open to the general public for the primary purpose of selling goods or services in which the majority of the gross square feet of space that is nonresidential is used for that purpose, and in which nondramatic musical works are performed publicly.

This definition of “establishment” will be used for business in this paper.

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<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> See NIMMER, *supra* note 69, at 1-2 Nimmer on Copyright § 2.05. (See Nimmer § 2.05, fn 23.1 On the meaning of ‘arrangement’ in a copyright contract, see *Anheuser-Busch, Inc. v. Elsmere Music, Inc.*, 633 F. Supp. 487 (S.D.N.Y. 1986)).

<sup>114</sup> 17 USCS § 101.

<sup>115</sup> *Id.*

A “food service or drinking establishment” is a restaurant, inn, bar, tavern, or any other similar place of business in which the public or patrons assemble for the primary purpose of being served food or drink, in which the majority of the gross square feet of space that is nonresidential is used for that purpose, and in which nondramatic musical works are performed publicly.

Here “food service or drinking establishment” is the definition we use for “restaurant” in this paper.

The term “financial gain” includes receipt, or expectation of receipt, of anything of value, including the receipt of other copyrighted works.

A work is “fixed” in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or both, that are being transmitted, is “fixed” for purposes of this title if a fixation of the work is being made simultaneously with its transmission.<sup>116</sup>

The “Geneva Phonograms Convention” is the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms, concluded at Geneva, Switzerland, on October 29, 1971.<sup>117</sup>

The “gross square feet of space” of an establishment means the entire interior space of that establishment, and any adjoining outdoor space used to serve patrons, whether on a seasonal basis or otherwise.<sup>118</sup>

The terms “including” and “such as” are illustrative and not limitative.<sup>119</sup>

An “international agreement” is—

- (1) the Universal Copyright Convention;
- (2) the Geneva Phonograms Convention;
- (3) the Berne Convention;
- (4) the WTO Agreement;

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<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

- (5) the WIPO Copyright Treaty;
- (6) the WIPO Performances and Phonograms Treaty; and
- (7) any other copyright treaty to which the United States is a party.<sup>120</sup>

A “joint work” is a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.<sup>121</sup>

To “perform” a work means to recite, render, play, dance, or act it, either 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.

A “performing rights society” is an association, corporation, or other entity that licenses the public performance of nondramatic musical works on behalf of copyright owners of such works, such as the American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music, Inc. (BMI), and SESAC, Inc.

“Phonorecords” are material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term “phonorecords” includes the material object in which the sounds are first fixed.

For purposes of section 513 [of the Copyright Act of 1976], a “proprietor” is an individual, corporation, partnership, or other entity, as the case may be, that owns an establishment or a food service or drinking establishment, except that no owner or operator of a radio or television station licensed by the Federal Communications Commission, cable system or satellite carrier, cable or satellite carrier service or programmer, provider of online services or network access or the operator of facilities therefore, telecommunications company, or any other such audio or audiovisual service or programmer now known or as may be developed in the future, commercial subscription music service, or owner or operator of any other transmission service, shall under any circumstances be deemed to be a proprietor.<sup>122</sup>

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<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

“Publication” is the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication. A public performance or display of a work does not of itself constitute publication.<sup>123</sup>

To perform or display a work “publicly” means—

- (1) to perform or display it 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; or
- (2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.<sup>124</sup>

“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.<sup>125</sup>

A “transmission program” is a body of material that, as an aggregate, has been produced for the sole purpose of transmission to the public in sequence and as a unit.<sup>126</sup>

To “transmit” a performance or display is to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent.<sup>127</sup>

A “treaty party” is a country or intergovernmental organization other than the United States that is a party to an international agreement.<sup>128</sup>

The “United States”, when used in a geographical sense, comprises the several States, the District of Columbia and the Commonwealth

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<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

of Puerto Rico, and the organized territories under the jurisdiction of the United States Government.<sup>129</sup>

For purposes of section 411 [17 USCS § 411], a work is a “United States work” only if—  
in the case of a published work, the work is first published—  
(A) in the United States;  
(B) simultaneously in the United States and another treaty party or parties, whose law grants a term of copyright protection that is the same as or longer than the term provided in the United States;  
(C) simultaneously in the United States and a foreign nation that is not a treaty party; or  
(D) in a foreign nation that is not a treaty party, and all of the authors of the work are nationals, domiciliaries, or habitual residents of, or in the case of an audiovisual work legal entities with headquarters in, the United States;  
(2) in the case of an unpublished work, all the authors of the work are nationals, domiciliaries, or habitual residents of the United States, or, in the case of an unpublished audiovisual work, all the authors are legal entities with headquarters in the United States; or  
(3) in the case of a pictorial, graphic, or sculptural work incorporated in a building or structure, the building or structure is located in the United States.<sup>130</sup>

A “useful article” is an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information. An article that is normally a part of a useful article is considered a “useful article”.<sup>131</sup>

The author's “widow” or “widower” is the author's surviving spouse under the law of the author's domicile at the time of his or her death, whether or not the spouse has later remarried.

The “WIPO Copyright Treaty” is the WIPO Copyright Treaty concluded at Geneva, Switzerland, on December 20, 1996.

The “WIPO Performances and Phonograms Treaty” is the WIPO Performances and Phonograms Treaty concluded at Geneva, Switzerland, on December 20, 1996.

The terms “WTO Agreement” and “WTO member country” have the meanings given those terms in paragraphs (9) and (10),

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<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

respectively, of section 2 of the Uruguay Round Agreements Act [19 USCS § 3501].

These definitions from §101 lay the framework for comparing U.S. copyright law to international treaties in determining if a royalty or license is due from businesses and restaurants playing music in their establishments. The previous sections of the 1976 Copyright Act, as codified in 17 U.S.C. 101, lead into this discussion of the rights that a copyright owner possesses.

### **5. §106, Exclusive Rights in Copyrighted Works**

Once the copyright owner completes the formalities and receives a copyright, the author receives exclusive rights to his work. These exclusive rights from section 106 follow:

Subject to sections 107 through 122 [17 USCS §§ 107 through 122], the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly;  
and

(6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.<sup>132</sup>

The 106 rights give the author of musical works the right to control how the copyrighted music is performed. For instance, in *Harper & Row*, “the author commonly sells his rights to publishers who offer royalties in exchange for their services in producing and marketing the author’s work.”<sup>133</sup> These §106 exclusive rights are individual rights that are separate and distinct from one another.<sup>134</sup> For example, section 106(1) provides the copyright holder the exclusive right “to reproduce the copyrighted work in copies or phonorecords,” as the 2<sup>nd</sup> Circuit held in *ABKCO Music Inc. v. Stellar Records, Inc.*<sup>135</sup> However, music copyrights to a single song may be held by multiple owners. “[W]hile a compulsory license permits the recording of a ‘cover’ version of a song, it does not permit the inclusion of a copy of the lyrics. That requires a separate permission or license of the copyright holder.”<sup>136</sup>

The ebb and flow of exclusive rights to limitations continues. Section 106(3) provides the exclusive right to the holder to control the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending while limited by sections 107 to 120.<sup>137</sup> Fair use under section 107 will be applicable to the distribution of copies or phonorecords to the public by sale. However, the copyright owner retains the right to sell the first copy, although the first sale doctrine will limit the copyright owner’s ability to prevent further sales of a properly sold copy or phonorecord of the musical work.

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<sup>132</sup> 17 USCS § 106.

<sup>133</sup> See FLOYD, *supra* note 56 at 149.

<sup>134</sup> *Id.* at 150 (citing *Evans & Associates v. Continental Homes, Inc.*, 785 F.2d 897, 01 note 7, (11<sup>th</sup> Cir. 1986).

<sup>135</sup> *ABKCO Music Inc. v. Stellar Records, Inc.*, 96 F.3d 60, 62 – 63 n.4 (2d Cir. 1996).

<sup>136</sup> See FLOYD, *supra* note 56 at 150 (citing *ABKCO Music Inc.*).

<sup>137</sup> *Id.* at 152 citing *Quality King Distributors Inc. v. L’anza Research International.*, 523 US 135, 138, (1998).

A copyright owner complying with the formalities and requirements of Title 17 is granted the bundle of exclusive rights forming copyright protection. This paper will now present what the music owner can do with those rights from section 106. Essentially, the owner has the right to reproduce, adapt, publish, perform, and display the musical works.<sup>138</sup> Although these rights are called exclusive rights, limitations do exist<sup>139</sup> and are in sections 107-122. A discussion of these limitations and applications to music played in a business or restaurant received over the radio follow.

## **V. TITLE 17 TODAY: MUSIC LIMITATIONS (§§ 107-122)**

### **A. Limitations That Do Not Affect the Playing of Music in Businesses or Restaurants**

Limitations to the exclusive rights of copyright owners allow the public to perform musical works or sound recordings if the user complies with the limitations. Not all of the copyright limitations are applicable to the playing of musical works and sound recordings in

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<sup>138</sup> See SCHULENBERG, *supra* note 25 at 503.

<sup>139</sup> See NIMMER, *supra* note 68 (The Copyright Act provisions that address rights in musical works and the compulsory licensing scheme for sound recordings of those musical works support the conclusion that when producing and selling a sound recording one must secure a license from the copyright owner of the underlying musical work. Under Section 106 of the Copyright Act, the owner of a copyright in a work of authorship generally has the following "exclusive rights": (1) to reproduce the copyrighted work in copies or phonorecords;

(2) to prepare derivative works based upon the copyrighted work;

(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending[.]17 U.S.C. 106(1)-(3). The copyright laws, however, attempt to strike a balance between rewarding the creative labor of authors of original works, and promoting further creativity by allowing public access to their works. See *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 429, 78 L. Ed. 2d 574, 104 S. Ct. 774 (1984). As applied to the present case, the most relevant example of this balance is the limitation the Act imposes on the exclusive rights of the copyright owner in an original musical work. That limitation is set forth in Section 115, which provides that the exclusive rights in the musical work under Section 106(1) and (3) are subject to "compulsory licensing" under certain specified conditions. See 17 U.S.C. 115. n9 (n9 Of course, the copyright owner in the musical work retains the right to prepare other "derivative works" under 106(2) such as musical arrangements. 17 U.S.C. 115(a)(2).”).

businesses and restaurants. This section introduces the provisions not applicable to musical works. These sections not applicable are sections 108, 113, 116, 117, 119, 120, 121 and 122.

Section 108 allows libraries and archives to reproduce works or phonorecords for their collection.<sup>140</sup> This 108 provision limits libraries and archives to making single copies of phonorecords. Several limitations do not apply to musical works for sound recordings. The next right that is not applicable is section 113. Section 113 provides limitation to pictorial, graphic and sculptural works and is, therefore, beyond the scope of this paper. The jukebox exception in section 116 provides a negotiated license for the public performances by means of coin-operated phonorecord players. The separate jukebox act is also beyond the scope of this paper, as the Act requires a license or royalties to play these machines. Thus, the copyright owner receives his royalties from jukeboxes and the jukebox is not equivalent to a business or restaurant playing a song received from a radio. Additional limitations that do not apply to playing music are sections 117, 119, and 120-122.

Section 117, applies limitations to computer programs, and is not applicable to playing music in a restaurant or business received from a radio station and then played in the establishment. Section 119's limitation applies to superstation and network transmissions subject to statutory licensing. Again, a copyright owner is receiving a royalty or licensing fee from the superstation that, in turn, charges their customers that receive the broadcast. Two further distinctions from radio broadcasts are that superstations broadcast television, and superstations pay the copyright owners a fee. Section 120 deals with architectural works; while section 121 covers limitations "for blind or other people with disabilities." Finally, section 122 is applicable to television rebroadcasts of network programs. The provisions in section 122 require the satellite provider to pay for the transmissions. A business or restaurant receiving paid

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<sup>140</sup> 17 U.S.C. §108.

satellite transmissions is not responsible for the satellite provider paying the network. The business or restaurant pays the fee to receive the programs that have been previously licensed. The satellite subscription has already paid the percentage of the license or royalty to which the copyright owner agreed. Having eliminated eight sections from discussion, this paper turns to the remaining eight sections that have an impact on business or restaurants playing musical works and sound recordings received from a radio broadcast.

## **B. Limitations That Do Affect the Playing of Music in Businesses or Restaurants**

Section 106 conveys exclusive rights to the owner of a copyrighted work. For musical works for sound recordings that are received over a radio the owner has the right to limit a public performance of their work. The previous section showed eight exemptions that did not provide an exemption to the musical works. This section presents the remaining eight sections that limit the exclusive rights of the musical work or sound recording owner. These Title 17 sections from the 1976 Copyright Act are now presented.

### **1. § 107 — Fair Use**

This fair use provision evaluates whether the work is played in relation to non-profit educational or another exception. Again, one of the first questions in the defense of copyright infringement is, does the copyright owner have a valid copyright. The Supreme Court in *Acuff-Rose Music Inc. v. Campbell*<sup>141</sup> provided the §107 analysis for fair use. The *Acuff-Rose* analysis consists of four factors used to determine if fair use is permissible.<sup>142</sup> Justice Souter's opinion

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<sup>141</sup> *Acuff-Rose Music Inc. v. Campbell*, 114 S.Ct., 1164 (1994).

<sup>142</sup> See SCHULENBERG, *supra* note 25 at 505.

that presented the fair use factor test utilizes a weighing of the four factors. For clarity, §107 is now provided for analysis:

Limitations on exclusive rights: Fair use

Notwithstanding the provisions of sections 106 and 106A [17 USCS §§ 106 and 106A], the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work. The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.<sup>143</sup>

The first factor to be evaluated regarding playing music in a business or restaurant is whether or not the purpose is of a commercial nature. Businesses and restaurants broadcast the music to create a more favorable shopping or dining environment. This favorable environment translates into customer satisfaction and encourages the customer to spend more time in the business or restaurant. In theory, this increases the sales for the business or restaurant. This consideration pushes the first element of fair use into the commercial category, and does not lean toward allowing the playing of musical works without a royalty or license payment.

The second and third factors relate to the nature of the copyrighted work and the amount that is used in relation to the whole copyrighted musical work. A business or restaurant

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<sup>143</sup> 17 USCS § 107.

broadcasting music from a radio station is not in control of either of these issues. In addition, businesses and restaurants receiving radio broadcast usually do not perform educational broadcast to their customers.

The final element to consider is the effect of the use upon the potential market of future sales of the record or song recording. It may be argued that the broadcast may actually increase sales after customers hear the music being played in the business or restaurant. Additionally the business and restaurant are not creating their own works and competing with the original musical work or sound recording. Thus, the fair use exception in the playing of music in a business or restaurant is not a factor when radio broadcast are used to provide the music. Radio broadcasts that play non-educational for-profit broadcasts do not receive an exemption for fair use. In most instances, the fair use exemption will not apply to an establishment playing music received through a radio broadcast. The next section that may apply to musical works is §109.

## **2. § 109 — Limitations on Exclusive Use: Effect of Transfer of Particular Copy or Phonorecord**

Section 109 applies to the provisions of §106(3) which allows for the copying or phonorecords being sold to the public.<sup>144</sup> However, section 109 also will not be applicable to the rebroadcasting of music received over the radio. This section refers to the first sale doctrine, where a person who purchases a phonorecord or copy of the music may resell the copy he lawfully purchased.<sup>145</sup> This subsection reads:

§ 109. Limitations on exclusive rights: Effect of transfer of particular copy or phonorecord  
(a) Notwithstanding the provisions of section 106(3) [17 USCS § 106(3)], the owner of a particular copy or phonorecord lawfully

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<sup>144</sup> 17 U.S.C. § 106(3).

<sup>145</sup> See SCHULENBURG, *supra* note 25 at 507.

made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord. Notwithstanding the preceding sentence, copies or phonorecords of works subject to restored copyright under section 104A [17 USCS § 104A] that are manufactured before the date of restoration of copyright or, with respect to reliance parties, before publication or service of notice under section 104A(e) [17 USCS § 104A(e)], may be sold or otherwise disposed of without the authorization of the owner of the restored copyright for purposes of direct or indirect commercial advantage only during the 12-month period beginning on—

- (1) the date of the publication in the Federal Register of the notice of intent filed with the Copyright Office under section 104A(d)(2)(A) [17 USCS § 104A(d)(2)(A)], or
- (2) the date of the receipt of actual notice served under section 104A(d)(2)(B) [17 USCS § 104A(d)(2)(B)],

whichever occurs first.

- (b) (1) (A) Notwithstanding the provisions of subsection (a), unless authorized by the owners of copyright in the sound recording or the owner of copyright in a computer program (including any tape, disk, or other medium embodying such program), and in the case of a sound recording in the musical works embodied therein, neither the owner of a particular phonorecord nor any person in possession of a particular copy of a computer program (including any tape, disk, or other medium embodying such program), may, for the purposes of direct or indirect commercial advantage, dispose of, or authorize the disposal of, the possession of that phonorecord or computer program (including any tape, disk, or other medium embodying such program) by rental, lease, or lending, or by any other act or practice in the nature of rental, lease, or lending. Nothing in the preceding sentence shall apply to the rental, lease, or lending of a phonorecord for nonprofit purposes by a nonprofit library or nonprofit educational institution. The transfer of possession of a lawfully made copy of a computer program by a nonprofit educational institution to another nonprofit educational institution or to faculty, staff, and students does not constitute rental, lease, or lending for direct or indirect commercial purposes under this subsection.

- (B) This subsection does not apply to—
- (i) a computer program which is embodied in a machine or product and which cannot be copied during the ordinary operation or use of the machine or product; or
  - (ii) a computer program embodied in or used in conjunction with a limited purpose computer that is designed for playing video games and may be designed for other purposes.

(C) Nothing in this subsection affects any provision of chapter 9 of this title [17 USCS §§ 901 et seq.].

(2) (A) Nothing in this subsection shall apply to the lending of a computer program for nonprofit purposes by a nonprofit library, if each copy of a computer program which is lent by such library has affixed to the packaging containing the program a warning of copyright in accordance with requirements that the Register of Copyrights shall prescribe by regulation.

(B) Not later than three years after the date of the enactment of the Computer Software Rental Amendments Act of 1990 [enacted Dec. 1, 1990], and at such times thereafter as the Register of Copyrights considers appropriate, the Register of Copyrights, after consultation with representatives of copyright owners and librarians, shall submit to the Congress a report stating whether this paragraph has achieved its intended purpose of maintaining the integrity of the copyright system while providing nonprofit libraries the capability to fulfill their function. Such report shall advise the Congress as to any information or recommendations that the Register of Copyrights considers necessary to carry out the purposes of this subsection.

(3) Nothing in this subsection shall affect any provision of the antitrust laws. For purposes of the preceding sentence, "antitrust laws" has the meaning given that term in the first section of the Clayton Act [15 USCS § 12] and includes section 5 of the Federal Trade Commission Act [15 USCS § 45] to the extent that section relates to unfair methods of competition.

(4) Any person who distributes a phonorecord or a copy of a computer program (including any tape, disk, or other medium embodying such program) in violation of paragraph (1) is an infringer of copyright under section 501 of this title [17 USCS § 501] and is subject to the remedies set forth in sections 502, 503, 504, 505, and 509 [17 USCS §§ 502, 503, 504, 505, and 509]. Such violation shall not be a criminal offense under section 506 [17 USCS § 506] or cause such person to be subject to the criminal penalties set forth in section 2319 of title 18.

(c) Notwithstanding the provisions of section 106(5) [17 USCS § 106(5)], the owner of a particular copy lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to display that copy publicly, either directly or by the projection of no more than one image at a time, to viewers present at the place where the copy is located.

(d) The privileges prescribed by subsections (a) and (c) do not, unless authorized by the copyright owner, extend to any person who has acquired possession of the copy or phonorecord from the copyright owner, by rental, lease, loan, or otherwise, without acquiring ownership of it.

(e) [Caution: For termination of application of this subsection, see § 804(c) of Act Dec. 1, 1990, P.L. 101-650, which appears as a note to this section.] Notwithstanding the provisions of sections 106(4) and 106(5) [17 USCS §§ 106(4) and 106(5)], in the case of an electronic audiovisual game intended for use in coin-operated equipment, the owner of a particular copy of such a game lawfully made under this title, is entitled, without the authority of the copyright owner of the game, to publicly perform or display that game in coin-operated equipment, except that this subsection shall not apply to any work of authorship embodied in the audiovisual game if the copyright owner of the electronic audiovisual game is not also the copyright owner of the work of authorship.<sup>146</sup>

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<sup>146</sup> 17 USCS § 109.

As stated by Schulenberg, “section 109 of the Act deals with the right of an individual to sell or otherwise dispose of the physical copy of a copyrighted work.”<sup>147</sup> Additionally, “Section 109(b)(1)(A), was added to the 1976 Act at the insistence of the recording industry.”<sup>148</sup> The purpose of this section was to prevent anyone from “rent[ing], leas[ing], or lend[ing] phonorecords.”<sup>149</sup> Section 109 therefore, will not have a bearing on the playing of music in businesses and restaurants, as this section pertains to the first sale doctrine.

### **3. § 110 — Limitations on Exclusive Use: Exemptions of Certain Performances and Displays**

Section 110 is an extremely important section of the copyright act for businesses and restaurants that play music in their establishments.<sup>150</sup> Section 110 as amended by the Fairness and Music Licensing Act of 1998 provides the critical provisions that are referred to as the “homestyle” exception, 110(5)(A), specifying the number of speakers and equipment allowable to play radio programs over the business or restaurant speakers and the “business exception” in 110(5)(B).<sup>151</sup> Section 110 follows:

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

Notwithstanding the provisions of section 106 [17 USCS § 106], the following are not infringements of copyright:

(1) performance or display of a work by instructors or pupils in the course of face-to-face teaching activities of a nonprofit educational institution, in a classroom or similar place devoted to instruction, unless, in the case of a motion picture or other audiovisual work, the performance, or the display of individual images, is given by

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<sup>147</sup> See SCHULENBERG, *supra* note 25 at 507.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 509.

<sup>151</sup> *Id.*

means of a copy that was not lawfully made under this title, and that the person responsible for the performance knew or had reason to believe was not lawfully made;

(2) except with respect to a work produced or marketed primarily for performance or display as part of mediated instructional activities transmitted via digital networks, or a performance or display that is given by means of a copy or phonorecord that is not lawfully made and acquired under this title, and the transmitting government body or accredited nonprofit educational institution knew or had reason to believe was not lawfully made and acquired, the performance of a nondramatic literary or musical work or reasonable and limited portions of any other work, or display of a work in an amount comparable to that which is typically displayed in the course of a live classroom session, by or in the course of a transmission, if--

(A) the performance or display is made by, at the direction of, or under the actual supervision of an instructor as an integral part of a class session offered as a regular part of the systematic mediated instructional activities of a governmental body or an accredited nonprofit educational institution;

(B) the performance or display is directly related and of material assistance to the teaching content of the transmission;

(C) the transmission is made solely for, and, to the extent technologically feasible, the reception of such transmission is limited to—

(i) students officially enrolled in the course for which the transmission is made; or

(ii) officers or employees of governmental bodies as a part of their official duties or employment; and

(D) the transmitting body or institution—

(i) institutes policies regarding copyright, provides informational materials to faculty, students, and relevant staff members that accurately describe, and promote compliance with, the laws of the United States relating to copyright, and provides notice to students that materials used in connection with the course may be subject to copyright protection; and

(ii) in the case of digital transmissions—

(I) applies technological measures that reasonably prevent--

(aa) retention of the work in accessible form by recipients of the transmission from the transmitting body or institution for longer than the class session; and

(bb) unauthorized further dissemination of the work in accessible form by such recipients to others; and

(II) does not engage in conduct that could reasonably be expected to interfere with technological measures used by copyright owners to prevent such retention or unauthorized further dissemination;

(3) performance of a nondramatic literary or musical work or of a dramatico-musical work of a religious nature, or display of a work, in the course of services at a place of worship or other religious assembly;

(4) performance of a nondramatic literary or musical work otherwise than in a transmission to the public, without any purpose of direct or indirect commercial advantage and without payment of any fee or other compensation for the performance to any of its performers, promoters, or organizers, if--

(A) there is no direct or indirect admission charge; or

(B) the proceeds, after deducting the reasonable costs of producing the performance, are used exclusively for educational, religious, or charitable purposes and not for private financial gain, except where the copyright owner has served notice of objection to the performance under the following conditions:

(i) the notice shall be in writing and signed by the copyright owner or such owner's duly authorized agent; and

(ii) the notice shall be served on the person responsible for the performance at least seven days

before the date of the performance, and shall state the reasons for the objection; and

(iii) the notice shall comply, in form, content, and manner of service, with requirements that the Register of Copyrights shall prescribe by regulation;

(5) (A) except as provided in subparagraph (B), communication of a transmission embodying a performance or display of a work by the public reception of the transmission on a single receiving apparatus of a kind commonly used in private homes, unless--

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

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

(B) communication by an establishment of a transmission or retransmission embodying a performance or display of a nondramatic musical work intended to be received by the general public, originated by a radio or television broadcast station licensed as such by the Federal Communications Commission, or, if an audiovisual transmission, by a cable system or satellite carrier, if—

(i) in the case of an establishment other than a food service or drinking establishment, either the establishment in which the communication occurs has less than 2,000 gross square feet of space (excluding space used for customer parking and for no other purpose), or the establishment in which the communication occurs has 2,000 or more gross square feet of space (excluding space used for customer parking and for no other purpose) and--

(I) if the performance is by audio means only, the performance is communicated by means of a total of not more than 6 loudspeakers, of which not more than 4 loudspeakers are located in any 1 room or adjoining outdoor space; or

(II) if the performance or display is by audiovisual means, any visual portion of the performance or display is communicated by means of a total of not more than 4 audiovisual devices, of which not more

than 1 audiovisual device is located in any 1 room, and no such audiovisual device has a diagonal screen size greater than 55 inches, and any audio portion of the performance or display is communicated by means of a total of not more than 6 loudspeakers, of which not more than 4 loudspeakers are located in any 1 room or adjoining outdoor space;

(ii) in the case of a food service or drinking establishment, either the establishment in which the communication occurs has less than 3,750 gross square feet of space (excluding space used for customer parking and for no other purpose), or the establishment in which the communication occurs has 3,750 gross square feet of space or more (excluding space used for customer parking and for no other purpose) and—

(I) if the performance is by audio means only, the performance is communicated by means of a total of not more than 6 loudspeakers, of which not more than 4 loudspeakers are located in any 1 room or adjoining outdoor space; or

(II) if the performance or display is by audiovisual means, any visual portion of the performance or display is communicated by means of a total of not more than 4 audiovisual devices, of which not more than one audiovisual device is located in any 1 room, and no such audiovisual device has a diagonal screen size greater than 55 inches, and any audio portion of the performance or display is communicated by means of a total of not more than 6 loudspeakers, of which not more than 4 loudspeakers are located in any 1 room or adjoining outdoor space;

(iii) no direct charge is made to see or hear the transmission or retransmission;

(iv) the transmission or retransmission is not further transmitted beyond the establishment where it is received; and

(v) the transmission or retransmission is licensed by the copyright owner of the work so publicly performed or displayed;

(6) performance of a nondramatic musical work by a governmental body or a nonprofit agricultural or horticultural organization, in the course of an annual agricultural or horticultural fair or exhibition conducted by such body or organization; the exemption provided by this clause shall extend to any liability for copyright infringement that would otherwise be imposed on such body or organization, under doctrines of vicarious liability or related infringement, for a performance by a concessionaire, business establishment, or other person at such fair or exhibition, but shall not excuse any such person from liability for the performance;

(7) performance of a nondramatic musical work by a vending establishment open to the public at large without any direct or indirect admission charge, where the sole purpose of the performance is to promote the retail sale of copies or phonorecords of the work, or of the audiovisual or other devices utilized in such performance, and the performance is not transmitted beyond the place where the establishment is located and is within the immediate area where the sale is occurring;

(8) performance of a nondramatic literary work, by or in the course of a transmission specifically designed for and primarily directed to blind or other handicapped persons who are unable to read normal printed material as a result of their handicap, or deaf or other handicapped persons who are unable to hear the aural signals accompanying a transmission of visual signals, if the performance is made without any purpose of direct or indirect commercial advantage and its transmission is made through the facilities of: (i) a governmental body; or (ii) a noncommercial educational broadcast station (as defined in section 397 of title 47); or (iii) a radio subcarrier authorization (as defined in 47 CFR 73.293-73.295 and 73.593-73.595); or (iv) a cable system (as defined in section 111(f) [17 USCS § 111(f)]);

(9) performance on a single occasion of a dramatic literary work published at least ten years before the date of the performance, by or in the course of a transmission specifically designed for and primarily directed to blind or other handicapped persons who are unable to read normal printed material as a result of their handicap, if the performance is made without any purpose of direct or indirect commercial advantage and its transmission is made through the facilities of a radio subcarrier authorization referred to

in clause (8)(iii), Provided, That the provisions of this clause shall not be applicable to more than one performance of the same work by the same performers or under the auspices of the same organization;

(10) notwithstanding paragraph (4), the following is not an infringement of copyright: performance of a nondramatic literary or musical work in the course of a social function which is organized and promoted by a nonprofit veterans' organization or a nonprofit fraternal organization to which the general public is not invited, but not including the invitees of the organizations, if the proceeds from the performance, after deducting the reasonable costs of producing the performance, are used exclusively for charitable purposes and not for financial gain. For purposes of this section the social functions of any college or university fraternity or sorority shall not be included unless the social function is held solely to raise funds for a specific charitable purpose; and

(11) the making imperceptible, by or at the direction of a member of a private household, of limited portions of audio or video content of a motion picture, during a performance in or transmitted to that household for private home viewing, from an authorized copy of the motion picture, or the creation or provision of a computer program or other technology that enables such making imperceptible and that is designed and marketed to be used, at the direction of a member of a private household, for such making imperceptible, if no fixed copy of the altered version of the motion picture is created by such computer program or other technology.

The exemptions provided under paragraph (5) shall not be taken into account in any administrative, judicial, or other governmental proceeding to set or adjust the royalties payable to copyright owners for the public performance or display of their works. Royalties payable to copyright owners for any public performance or display of their works other than such performances or displays as are exempted under paragraph (5) shall not be diminished in any respect as a result of such exemption.

In paragraph (2), the term "mediated instructional activities" with respect to the performance or display of a work by digital transmission under this section refers to activities that use such work as an integral part of the class experience, controlled by or under the actual supervision of the instructor and analogous to the type of performance or display that would take place in a live classroom setting. The term does not refer to activities that use, in 1 or more class sessions of a single course, such works as

textbooks, course packs, or other material in any media, copies or phonorecords of which are typically purchased or acquired by the students in higher education for their independent use and retention or are typically purchased or acquired for elementary and secondary students for their possession and independent use.

For purposes of paragraph (2), accreditation—

(A) with respect to an institution providing post-secondary education, shall be as determined by a regional or national accrediting agency recognized by the Council on Higher Education Accreditation or the United States Department of Education; and

(B) with respect to an institution providing elementary or secondary education, shall be as recognized by the applicable state certification or licensing procedures.

For purposes of paragraph (2), no governmental body or accredited nonprofit educational institution shall be liable for infringement by reason of the transient or temporary storage of material carried out through the automatic technical process of a digital transmission of the performance or display of that material as authorized under paragraph (2). No such material stored on the system or network controlled or operated by the transmitting body or institution under this paragraph shall be maintained on such system or network in a manner ordinarily accessible to anyone other than anticipated recipients. No such copy shall be maintained on the system or network in a manner ordinarily accessible to such anticipated recipients for a longer period than is reasonably necessary to facilitate the transmissions for which it was made.

For purposes of paragraph (11), the term "making imperceptible" does not include the addition of audio or video content that is performed or displayed over or in place of existing content in a motion picture.

Nothing in paragraph (11) shall be construed to imply further rights under section 106 of this title [17 USCS § 106], or to have any effect on defenses or limitations on rights granted under any other section of this title or under any other paragraph of this section.<sup>152</sup>

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<sup>152</sup> 17 USCS § 110.

The incorporation of the Fairness in Music Licensing Act of 1998 into the 1976 Copyright Act created a profound safe harbor for businesses and restaurants. If a business has less than 2000 gross square feet (excluding parking), correctly limits the number of speakers and uses a receiver of the type that would be found in a home then the business will be allowed to play music or television that is received over the airwaves without paying a licensing fee or royalty. Similarly, a restaurant that has a similar sound system and remains below 3750 gross square feet of space will also be exempt from paying a license or royalty for the music played in its establishment. Further discussion of the Fairness in Music Licensing Act of 1998 is below.

The 1976 Copyright Act §110 also provides exemptions for educational purposes, religious performances, and if the performance is “without any purpose of direct or indirect commercial advantage and without payment of any fees or other compensation for the performance to any of its performers,” or a charitable purpose not for private financial gain is exempt.<sup>153</sup>

A Texas court reinforced these provisions in *Crabshaw Music v. K-Bob's of El Paso, Inc.*:

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

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

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

(B) the transmission thus received is further transmitted to the public . . . .

17 U.S.C. § 110(5).<sup>154</sup>

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<sup>153</sup> 17 U.S.C. § 110(1) – (4)(B).

<sup>154</sup> *Crabshaw Music v. K-Bob's of El Paso, Inc.*, 744 F. Supp. 763, 766 (D. Tex. 1990)

Thus, §110 as modified by the Fairness in Music Licensing Act provide the framework for a business or restaurant to legally receive exemption from paying licensing fees or royalties for playing music in their establishments of copyrighted works. Therefore, §110 is the exemption on point for businesses or restaurants that play music in their establishments. This is also the copyright exemption that the EU litigated in the WTO case DS160 as violating TRIPS.

#### **4. § 111 — Limitations on exclusive rights: secondary transmissions**

Subsection §111(a)(1) provides that if the secondary transmission “is not made from a cable system, and consist entirely of the relaying, by the management of a hotel, apartment house, or similar establishment, of signals transmitted by a broadcast station licensed by the Federal Communications Commission, within the local service area of such station, to the private lodgings of guests or residents of such establishment, and no direct charge is made to see or hear the secondary transmission” then this is not an infringement.<sup>155</sup>

A business (retail) or restaurant that is not operated as a hotel must be cautious in using any cable system that would not be found in a home. Court analysis of business and restaurant equipment evaluates the type of equipment to determine if the equipment is of a professional quality and type. Additional consideration should be given if it is a “primary transmission” or “secondary transmission” that is being brought into the business or restaurant.<sup>156</sup> “A ‘primary transmission’ is a transmission made to the public by the transmitting facility whose signals are being received in further transmitted by the secondary transmission service, regardless of where or when a performance or display was first transmitted.”<sup>157</sup> Whereas “a ‘secondary transmission’ is the further transmitting of a primary transmission simultaneously

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<sup>155</sup> 17 U.S.C. §111(a)(1).

<sup>156</sup> 17 U.S.C. § 111(f).

<sup>157</sup> *Id.*

with the primary transmission, or non-simultaneously with a primary transmission is by a ‘cable system’ not located in whole or in part within the boundary of the 48 contiguous States....”<sup>158</sup>

This particular subsection clarifies the wording of §111. Essentially a business that does not retransmit a signal or charge for the broadcast again will not have to pay a licensing fee or royalties if it remains in compliance with section 110.

#### **5. § 112 — Limitations on exclusive rights: Ephemeral recordings**

This section is more applicable to radio stations that make a copy of the musical work in order to play the copy later instead of using the master and risking damaging the master.<sup>159</sup> It is the radio station’s responsibility to pay the royalty or licensing fees for the musical work or sound recording. “Under this subsection a ‘transmitting organization’ must first have the right or license to transmit a sound recording and then may make a single copy or phonorecord for its own transmissions within its own ‘local service area’ which, after six months, must either be destroyed or preserved ‘exclusively for archival purposes.’”<sup>160</sup> It is irrelevant as to whether a business or restaurant receives music broadcasts from a radio station that plays a master or copy. The public performance issue occurs when an establishment plays the music received from the radio broadcast, not if it is played only from a master sound recording.

#### **6. § 114 — Scope of exclusive rights in sound recordings**

Section 114(a) states “the exclusive rights of the owner of copyright in a sound recording are limited to the right specified by clauses (1), (2), (3) and (6) of section 106, and do

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<sup>158</sup> *Id.*

<sup>159</sup> 17 U.S.C. § 112.

<sup>160</sup> *See* SCHULENBERG, *supra* note 25 at 510.

not include any right of performance under section 106(4) [17 U.S.C.S. §106(4)].”<sup>161</sup>

Schulenberg states, “While the protection to the owner of the copyright in a sound recording extends to any portion of that recording if it is copied directly off of the protected recording, it does not extend to sound alike recordings.”<sup>162</sup> “In *Agee v. Paramount Communications*, the [2<sup>nd</sup> Circuit] held that Paramount’s televised program *Hard Copy*’s use of sound recordings as background music violated the plaintiff’s exclusive right to reproduce sound recordings under Section 114.”<sup>163</sup> Section 114 contains numerous exceptions that are applicable to businesses and restaurants depending on the transmission means and if the transmission is a subscription, non-subscription, satellite, or one of the other exceptions listed in this provision. Analysis of section 114 shows that as long as a business or restaurant complies with the provisions of §114 and uses a homestyle radio system to receive the radio programs, there should be no licensing fees or royalty payments due.

## **7. § 115 — the compulsory license**

The importance of section 115 is that it forces the copyright owner to grant compulsory licenses once he has placed his musical composition in the public domain.<sup>164</sup> The musical composer or author has the exclusive right not to publish his work. Section 115 applies once the copyright owner has released the work to the public. The author then cannot prohibit the works use, but instead the copyright owner must grant a license to those who pay and perform the musical works. The licensing fee is payable to the holder of the copyright. After securing a license, the licensee may in the case of a radio station broadcast the musical works. In

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<sup>161</sup> 17 U.S.C. § 114(a).

<sup>162</sup> See SCHULENBERG, *supra* note 25 at 510.

<sup>163</sup> *Id.* at 511.

<sup>164</sup> 17 U.S.C. § 115.

a 10<sup>th</sup> Circuit case that explains the significance of ensuring that someone claiming copyright ownership have a valid copyright, *Palladium Music, Inc. v. EatSleepMusic, Inc.*, cites the copyright office's Circular 50 to explain the significance and application of §115:

[The Copyright Office's] Circular 50, entitled 'Copyright Registration for Musical Compositions,' which *Palladium* also cites in its brief, provides that 'copyright in a musical work includes the right to make and distribute the first sound recording. Although others are permitted to make subsequent sound recordings, they must compensate the copyright owner of the musical work under the compulsory licensing provision of the law (title 17, United States Code, Section 115).' Circ. 50 at 1.

Under Section 115, a party intending to make and distribute a sound recording of a previously published musical work may obtain a compulsory license in that work simply by complying with the statutory requirements, including timely and sufficient notice to the owner of the copyright in the musical work and payment of statutory, or otherwise negotiated, royalties. 17 U.S.C. 115(a)(1), (b), (c). Thus, the exclusive rights of copyright owners of previously published musical works are limited only in that they are required (hence the term 'compulsory') to license the work to a party who has complied with Section 115. The concept is simple. In order for a party in *Palladium's* position to lawfully use preexisting, copyrighted musical works to create and sell its sound recordings, it must first secure the appropriate licensing from the copyright owners of those musical works. See *Bridgeport Music, Inc. v. Dimension Films*, 383 F.3d 390, 398 n.7 (6th Cir. 2004) ('Needless to say, in the case of a [sound] recording of a musical composition the imitator would have to clear with the holder of the composition copyright.'). By failing to comply with Section 115, *Palladium* has illegally used the preexisting material. See 17 U.S.C. 103(a). As a result, *Palladium's* copyrights in the sound recordings at issue are invalid and unenforceable.

*Palladium* also argues, in the alternative, that the licensing scheme provided by Section 115 does not apply here because *Palladium* only distributed its sound recordings on a wholesale basis and not retail or "directly to the public" as required by 115(a)(1)... As support for this argument, *Palladium* relies upon the first sentence of 115(a)(1), which provides: When phonorecords of a nondramatic musical work have been distributed to the public in the United States under the authority of the copyright owner, any other person, including those who make phonorecords or digital

phonorecord deliveries, may, by complying with the provisions of this section, obtain a compulsory license to make and distribute phonorecords of the work. *Palladium* fails to offer any authority, and we could find none, for reading a wholesale/retail distinction into 115(a)(1). More importantly, the first sentence of 115(a)(1) refers to public distribution of (a) a nondramatic musical work, and (b) under the authority of the copyright owner of that musical work. See also, *Peer Int'l Corp. v. Pausa Records, Inc.*, 909 F.2d 1332, 1334 n.2 (9th Cir. 1990) (noting that ‘once the owner of a copyright in a nondramatic musical work distributes copies of that work to the public,’ others may obtain a compulsory license under Section 115); 2 Nimmer § 8.04[A] (stating that Section 115's compulsory license is applicable only to copyright owners of ‘nondramatic musical works’). The first sentence, therefore, cannot address *Palladium's* distribution, whether retail or wholesale, of its sound recordings because, as *Palladium* admits, it is not a copyright owner of the underlying musical works. Instead, this language refers to the initial distribution to the public "under the authority of the copyright owner" which triggers when others may, by complying with Section 115, obtain a compulsory license to make and distribute the work in question.<sup>165</sup>

The importance of *Palladium* shows that unless there is a valid copyright no licensing fee or royalty is due. The significance of section 115 to the business or restaurant owner for this paper is the inclusion of the statutory royalty rate in §115(c) and the Digital Performance Right in Sound Recordings Act of 1995 (DPRSR) provisions amending §115. The DPRSR is discussed later in the “Other U.S. Acts” section of this paper.

#### **8. § 118 — Exclusive rights: use of certain works in connection with noncommercial broadcasting**

The most significant provision of this section is §118(2) which states “License agreements voluntarily negotiated at any time between one or more copyright owners and one or more public broadcasting entities shall be given effect in lieu of any determination by the

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<sup>165</sup> *Palladium Music, Inc. v. EatSleepMusic, Inc.*, 398 F.3d 1193, 1198 (10th Cir. 2005).

Librarian of Congress or the Copyright Royalty Judges....”<sup>166</sup> Therefore, this provision is applicable to the business or restaurant that is receiving the radio broadcasts from the non-commercial broadcast, because playing the broadcast is a public performance. The copyright owner is entitled to a license fee. However, the provider is the source that should negotiate the licensing fee not the business or restaurant owner if the enterprise complies with §110’s exemptions.

### **9. Summary of the provisions of the 1976 Copyright Act applicable to businesses and restaurants playing music**

Of the sixteen exemptions to the copyright holder’s exclusive rights, only three exemptions will have an impact and exert some operational control over business or restaurant proprietors. Section 114 pertains to the use of a sound recording in some other transmission or use. A business or restaurant that includes a copyrighted sound recording in an ad would owe a royalty and should obtain a license before using the work.

The compulsory license allows the radio broadcast stations or business and restaurant proprietors to obtain a license for the right to play the song. Businesses and restaurants are directly affected by section 110 and the homestyle and business exemptions. If an enterprise does not meet these requirements by being too large in square footage (Sears, Wal-Marts, etc.) or the equipment used is of a professional nature not found in a normal home then the enterprise needs to pay for a license through a performance right society or a commercial musical background service. The means of enforcing the copyright owner’s rights will be presented below.

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<sup>166</sup> 17 U.S.C. § 118(2).

## VI. ADMINISTRATION RIGHTS AND ENFORCEMENT

### A. §501 — Infringement of Copyright

Copyright protection was established in the Constitution while copyright laws have evolved over the last 217 years to provide copyright owners exclusive rights and exemptions. The Copyright clause of the Constitution promotes the useful arts and gives the authors of writings the right to control their writings. The 1976 Copyright law as amended states the copyright owner “is entitled... to institute an action for any infringement of that particular right committed while he or she is the owner of it.”<sup>167</sup> The owner of the musical works claims exclusive rights to the musical works and sound recordings through the protection afforded by §106(4) and (6).<sup>168</sup> Section 513 then provides the “proprietor” of an individual business or restaurant provisions for judicial help in setting “reasonable licensing fees” with performing rights societies.<sup>169</sup> A good question to ask is “just what are performance and performing rights societies?” The next section begins with a brief introduction and explanation of performance societies and their function within the world of musical works and copyright owners.

From *Swirsky v. Carey*, “To establish a successful copyright infringement claim, the [plaintiff] must show that (1) he owns the copyright in [his song or musical work] and (2) the [defendant] copied protected elements of [the song or musical work].”<sup>170</sup> Additionally, *Swirsky* provides the copyright owner must prove the infringer copied the sound recording:

The element of copying is rarely the subject of direct evidence; [the plaintiff] may establish copying by showing that [defendant] had access to *One* [infringed song] and that *Thank God* [new song] was substantially similar to *One* in *One's* protected elements. *See*

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<sup>167</sup> 17 U.S.C. § 501(b).

<sup>168</sup> 17 U.S.C. § 106(4), (6).

<sup>169</sup> 17 U.S.C. § 513.

<sup>170</sup> *Swirsky v. Carey*, 376 F.3d 841, 844 (9th Cir. 2004).

*Smith*, 84 F.3d at 1218; *Metcalf v. Bochco*, 294 F.3d 1069, 1072 (9th Cir. 2002). Where a high degree of access is shown, we require a lower standard of proof of substantial similarity. See *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 485 (9th Cir. 2000); *Smith*, 84 F.3d at 1218.<sup>171</sup>

The court stated that direct evidence is rarely present, thus the court then explained an extrinsic test to help determine if infringement indeed occurred:

The extrinsic test considers whether two works share a similarity of ideas and expression as measured by external, objective criteria. See *Smith*, 84 F.3d at 1218. The extrinsic test requires ‘analytical dissection of a work and expert testimony.’ *Three Boys*, 212 F.3d at 485. ‘Analytical dissection’ requires breaking the works “down into their constituent elements, and comparing those elements for proof of copying as measured by ‘substantial similarity.’” *Rice v. Fox Broad. Co.*, 148 F. Supp. 2d 1029, 1051 (C.D. Cal. 2001).<sup>172</sup>

To have infringement there must be a valid copyright owned by the entity whose work is infringed. Next, the plaintiff must show through the application of the extrinsic test and expert testimony that the songs are similar to prove the defendant infringed. An interesting aspect previously pointed out is a single musical work or sound recording may have multiple copyright owners. Multiple copyright owners may mean one or two licenses may not actually secure the right to perform the work, as the licenses do not involve all of the musical works or sound recording owners.

## **B. Performance Rights**

This multiple ownership for a single musical work may create a dilemma for a business or restaurant proprietor. How does a proprietor know his license covers all copyright owners of the

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<sup>171</sup> *Id.* (See footnote 3A for the access that a court looks for: “A number of the people involved in recording One were also involved in the recording of Thank God. Both songs were mastered by Bob Ludwig at Gateway Mastering, produced by Sony Music Entertainment, and distributed through Columbia Records. Jermaine Dupri served as a producer to both albums and Kandi Burrese, one of the former members of Xscape, co-wrote the song "X-Girlfriend" with Carey for the "Rainbow" album.”).

<sup>172</sup> *Id.*, at 845.

work? There may be separate owners for the lyrics, musical composition, and even the producers of the musical work. Title 17 U.S.C. § 106(4) provides the copyright owner exclusive rights to “perform the copyrighted [musical] work publicly.”<sup>173</sup> While owners of the sound recordings also have the exclusive right to authorize “perform[ances to] the copyrighted work publicly by means of a digital audio transmission.”<sup>174</sup> These rights vest in the author when an original work by the author is fixed in a tangible medium. However, as noted in *Harper & Row*, the Supreme Court stated that in regards to musical works for sound recordings “In practice, the author commonly sells his rights to publishers who offer royalties in exchange for their services in producing and marketing the author’s work.”<sup>175</sup> The sale of the author’s rights to the publisher is in accordance with the copyright clause in the Constitution stating, “[P]romote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings.”<sup>176</sup> The copyright clause coupled with §106 exclusive rights allow the author to hold, assign, or even sell the copyright to the musical works or sound recording. This arrangement allows the publisher or the copyright owner to receive payment for their exclusive rights through charging royalties or securing a licensing fee for allowing the performance of the musical works. However, with thousands of radio stations nationwide and millions of songs, a copyright owner could not possibly enforce his rights individually.<sup>177</sup> Luckily, performance right societies monitor public performances of the copyrighted works registered with the performance right society. These centralized performance right societies license the musical work to radio stations or charge a royalty when a copyrighted musical work broadcasts over the airwaves without the owner licensing such a performance.

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<sup>173</sup> 17 U.S.C. §106(4).

<sup>174</sup> 17 U.S.C. §106(6).

<sup>175</sup> See FLOYD, *supra* note 56 at 149.

<sup>176</sup> U.S. Const. art. I, §8 cl. 1.

<sup>177</sup> See Hagins, *supra* note 81 at 398.

## 1. Performance vs. performing

Copyright law permits the copyright owner to control the performance of their works. It is important to understand the difference between a *performance* and *performing*. A performance occurs when a singer is onstage singing a song.<sup>178</sup> A radio station that plays the song is performing the musical work (song). Similarly, an establishment playing music over the speakers is also performing the musical work. The copyright act defines public performance as:

To perform or display a work “publicly” means—

- (1) to perform or display it 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; or
- (2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.<sup>179</sup>

A public performance occurs when a radio station broadcasts a song. This is when a performance rights society’s services come to play. Upon entering a business or restaurant, the employee of the performance right society notes the copyrighted songs being played. The performance right society then attempts to negotiate a license with the proprietor of the business or restaurant, or demands a royalty payment for the public performance. The performance rights society or copyright owner may file an infringement complaint if either of these methods fails. A quick discussion of the “Music Industry Players” follows for clarification.<sup>180</sup>

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<sup>178</sup> See KOHN, *supra* note 72, 1312.

<sup>179</sup> 17 U.S.C. §101.

<sup>180</sup> See KOHN, *supra* note 72, 1306.

### C. Record Companies and Musical Publishers

“Record companies are entities who enter into contractual relationships with recording artists for the financing, promotion, and distribution of sound and video recordings featuring artist’s performances.”<sup>181</sup> The artists in turn receive royalties from the record company based on sales.<sup>182</sup>

“Musical publishers are entities who enter into contractual relationships with songwriters, often the same person as the recording artists, for the commercial exploitation of the songs written by the song writers.”<sup>183</sup> The musical publisher then may license the song in written form such as sheet music and songbooks.<sup>184</sup> Of significant interest to the issue of this paper is that musical publishers also have the right to license “the song for use in recordings made and distributed by record companies, ...for live and recorded performances of the songs in nightclubs, restaurants, hotels and similar establishments and on radio, television and other kinds of broadcasts.”<sup>185</sup> This right is how the performance rights societies seek and collect licensing fees and royalties for the public performance of the copyright owner’s musical works or sound recordings under contract with their society.

### D. Performance Right Societies

There are three major U.S. organizations that collect royalties or establish licensing agreements for music publishers and songwriters.<sup>186</sup> The Copyright Act §101 even defines these organizations “A ‘performing rights society’ is an association, corporation, or other entity that licenses the public performance of nondramatic musical works on behalf of copyright owners of

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<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* at 1307.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* (“The majors [music publishers] include Warner/Chappell, EMI, Famous, and Peermusic.”).

<sup>186</sup> *Id.*

such works, such as the American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music, Inc. (BMI), and SESAC, Inc.”<sup>187</sup>

These organizations are responsible for collecting monies from radio stations “for the public performance of all the songs they represent in their respective catalogs.”<sup>188</sup> Typically, the performance rights societies charge radio stations a percentage based upon the number of listeners or advertising revenues.<sup>189</sup> The organizations usually license all works they represent through a blanket license to the radio stations that can then broadcast all the songs in the performance right society’s portfolio.<sup>190</sup>

The United States performance right societies were against passage of the FMLA. As previously noted, immediately after the FMLA passed revenues from public performance royalties from businesses and restaurants dropped 75%. U.S. societies are not unique, there are at least 16 similar foreign societies that protect their citizen’s performance rights.<sup>191</sup> Both the U.S. and international societies have the responsibility of licensing their works. Thus, it is no surprise that the business exemption that excludes such a large percentages of establishments based on square footage alone was immediately the target of litigation with WTO countries.

### **E. Harry Fox Agency**

Before this paper evaluates the international dispute, one last agency needs to be presented. The Harry Fox Agency “represents music publishers and specializes in issuing licenses to record companies for the reproduction of songs and CDs and other kinds of

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<sup>187</sup> 17 U.S.C. § 101.

<sup>188</sup> See KOHN, *supra* note 72, 1307.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> See SCHULENBERG, *supra* note 25 at 413-6.

recordings.”<sup>192</sup> This agency, although extremely important and well known, is not concerned with whether businesses or restaurants have to pay a royalty or license fee for the public performance created by playing music received over the radio in their establishments.

The fear of loss of revenue had the international community hopping mad before the FMLA was even law. Therefore, although the U.S. Fairness in Musical Licensing Act was an attempt by the U.S. Congress to create a black letter rule of law specifying when a business or restaurant would be required to pay a license or royalty when playing music over a radio in this country. The international community disagreed with the line drawn and with the exemption of FMLA. The U.S. Congress and Courts heard the exemption to copyrighted music or sound recordings in a much different tone than the Europeans, leading to the WTO dispute.

## **VII. INTERNATIONAL DISPUTE WITH THE U.S. AS LITIGATED IN WTO DS160.**

### **A. The European Community had issues with the U.S. over the FMLA**

On the day the FMLA became law in January 1999, the European Community (EC) filed a complaint alleging that the FMLA violated the WTO Trade-Related Aspects of Intellectual Property (TRIPS) agreement.<sup>193</sup> Copyright law had always been a territorial issue, for instance until January 6, 1897 the United States did not recognize any foreign copyright holders applying for U.S. copyrights.<sup>194</sup> Even this 1897 change came with a stipulation requiring the foreigner’s government to afford copyright protection to U.S. citizens.<sup>195</sup> This territorial copyright regime

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<sup>192</sup> See KOHN, *supra* note 72, 1307.

<sup>193</sup> See Hiaring, *supra* note 75 at 281.

<sup>194</sup> See U.S. Copyright Office, *supra* note 9.

<sup>195</sup> *Id.*

changed on January 1, 1995, when the United States became a member of the World Trade Organization (WTO).<sup>196</sup> Copyright was a new collective territorial issue. Conversely, membership in the WTO has its privileges including immediate most-favored-nation status (where each nation must treat all other members no worse than it treats itself). Membership in the WTO has its obligations including compliance with the Berne Convention Articles 1-21.<sup>197</sup> The articles of the Berne Convention that the international community stated the FMLA violated began with, but were not limited to, article 9(1) (right of reproduction).<sup>198</sup> The “Introduction” to the First Written Submission of the European Communities and their Member States” clearly states the EC position against the U.S.:

#### Introduction

The European Communities and their member States (hereinafter EC/MS) bring this complaint against the United States of America (US) because they consider that certain aspects of the US legislation relating to the protection of copyrighted works are incompatible with the US' obligations stemming from the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).

While Section 106 Copyright Act gives the right holder of a copyrighted work, the exclusive right to reproduce the work, prepare derivative works, distribute copies of the work and to perform the copyrighted work publicly, Section 110(5) Copyright Act provides for two exemptions from copyright protection, which in simple terms can be summarised as follows:

- Under Subsection A, anybody is allowed to perform in his business premises for the enjoyment of customers under certain conditions, without the consent of the copyright holder, copyrighted works other than nondramatic compositions such as plays, operas or musicals from radio or television (TV) transmissions;

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<sup>196</sup> WTO membership and observer page, *available at* [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm).

<sup>197</sup> *Id.*

<sup>198</sup> WTO Doc. WT/DS/160/5/R.

- Under Subsection B, anybody is allowed to perform in his business premises for the enjoyment of customers, 'nondramatic music' by communicating radio or TV transmissions without the consent of the copyright owner in cases where a certain surface is not exceeded without any practical limitation or above that surface limit by respecting certain conditions as to the number of loudspeakers used.

In the view of the EC/MS, these US measures are in violation of the US' obligations under the WTO-TRIPS Agreement. In particular, the US measures are incompatible with Article 9(1) TRIPS together with Articles 11(1) and 11*bis*(1) of the Berne Convention and cannot be justified under any express or implied exception or limitation permissible under the Berne Convention or under TRIPS. These measures cause prejudice to the legitimate rights of copyright owners, thus nullifying and impairing the rights of the EC/MS.

The EC/MS would also like to mention that several senior US government officials, which have testified before the US Congress during the legislative process which led to the present version of Section 110(5) Copyright Act, have expressed the view that the extension of the scope of this provision would violate the US' obligations under TRIPS and the Berne Convention.<sup>199,200,201</sup>

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<sup>199</sup> WTO Doc. WT/DS/160/R, 75. (See fn 1 "The Register of Copyrights stated on 17 July 1997 in Congress (copy of the entire statement on international aspects attached – [Exhibit EC-11](#)) that: "The Copyright Office believes that several of the expanded exemptions, if passed in their current form, would lead to claims by other countries that the United States was in violation of its obligations under the Berne Convention for the Protection of Literary and Artistic Works, incorporated into the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS") of the Uruguay Round of GATT".)

<sup>200</sup> WTO DOC. WT/DS/160/R, 75. (See fn 2 "At the same occasions, the Assistant Secretary of Commerce and Commissioner of Patents and Trademarks stated that: "Our trading partners are likely to allege that several of the changes to the copyright law proposed in Section 2 of the proposed bill may be inconsistent with our obligations under the Berne Convention and the Agreement on Trade-Related Aspects of Intellectual Property Rights ("the TRIPS Agreement") administered by the World Trade Organization. If H.R. 789 is enacted, and we undermine the rights of copyright owners of musical works to perform their works in public, in particular at a restaurant or bar as envisioned by Section 2(a) and at the establishments covered by Section 2(c), we are seriously concerned that they will claim that we are in violation of our international commitments under both the Berne Convention and the TRIPS Agreement, the latter of which contains a similar right under Article 14(3)" (copy of the entire statement on international aspects attached – [Exhibit EC-12](#).").

<sup>201</sup> WTO Doc. WT/DS/160/R, 75-6. (See fn 3 "For the sake of accuracy, it has to be mentioned that the statements referred to under point 4 have been made on the basis of an earlier proposal (H.R. 789 attached as [Exhibit EC-13](#)) which provided for slightly wider exception than the one contained in the present Section 110(5) Copyright Act.").

The EC/MS' economic interests in this matter are significant. According to a study to which the EC/MS will refer to under Part IV, approximately 70% of all drinking and eating establishments and 45% of all retail establishments in the US can play without limitation radio or TV music without the consent of the copyright owner. This demonstrates clearly the potential of Section 110(5) Copyright Act to cause very significant losses of licensing income.<sup>202</sup>

At the heart of any good litigation is principle and money. The EC saw both issues with the passage of the Fairness in Music Licensing Act by the United States.<sup>203</sup> The FMLA immediately excluded 45% of all retail businesses and a whopping 70% of restaurants from paying any further royalties based upon having a building below specified square footage.<sup>204</sup> The business exception excluded the business and restaurant from licensing or royalty payments if the business or restaurant remained below 2,000 and 3,750 square feet respectively.<sup>205</sup> The EC and even U.S. performance rights societies saw the business exemption as an arbitrary and a significant threat to copyright owners receiving compensated for their works. This conflict between the Berne and TRIPS agreements with the FMLA is the issue that the EC presented to the WTO.<sup>206</sup> This section will now introduce the Berne Convention and TRIPS articles that formed the basis for the litigation between the European Community and the United States.

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<sup>202</sup> WTO Doc. WT/DS/160/R, 76.

<sup>203</sup> *Id.* at 75-6.

<sup>204</sup> *Id.* at 76.

<sup>205</sup> 17 U.S.C. § 110(5)(B)(i).

<sup>206</sup> WTO Doc. WT/DS/160/5/R.

## B. TRIPS and Berne Article 9(1)

TRIPS article 9(1) states “Members shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto.”<sup>207</sup> This article makes those provisions of the Berne Convention applicable to the United States and all other members of TRIPS.

Berne article 9(1) is one of the provisions the European Community stated the FMLA was violating. The article 9(1) enforced the WTO agreement pertained to the right of reproduction by authors of literary and artistic works. U.S. Title 17 Section 110(5) appeared to the EC to grant too large an exception to the copyright acts § 106 exclusive rights and would reduce copyright protection to WTO members. Thus, the European Community saw § 110(5) as amended by FMLA AS a threat to the European musical works copyright holder’s right to receive the royalties which they had previously been entitled to. Started with Article 9(1):

### Berne Article 9

Right of Reproduction: 1. Generally; 2. Possible Exceptions; 3. Sound and Visual Recordings

1. Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form.

2. It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in *certain special cases*, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author. [Emphasis added.]

3. Any sound or visual recording shall be considered as a reproduction for the purposes of this Convention.<sup>208</sup>

Berne article 9(1) provides authors of literary and artistic works “the exclusive right of authorizing the reproduction of these works, in any manner or form.”<sup>209</sup> Article 9(1)’s use of the

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<sup>207</sup> TRIPS, Part II, Sec. 1, Art. 9(1).

<sup>208</sup> Berne Conv. of September 9, 1886 for the Protection of Literary and Artistic Works, §9.

<sup>209</sup> Berne Conv. art. 9(1)(ii).

term literary and artistic works is similar to the exclusive rights provided in § 106(1), (4), and (6) of the Copyright Act. Additionally, Berne article 2 defines “literary and artistic works” as “dramatic or dramatico-musical works ... [or] musical compositions with or without words.”<sup>210</sup> This is similar to the works given exclusive rights in the Copyright Act through § 102(a).

Next, Berne subparagraph 9(2) states “It shall be a matter for legislation in the country of the Union to permit the reproduction of such works and certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interest of the author.”<sup>211</sup>

The United States argued that §110(5) was in fact a “certain special case” and therefore was a valid exclusion and met the U.S. obligation to comply with the Berne and TRIPS articles. Additionally, the U.S. argued the exemptions in §110(5) were not too broad and did not violate this article or any other Berne or TRIPS articles. Nevertheless, the EC held TRIPS article 9(1) was indeed violated, along with other provisions of the Berne and TRIPS agreements by the U.S. FMLA. As a result of this belief, the European Union sought a WTO Dispute Settlement Understanding, which included analyzing article 13, “POSSIBLE LIMITATION OF THE RIGHT OF RECORDING OF MUSICAL WORKS & ANY WORDS PERTAINING THERETO.”<sup>212</sup>

### **C. TRIPS Article 13**

This article is the limitation and exceptions article, certain special cases, that is central to the WTO litigation, which reads:

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<sup>210</sup> Berne Conv. art. 2(1).

<sup>211</sup> Berne Conv. art. 9(2).

<sup>212</sup> Berne Conv. art. 13.

Member shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interest of the right holder.<sup>213</sup>

The U.S. argued this “minor exception doctrine” allowed the U.S. FMLA to comply with the WTO-TRIPS agreements. The WTO Dispute Settlement Board conducted an analysis of this doctrine and concluded the U.S. could “provide minor exceptions to the respective exclusive rights [Articles 11 and 11*bis* of TRIPS].”<sup>214</sup> The panel stated there is a three-part criteria test under Article 13 that is applied to Article 13, 11, and 11*bis*.

In the evaluation of the Berne Articles, the U.S. claimed the first criteria of “confining to certain special cases” allowed flexibility to the countries.<sup>215</sup> The DSB found § 110(5) not to be a “certain special case.”<sup>216</sup> There were too many business and restaurants excluded based on an arbitrary square footage. Thus, the business exception (§ 110(5)(B)) did not meet the first criteria of TRIPS Article 13.<sup>217</sup> The Dispute Settlement Board (DSB) stated “We fail to see how a law that exempts a major part of the users that were specifically intended to be covered by the provision of Article 11*bis*(1)(iii), broadcast by a loudspeaker, could be considered a special case in the sense of the first condition of Article 13 of the TRIPS Agreement.”<sup>218</sup>

The homestyle exception (§ 110(5)(A)) was similarly evaluated, but here the DSB found that the U.S. purpose of protecting the “mom & pop businesses” was limited in scope and reach.<sup>219</sup> The DSB concluded that the homestyle exemption was a certain special case.

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<sup>213</sup> TRIPS Conv. art. 13.

<sup>214</sup> GRAEME B. DINWOODIE, ET AL., INTERNATIONAL INTELLECTUAL PROPERTY LAW AND POLICY, 580 (Matthew Bender 2001).

<sup>215</sup> *Id.* at 588-595.

<sup>216</sup> *Id.* at 595.

<sup>217</sup> *Id.*

<sup>218</sup> *Id.* at 594.

<sup>219</sup> *Id.* at 599-600.

The DSB evaluated the second criteria of Article 13's three-part criteria test as applied to 11*bis*. The exclusive rights of 11*bis* also contained three elements that were each individually evaluated. These exclusive rights of 11*bis* are authors of literary and artistic works shall have the exclusive right of authorizing (i) broadcast; (ii) communication by wire or rebroadcast of work; or, (iii) a public broadcast by loudspeaker.<sup>220</sup> The second criteria, "do not conflict with normal exploitation of the work" were evaluated against the exclusive rights of 11*bis* and the business and homestyle exceptions.<sup>221</sup> The DSB selected changes to market sales to determine if the market representing an author's right to copyright license or royalties was affected as the second criteria test.<sup>222</sup> The DSB found the business exception did conflict with the normal exploitation allowed authors under 11*bis*.<sup>223</sup> On the other hand, the DSB found the homestyle exception did not conflict with the normal exploitation of authors.<sup>224</sup>

The last Article 13 test criterion "do not unreasonably prejudice the legitimate interests of the right holder" that evaluated 110(5) against the Berne Articles to determine if 110(5) violated the WTO agreements exclusive rights.<sup>225</sup> Again, the Berne articles were evaluated against 110(5) and the results were the same. The business exception did not meet the third condition, whereas the homestyle exception passed. For completeness and convenience, the three Berne Articles that were evaluated follow.

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<sup>220</sup> Berne Conv. art. 11*bis*.

<sup>221</sup> See DINWOODIE, *supra* note 214 at 600-10.

<sup>222</sup> *Id.* at 603.

<sup>223</sup> *Id.* at 609.

<sup>224</sup> *Id.* at 610.

<sup>225</sup> *Id.* at 588.

#### D. Berne Article 13

This article allows each WTO member to set the “reservations and conditions on the exclusive right granted to the author of a musical work...”<sup>226</sup> Article 13 as applied follows:

##### Article 13

Possible Limitation of the Right of Recording of Musical Works and any Words Pertaining thereto: 1. Compulsory Licenses; 2. Transitory Measures; 3. Seizure on Importation of Copies Made without the Author's Permission

1. Each country of the Union may impose for itself reservations and conditions on the exclusive right granted to the author of a musical work and to the author of any words, the recording of which together with the musical work has already been authorized by the latter, to authorize the sound recording of that musical work, together with such words, if any; but all such reservations and conditions shall apply only in the countries which have imposed them and shall not, in any circumstances, be prejudicial to the rights of these authors to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority.

2. Recordings of musical works made in a country of the Union in accordance with Article 13(3) of the Conventions signed at Rome on June 2, 1928, and at Brussels on June 26, 1948, may be reproduced in that country without the permission of the author of the musical work until a date two years after that country becomes bound by this Act.

3. Recordings made in accordance with paragraphs (1) and (2) of this article and imported without permission from the parties concerned into a country where they are treated as infringing recordings shall be liable to seizure.<sup>227</sup>

The U.S. used Article 13(1) to argue that it had the right to set limitations and exceptions such as the homestyle and business exceptions of section 110(5) and therefore, did not violate any WTO commitment. This argument ultimately failed when the DSB judged 110(5) was not in compliance with the WTO membership obligations..

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<sup>226</sup> TRIPS Conv. art. 13.

<sup>227</sup> Berne Conv., art 13.

## E. Berne Article 11bis

One of the few areas of consensus was when the EC and U.S. agreed the conflict rested with Articles 11 and 11bis.<sup>228</sup> These articles are now presented:

### Article 11bis

Broadcasting and Related Rights: 1. Broadcasting and Other Wireless Communications, Public Communication of Broadcast by Wire or Rebroadcast, Public Communication of Broadcast by Loudspeaker or Analogous Instruments; 2. Compulsory Licenses; 3. Recording; Ephemeral Recordings

1. Authors of literary and artistic works shall enjoy the exclusive right of authorizing:

(i) the broadcasting of their works or the communication thereof to the public by any other means of wireless diffusion of signs, sounds or images;

(ii) any communication to the public by wire or by rebroadcasting of the broadcast of the work, when this communication is made by an organization other than the original one;

(iii) the public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of the work.

2. It shall be a matter for legislation in the countries of the Union to determine the conditions under which the rights mentioned in the preceding paragraph may be exercised, but these conditions shall apply only in the countries where they have been prescribed. They shall not in any circumstances be prejudicial to the moral rights of the author, nor to his right to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority.

3. In the absence of any contrary stipulation, permission granted in accordance with paragraph (1) of this article shall not imply permission to record, by means of instruments recording sounds or images, the work broadcast. It shall, however, be a matter for legislation in the countries of the Union to determine the regulations for ephemeral recordings made by a broadcasting organization by means of its own facilities and used for its own broadcasts. The preservation of these recordings in official

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<sup>228</sup> See DINWOODIE, *supra* note 214 at 580.

archives may, on the ground of their exceptional documentary character, be authorized by such legislation.<sup>229</sup>

Article 11*bis*(1)(iii) was the major provision that the EC claimed should be protected or enforced as the means of protecting the licensing fee or royalties of the WTO copyright holder's works. In the first statement to the DSB, the EC stated that radio waves would have to use some loudspeaker to make the music or songs capable of being heard. Regardless of the size of the enterprise, music radios consist of a receiver and some sort of speaker. However, not every broadcast is a public performance warranting a license or royalty payment. Thus, the EC was not as successful in arguing the homestyle exception violated the Berne and TRIPS agreements. To understand the basis of the EC/WTO dispute with the U.S. it is relevant to understand the U.S. agreed to abide by Berne articles 1-21 thirteen years prior to passing the FMLA. The last article argued as being violated was Article 11.

#### **F. Berne Article 11**

Article 11 was evaluated separately using the three-part test from TRIPS Article 13 previously presented. Article 11 follows:

##### Article 11

Certain Rights in Dramatic and Musical Works: 1. Right of Public Performance and of Communication to the Public of a Performance; 2. In Respect of Translations

1. Authors of dramatic, dramatico-musical and musical works shall enjoy the exclusive right of authorizing:

(i) public performance of their works, including such public performance by any means or process;

(ii) any communication to the public of the performance of their works.

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<sup>229</sup> Berne Conv. art. 11*bis*.

2. Authors of dramatic or dramatico-musical works shall enjoy, during the full term of their rights in the original works, the same rights with respect to translations thereof.<sup>230</sup>

In the litigation against the U.S. the DSB ruled against the U.S. regarding public performance rights, holding that application of FMLA was unfair to the other WTO members and violated the terms of TRIPS and the U.S. obligation to conform the United States laws to the international agreement.

### **VIII. ANALYSIS**

The United States lost the litigation with the EC and after not being able to agree in arbitration the matter was settled by a WTO Dispute Settlement Board. The U.S. failed to appeal, and has paid \$1.1 million to the EC since 2001 as an ongoing penalty. Unfortunately, for the U.S. when the U.S. failed to appeal the WTO rulings, DS160 became final. Fortunately, for the U.S. the WTO does not have the ability to directly enforce the DS160 findings. Instead, the U.S. ability to enforce U.S. copyright owners' rights in other WTO countries is limited. It is the U.S. copyright owners who suffer abroad for the U.S. Government's inaction on the DS160 litigation and FMLA's business exemption not being brought into compliance with the Berne convention.

The WTO's findings do not affect the U.S. business or restaurant proprietor because these enterprises are only responsible for the copyright laws enacted by the U.S. Congress. However, since the United States has been found in violation of a treaty ratified by the Congress, the WTO and its member states may eventually force the U.S. to change our copyright laws to be in compliance. For that reason a review of the U.S. Court cases applicable to the homestyle and

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<sup>230</sup> Berne Conv. art. 11.

business exceptions are presented below. The following decisions may help the U.S. adjust the business exception of § 110(5)(B). This is the most important copyright act section regulating when the business or restaurant proprietor must pay licensing fees or royalties for playing music received over a FM and AM radio and played in the establishments.

## **A. U.S. Case law for Homestyle Exceptions (§ 110(5)(A)) and Business Exception (§ 110(5)(B))**

### **1. *Buck v. Jewell-LaSalle Realty Company***

This is the first of the homestyle exception cases. The Supreme Court first addressed “performed” and radio in 1931 in *Buck v. Jewell-LaSalle Realty Company*.<sup>231</sup> The case applied the 1909 Copyright Act to determine if a hotel owner was infringing the rights of copyright owners when he played radio programs for his guest’s enjoyment over loudspeakers.<sup>232</sup>

Technology once again outpaced the copyright act, forcing the Supreme Court to apply a copyright law to the new technology of radio and public performances. The *Buck* court held that the hotel proprietor’s playing of the radio was a performance equivalent to his hiring an orchestra to perform the copyrighted songs.<sup>233</sup> This court did not give an exception for the type of equipment used to produce the performance. The result was the hotel proprietor would have to pay the copyright owner to play any music received over a radio for his guests.<sup>234</sup>

The EC cited this case in DS160 supporting their claim that the U.S. was violating TRIPS.<sup>235</sup> Distinguishing aspects of this case are that the 1976 Copyright Act now defined

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<sup>231</sup> *Buck v. Jewell-LaSalle Realty Co.*, 283 US 191 (1931).

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

<sup>235</sup> WTO Doc. WT/DS/160/5/R at 78.

“perform” and “to perform or display a work publicly.”<sup>236</sup> The holding in *Buck* remained until the next case saw a change to the common-law decisions cited in *Buck*.

## **2. *Twentieth Century Music Corp. v. Aiken***

Forty-four years later, the Supreme Court, in *Twentieth Century Music Corp. v. Aiken*, once again took up the issue of copyright infringement and whether a business, in this case a restaurant, that played music to its patrons without paying a licensing fee was infringing in 1975.<sup>237</sup> By 1975, technology had matured from the infancy of radio and this time the results would differ from the common law holding in *Buck*.

The Pittsburgh, Pennsylvania, restaurant in *Aiken* was known as “George Aiken’s Chicken” where the restaurant had a radio connected to four speakers.<sup>238</sup> The issue for this court was “whether the reception of a radio broadcast of a copyrighted musical composition can constitute copyright infringement, when the copyright owner has licensed the broadcaster to perform the composition publicly for profit.”<sup>239</sup> The music broadcast originated from a local radio station that had paid a license to ASCAP for the right to play the music.<sup>240</sup> The argument presented was that the restaurant proprietor had no control over any of the music, news, or even commercials broadcast during the hours that the radio played.<sup>241</sup> With the passing of over sixty years from the enactment of the 1909 Copyright Act and the initiation of litigation in *Aiken* radio now was an everyday item. As the court stated “When technological change has rendered its literal terms ambiguous, the Copyright Act must be construed in light of this basic purpose.”<sup>242</sup>

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<sup>236</sup> 17 U.S.C. § 101.

<sup>237</sup> *Twentieth Century Music Corp. v. Aiken*, 422 US 151 (1975).

<sup>238</sup> *Id.* at 152.

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> *Id.*

<sup>242</sup> *Id.* at 152. (See note 7: “*In Fortnightly Corp. v. United Artists*, 392 U.S. 390, the court stated:

The purpose that the court set forth was that “[T]he sole interest of the United States and the primary objective in conferring the monopoly [copyright holder statutory monopoly]’ ... ‘lie in the general benefits derived by the public from the labors of authors.’ *Fox Film Corp. v. Doyle*, 286 U.S. 123, 127.”<sup>243</sup>

Of importance to this paper, the Court addresses technological changes that are applicable to the DS160 liability and application of “whether this radio reception constituted a ‘performance’ of the copyrighted works.”<sup>244</sup> Specifically the Court analyzed the copyright law in relation to commercial radio.<sup>245</sup> The facts from *Buck* differ from *Aiken* in that the reception of the music in 1975 was received from a radio station that had licensed the right to play the music.<sup>246</sup> ASCAP had now grown to include approximately 5,150 business establishments across the nation.<sup>247</sup> The court went on to state “a ruling that a radio listener ‘performs’ every broadcast that he receives would be highly inequitable for two distinct reasons.”<sup>248</sup> First, anyone playing music from a radio would be an infringer.<sup>249</sup> Secondly, to license every single business would be impracticable, even with a license the business or restaurant proprietor could not guarantee that the song playing over the airwaves were owned by the performance society that the business contracted with for a license owned the copyright to the musical composition or sound recording.<sup>250</sup> The court reasoned that the performance rights societies and copyright

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

<sup>243</sup> *Id.*

<sup>244</sup> *Id.* at 157.

<sup>245</sup> *Id.* at 157-8.

<sup>246</sup> *Id.* at 160.

<sup>247</sup> *Id.*

<sup>248</sup> *Id.* at 162.

<sup>249</sup> *Id.*

<sup>250</sup> *Id.* at 162-3.

owners were in fact receiving royalties based upon the licensing agreements.<sup>251</sup> The Court reasoned that advertising revenues would determine the number of listeners and determine the licensing fee during contract formation.<sup>252</sup> The *Aiken* decision modified the constitutional framework for determining public performance at a business or restaurant and provided allowable square footage for a business or restaurant. Congress used *Twentieth Century Music Corp. v. Aiken* to formulate protection for businesses a year later with § 110(5) in the 1976 Copyright Act.<sup>253</sup> However, in 1976, Congress did not include § 110(5)(B), that section was added in 1998, three years after the U.S. joined the WTO. *Twentieth Century Music Corp. v. Aiken* set the initial square footage limitation for the courts.

### 3. *Sailor Music v. The Gap Stores*

*Sailor Music v. The Gap Stores* enabled the Second Circuit, in 1981, to begin the judicial interpretation of the 1976 Copyright Act to define exactly what square footage was permissible in a business was for a § 110 exemption.<sup>254</sup> The Gap Stores on average exceeded over 3500 square feet for each one of their 2769 stores.<sup>255</sup> The trial court and the Second Circuit held that the square footage in the Gap stores exceeded the limit Congress had intended to exempt. Therefore, the Gap had to purchase a license to play the music in the stores.<sup>256</sup> However, to reach this decision the courts examined both square footage and the type of equipment used.

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<sup>251</sup> *Id.* at 164.

<sup>252</sup> *Id.*

<sup>253</sup> *Sailor Music v. The Gap Stores*, 668 F.2d 84, (2d Cir. 1981).

<sup>254</sup> *Id.* at 86. (See “In enacting § 110(5) Congress expressly considered the scope of the exemption this section provided. The House Committee sponsoring the 1976 Copyright Act made reference to *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 95 S. Ct. 2040, 45 L. Ed. 2d 84 (1975), a case holding that a fast-food shop of 1055 square feet with a commercial area open to the public of 620 square feet in which radio programs were played by means of a radio receiver connected to four speakers in the shop's ceiling was exempt pursuant to the 1909 copyright laws. The Committee noted that this particular fact situation represented the "outer limit" of the § 110(5) exemption. H. Rep. No. 1476, 94th Cong., 2d Sess., 87 (1976), U.S. Code Cong. & Admin. News 1976, p. 5659.”).

<sup>255</sup> *Id.*

<sup>256</sup> *Id.*

However, the next case points out the square footage from *Aiken* was not a bright line maximum; the equipment had to be considered to determine if the establishment was exempt.

#### **4. *Springsteen v. Plaza Roller Dome***

In 1985, the Middle District of North Carolina took up *Springsteen v. Plaza Roller Dome, Inc.*, 602 F. Supp. 1113, involving numerous artists and members of “the American Society of Composers, Authors, and Publishers (ASCAP)” against a business that consisted “of an indoor roller rink and an outdoor miniature golf” facility.<sup>257</sup> The *Plaza Roller Dome* owner had licensed his facility with ASCAP, believing this license allowed the right to play music for the entire facility.<sup>258</sup> The copyright owners claimed the outdoor facility required a separate license based on the square footage of the miniature golf facility.<sup>259</sup> The *Plaza Roller Dome* Court noted the Gap stores analysis included “built-in wiring and four or seven loudspeakers recessed in ceiling cavities, may be considered to be ‘standard home receiving apparatus [converted] (by augmenting it with sophisticated or expensive amplification equipment) into the equivalent of a commercial sound system.’”<sup>260</sup> The *Plaza Roller Dome* Court held that although the miniature golf facility was over approximately 7500 square feet the poor quality of the loudspeakers exempted the facility under the homestyle exemption. The *Plaza Roller Dome* Court showed both the square footage was to be considered and then the type of equipment was to be evaluated. The dispositive factor was whether the miniature golf sound system equipment was of a

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<sup>257</sup> *Springsteen v. Plaza Roller Dome, Inc.*, 602 F. Supp. 1113, 1113-14 (D.N.C. 1985).

<sup>258</sup> *Id.*

<sup>259</sup> *Id.* at 1116.

<sup>260</sup> *Id.*

commercial type or was the type of equipment found in a normal home. Here the speakers were of such poor quality, one had to stand practically underneath the speakers to hear the radio.<sup>261</sup>

### **5. *Broadcast Music, Inc. v. United States Shoe Corporation***

In one of the few cases discussing equipment placed in stores and the applicability to the homestyle exemption, is a Ninth Circuit case, *Broadcast Music, Inc. (BMI) v. United States Shoe Corporation*, 211 U.S.P.Q. 43.<sup>262</sup> *BMI v. U.S. Shoe* found the defendant operated over 600 women's shoe stores under the trade name of Casual Corner infringed BMI's copyright owner's rights by playing copyrighted music in the Casual Corner stores.<sup>263</sup>

The court held that the Casual Corner stores exceeded the "outer limit" of the exemption (specified by the House Judiciary Committee to approximate the facts in *Aiken*), because each store had a commercial monaural system, with widely separated speakers of a type not used in private homes, and the size and nature of the operation justified, in the eyes of the court, the use of a commercial background music system. 678 F.2d at 817.<sup>264</sup>

The key factors to determine exemptions were the square footage and the type of sound equipment. Both the *BMI* and *Plaza Roller Dome* courts initially evaluated and focused on the square footage. The *Plaza Roller Dome* court noted the outdoor miniature golf area, was "larger by a factor of 12 - - 7,500 square feet to 620 than that of the restaurant in *Aiken*," but finished with the equipment. However, the Second Circuit noted that the equipment, specifically the loudspeakers, at the miniature golf course were six in number but "the speakers did not project very well and one needed to be in a close proximity to the speaker to hear without much

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<sup>261</sup> *Id.*

<sup>262</sup> *Broadcast Music, Inc. v. United States Shoe Corporation*, 211 U.S.P.Q. 43 (C.D. Cal. 1980), *aff'd*, 678 F.2d 816 (9th Cir. 1982) (hereinafter '*BMI v. U.S. Shoe*').

<sup>263</sup> *Springsteen v. Plaza Roller Dome, Inc.*, 602 F. Supp. 1113, 1117.

<sup>264</sup> *Id.*

distortion.”<sup>265</sup> The test applied from the Congressional record was whether the system transformed into a commercial sound system.<sup>266</sup> In the evaluation of a commercial system the court also considered the revenues of the putt-putt course and stated that the course was “not of sufficient size to justify a subscription to a commercial background music service and therefore is within the scope of Section 110(5) exemption.”<sup>267</sup>

#### **6. *Broadcast Music, Inc. v. Jeep Sales & Service Co.***

*BMI v. Jeep Sales* reinforced the number of speakers and reiterated the Congressional intent for this exception to apply.<sup>268</sup> Specifically, BMI represented 1.5 million copyright owner’s musical compositions.<sup>269</sup> *Jeep Sales* was an automobile sales business that played the radio over four inside speakers and outside speakers (public address horns) mounted on poles and broadcast from 4:50 until 8:01 p.m.<sup>270</sup> *Jeep Sales* provides the five elements to prove copyright infringement:

In order to prevail in an action for copyright infringement, a plaintiff must establish the following five elements: (1) originality and authorship of the copyrighted works involved; (2) compliance with the formalities of the Copyright Act; (3) proprietary rights in the copyrighted works involved; (4) public performance of the compositions involved; and (5) lack of authorization for the public performance. *Broadcast Music, Inc. v. Allen-Genoa Rd. Drive-In, Inc.*, 598 F. Supp. 415 (S.D. Tex. 1983); *Boz Scaggs Music v. KND Corp.*, 491 F. Supp. 908, 912 (D. Conn. 1980); *Shapiro, Bernstein & Co. v. The Log Cabin Club. Assoc.*, 365 F. Supp. 325, 328 n. 4 (N.D.W.Va. 1973).<sup>271</sup>

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<sup>265</sup> *Id.* at 1118.

<sup>266</sup> *Id.*

<sup>267</sup> *Id.* at 1119.

<sup>268</sup> *Broadcast Music, Inc. v. Jeep Sales & Service Co.*, 747 F. Supp. 1190 (D. Va. 1990).

<sup>269</sup> *Id.*

<sup>270</sup> *Id.* at 1191.

<sup>271</sup> *Id.* at 1192.

The importance of this case is that the copyright owner has remedies available based upon whether or not the infringement is done knowingly. 17 U.S.C. § 504(c)(1) allows a court to award between \$500 and \$20,000 if infringement is done knowingly.<sup>272</sup> If the infringer did not know the act was an infringement, the court may award \$500 for each proven infringement.<sup>273</sup> Comparing this court award for the single business infringement and the \$1.1 million that the United States pays the European Community, it is easy to see that the EC amount requested in the DS160 of over \$200 million a year may have merit.

The *Jeep Sales* Court also referenced the House Committee report on the homestyle exemption:

The exemption, 17 U.S.C. § 110(5), applies to any ‘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 the kind commonly used in private homes, unless . . . the transmission thus received is further transmitted to the public . . .’ The House Committee which drafted this exemption explained that it was intended to accommodate situations such as that in *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 45 L. Ed. 2d 84, 95 S. Ct. 2040 (1975).<sup>274</sup>

The homestyle exception was becoming clear, the *Aiken*, limit was a maximum. Additionally:

The [Congressional] Committee pointed out that the operation [of *Aiken’s* restaurant] ‘was not of sufficient size to justify, as a practical matter, a subscription to a commercial background musical service . . . . However, where the public communication was by means of something other than a home’s type receiving apparatus . . . the exemption would not apply.’ H.R. Conf. Rep. No. 1733, 94<sup>th</sup> Congress, 2d Session, 75.<sup>275</sup>

There is now agreement with the statutes and court rulings on the homestyle exemption. The 1976 Copyright Act stated in §110(5) the limit was no more than six speakers and the courts

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<sup>272</sup> 17 U.S.C. § 504(c)(1).

<sup>273</sup> *Id.*

<sup>274</sup> *Id.* at 1193.

<sup>275</sup> *Id.*

were not going to surpass this number. Also in 1990, a case that statutorily superseded *Twentieth Century* was decided in the Western District of Texas.

### **7. *Crabshaw Music v. K-Bob's of El Paso Inc.***

*Crabshaw Music v. K-Bob's of El Paso Inc.* held a restaurant liable for playing music over several different systems.<sup>276</sup> In particular, one of the three restaurants had a sound system with 11 speakers. Another K-Bob restaurant allowed the unlicensed playing of music from radio stations over its loudspeakers after being warned that the playing of the music was an infringement.<sup>277</sup> The court once again looked to the equipment employed to determine if infringement had occurred:

The particular apparatus involved in the above-numbered suit is based upon a public address system with a stereo wired into it and eleven speakers installed throughout the restaurant. Deposition testimony of Thomas Howell of Howell Electronics, the servicer for K-Bob's electronic equipment, reveals K-Bob's requested Howell Electronics to service the tuner because of the low volume and distorted music on the speaker system. Howell testified the tuner was of a commercial type, the speakers were designed for dissemination of sound in a commercial building, the microphones were of commercial quality or type.<sup>278</sup>

Next, the court considered damages ranging from \$1500 to \$60,000 for the total infringement under 17 U.S.C. § 504(c)(1) based upon a minimum of \$250-\$10,000 per infringement:

(c) Statutory Damages. -- (1) Except as provided by clause (2) of this subsection, the copyright owner may elect, at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages for all infringements involved in the action, with respect to any one work, for which any one infringer is liable individually, or for which any two or more

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<sup>276</sup> *Crabshaw Music v. K-Bob's of El Paso, Inc.*, 744 F. Supp. 763, 765 (D. Tex. 1990).

<sup>277</sup> *Id.*

<sup>278</sup> *Id.* at 767.

infringers are liable jointly and severally, in a sum not less than \$250 or more than \$ 10,000 as the court considers just.<sup>279</sup>

Thus, the damages if calculated at \$10,000 per infringement, would greatly exceed the approximately \$773,000 in damages the U.S. claimed that the EC was suffering by losing the ability to collect royalties under the business exemption. The \$10,000 per claim may support the \$200 million in damages claimed in the EC in the WTO DS160 arbitration.<sup>280</sup>

### **B. Summary of U.S. Case law Applicable to Business and Restaurants**

The courts and the congressional intent establish that the homestyle exemption existed for businesses that utilized no more than six speakers. The 1976 Copyright Act eliminated the requirement under *Twentieth Century v. Aiken* to prove that the performance was for profit. Instead, the copyright owner now has to prove the five elements of copyright infringement. As technology evolved from the early days of radio analyzed in *Buck* and moved to the *Twentieth Century v. Aiken* Congress and the Courts have attempted to provide the framework for the homestyle exemption. The 1976 Copyright Act that was amended by the Fairness in Music Licensing Act was the same code used in the *Twentieth Century v. Aiken* case with the exception of adding the word “except” to 110(5)(A) referring to the business exemption.

### **C. Discussion of 17 U.S.C. § 110(5)(A) & (B) Violations in Regards to TRIPS**

The Dispute Settlement Board found that the business exemption codified in §110(5)(B) violated TRIPS because the square footage exemption allowed too high of a percentage of restaurants and businesses not to pay royalties to copyright owners. In her article, *Fish or Fowl?*

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<sup>279</sup> *Id.* at 768.

<sup>280</sup> WTO WS/DS160/5.

*The Nature of WTO Dispute Resolution under TRIPS*, Anne Hiaring stated that TRIPS compliance with the Fairness in Music Licensing Act “was doomed from the beginning.”<sup>281</sup> Representative Sensenbrenner had drafted the legislation for small-business owners in spite of the fact that the U.S. Trade Representative and Copyright Register stated this act would not comply with TRIPS.<sup>282</sup> This article goes on to state that the problem with the WTO Dispute Panel is that there is an “inability of private parties . . . to participate in the dispute resolution process,” and questions “whether a right granted under TRIPS was impaired by domestic legislation of a member State.” In the end, the decision was that the Fairness in Music Licensing Act indeed was a violation based upon an economic analysis.<sup>283</sup>

Indeed, the Dispute Settlement Understanding showed that the business exemption was not narrow as the percentage of businesses and restaurants exempted was, in fact, almost the majority of both businesses and restaurants that in turn received automatic exemption from musical composition copyright royalties.<sup>284</sup>

## **IX. CONCLUSION**

A business or restaurant proprietor who plays in their establishment music received from a radio is only responsible for compliance with the copyright laws that the U.S. Congress has enacted and those interpreted by the courts. When AM or FM radio transmissions are received and played in the establishment this is a public performance. The proprietor will be liable for those copyrighted performances unless an exemption applies to the business or restaurant. If an

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<sup>281</sup> See Hiaring, *supra* note 75 at 282.

<sup>282</sup> *Id.*

<sup>283</sup> *Id.* at 286.

<sup>284</sup> WTO WT/DS160/5/R.

exemption applies then the owner does not have to pay royalties or to pay a blanket-licensing fee to the copyright owner or pay for a commercial background service.

The U.S. code section that provides copyright owners the exclusive right to receive payment for the public performance of his or her works is Title 17 Section 106. The exemptions most applicable for the business or restaurant proprietor that receives and plays AM or FM analog radio programs is section 110(5)(A) and (B). Title 17 United States Code provides the two major exemptions balancing the exclusive rights of the musical work or sound recording copyright owner, the homestyle exemption and the business exemption. The homestyle exemption appears well documented to limit the type of equipment used at the business or restaurant to “a single receiving apparatus of the kind commonly found in a home.”<sup>285</sup> The 1976 Copyright Act and the courts have sufficiently defined what “apparatus of the kind commonly found in a home” means. The equipment cannot be of commercial quality.

Under the business exemption, the U.S. courts have a bright line rule that if a business is below 2,000 square feet the business is exempt from royalties or licensing fees. Additionally, restaurants below 3,750 square feet in size are exempt. Stay below the square footage and “no direct charge is made to see or hear the transmission or retransmission.”<sup>286</sup> A further prohibition for the business or restaurant is that “the transmission or retransmission is not further transmitted beyond the establishment where it is received.”<sup>287</sup> Consideration of the equipment is not necessary if the size of the establishment is below the allowed square footage.

If the business or restaurant exceeds the square footage then the equipment is considered to determine if an exemption is applicable. First, for audio performances, “a total of not more than 6 loudspeakers, of which not more than 4 loudspeakers are located in any 1 room or

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<sup>285</sup> 17 U.S.C. § 110(5)(A).

<sup>286</sup> 17 U.S.C. § 110(5)(B)(iii).

<sup>287</sup> 17 U.S.C. § 110(5)(B)(iv).

adjoining outdoor space” are allowed.<sup>288</sup> The radio receiver and any components must not be of a commercial type. Failing to have an exemption, the business or restaurant must pay the royalty or licensing fee.<sup>289</sup>

The Copyright Act historically is revised when technology outpaces the Act. In coming years with satellite radio being more prevalent as normal home equipment, Congress should redefine the homestyle exemption to adapt to this technological change. This would also allow an appropriate opportunity for legislative change to bring the business exemption in line with the TRIPS and Berne treaties.

The proprietor is not responsible for international treaty obligations of the United States. However, the U.S. is liable for the international treaties ratified by Congress. The Dispute Settlement Board found that the FMLA business exemption violated these treaties and the United States has been paying 1.1 million dollars in penalties since 2001. At some point the European Community could petition that the Dispute Settlement Board reconvene to address the over 225 million dollars a year claimed in lost revenues. The EC could argue that the U.S. is in continuous and systematic violation by not changing the U.S. Copyright Act to conform to TRIPS since the DSB decision establishing U.S. liability in 1999.

The United States has three options to correct the liability found in DS160. The United States can; (1) Continue to pay the \$1.1 million yearly and hope the EC does not seek other trade sanctions versus the U.S.; (2) Implement a new Act that incorporates the digital technology and enact legislation that exempts a smaller percentage of businesses and restaurants based on the square footage; and (3) Develop a new international treaty with the EC to allow U.S. and EC copyright owners to receive their royalties.

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<sup>288</sup> 17 U.S.C. § 110(5)(B)(i)(I).

<sup>289</sup> 17 U.S.C. § 110(5)(B)(i)(I) and (ii)(I).

The first option is the do nothing and pray approach. Since the U.S. was found liable, in 1999, and did not appeal in 2000, it could be argued that the U.S. is systematically and continuously violating the DS160 findings. Although the DSB does not have the ability to enforce the judgment against the U.S., it is the U.S. copyright owners who are losing their royalties from U.S. businesses and restaurants that obtain the exemption, as well as their ability to enforce their rights in other countries.

Possible solutions to the United States violation of the Berne convention include rewriting the business exemption to include a reduction of the square footage to a more modest size establishment that would decrease the percentage of businesses and restaurants that would be exempt. Besides reducing the square footage allowable under the business exemption for businesses and restaurants, the percentage of these establishments receiving exemption can be reduced by adding the consideration of the ability to pay for commercial background services to the copyright act. New copyright laws could be enacted that benefit U.S. musical and sound recording copyright owners and equally provide the royalties to the international copyright owners.

Congress should comply with the DS160 findings and modify the Copyright Act doing so in a manner that benefits the U.S. musical copyright holders, while protecting business and restaurant owners to the maximum allowed. It is important to remember that U.S. copyright holders lost 75% of their licensing fees and royalties after enactment of FMLA. Amendments to the copyright act could be made by technical correction to the FMLA or by another general revision of the copyright act. Either means should incorporate satellite or non-analog received musical works. In addition to the DS160 inspired revisions the Digital Performance Rights Act and Digital Millennium Copyright Act of 1999 must be incorporated. Bottom line, since the

U.S. did not appeal the liability found in DS160, the U.S. Congress is obligated to conform the Copyright Act 17 U.S.C. § 110(5)(B).

The most economically desirable method to achieve an Act that serves all involved should include parties that represent the interests of intellectual property law, business and restaurants, the copyright owners of musical and dramatico-musical and sound recordings from the U.S. and other WTO member nations. Implementing the digital and satellite mediums such as XM or Sirius radio should allow the licensing fees received by these broadcasting stations to offset some of the current lost royalties. Satellite radio provides the U.S. the opportunity to recapture this lost licensing fees and royalties and provide a new means to comply with DS160 without completely removing the business exemption. The revision could incorporate a licensing fee for satellite radio music as a new revenue stream to reduce the royalty payments lost under FMLA to both U.S. and EC copyright owners. If the WTO countries accept payments for the digital and satellite radio transmissions, the WTO DSB might allow the FMLA business exemption to remain or be modified to a lesser extent than complete removal from the United States copyright law.

As this paper has noted, copyright laws change when technology changes and overcomes the current laws. Many changes and technological developments have occurred since 1999. The U.S. has the obligation to comply with its trading partners and treaty obligations. The Dispute Settlement Panel found that the business exception violates TRIPS in 1999, and when the U.S. did not appeal in 2000, it became an obligation for the U.S. to implement a change to the business exemption. Change should occur sooner than later. The solutions to the situation with the WTO can incorporate the new digital and satellite radio broadcast to reshape the United States copyright law, and at the same time comply with the WTO compliance requirements.

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