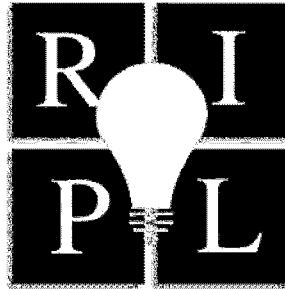


# THE JOHN MARSHALL REVIEW OF INTELLECTUAL PROPERTY LAW



## FOOTBALL'S INTELLECTUAL SIDE: THE NFL VERSUS SUPER BOWL PARTIES AND THE STORY OF THE FIFTY-FIVE INCH TELEVISION

MICHAEL M. FENWICK

### ABSTRACT

The increasing popularity of the National Football League's Super Bowl Championship has spawned an increasing number of private parties, some that employ projection-screen televisions measuring up to twenty feet diagonally. Only days before the 2004 Super Bowl, the NFL sent cease-and-desist letters to a number of business proprietors claiming display of the broadcast on televisions larger than fifty-five inches diagonally violated the NFL's rights under 17 U.S.C. § 110(5). This Comment will show that because 17 U.S.C. § 110(5) was written to protect authors within the music industry, its application to broadcast television fails because of television's fundamentally different business model. In addition, the Nielsen ratings system currently in place is overly demanding and the fair-use laws that should otherwise protect the public interest in dissemination are either inapplicable to television or blatantly unconstitutional.

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FOOTBALL'S INTELLECTUAL SIDE: THE NFL VERSUS SUPER BOWL PARTIES AND THE  
STORY OF THE FIFTY-FIVE INCH TELEVISION

MICHAEL M. FENWICK\*

“After a whirlwind season of last-second scoring, game-winning touchdown runs, stomach-turning rivalries and, yes, the return of instant replay, throwing a fantastic Super Bowl party is the only way to say goodbye to NFL action for the year.”<sup>1</sup>

INTRODUCTION

*Rule 1: “The single-most important detail in planning a Super Bowl party is to first establish a guest list.”*<sup>2</sup>

Since its inception in 1967,<sup>3</sup> the National Football League’s (hereinafter “NFL”) Super Bowl has rapidly emerged as one of the nation’s most anticipated annual events.<sup>4</sup> Unlike other sporting championships, it has entered the repertoire of American holidays, spawning a national tradition that has transformed the way in which people watch a game. The Super Bowl, celebrated every year on a Sunday in late January or early February, engages millions of people from across the country to gather in annual winter revelry.<sup>5</sup>

*Rule 2: “[A]llow the more serious fan better viewing access.”*<sup>6</sup>

For many fans, a Super Bowl party demands a professional touch. Over the years, bars and restaurants have acted on consumer demand by hosting parties that

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<sup>1</sup> Nicole Coward, *Super Bowl Party Tips*, NFL For Her: The Complete Football Playbook for Women, at [http://ww2.nfl.com/fans/forher/sb\\_partytips.html](http://ww2.nfl.com/fans/forher/sb_partytips.html) (last visited Aug. 13, 2004) [hereinafter *Party Tips*]. The website is part of the National Football League’s fan section. *Id.* The article, used primarily for satirical purposes, highlights the NFL’s own encouragement of Super Bowl parties versus its prohibition of commercially organized events.

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

<sup>3</sup> This year’s Super Bowl was on February 1, 2004. SuperBowl.com, *Super Bowl Recaps*, at <http://www.superbowl.com/history/recaps> (last visited Aug. 13, 2004). The first Super bowl was on January 15, 1967. *Id.*

<sup>4</sup> NFL.com, *Super Bowl Sunday Fun Facts*, at [http://ww2.nfl.com/fans/forher/sb\\_funfacts.html](http://ww2.nfl.com/fans/forher/sb_funfacts.html) (last visited Aug. 13, 2004) [hereinafter *Fun Facts*]. Anyone underestimating the scale of the typical Super Bowl Sunday should consider the following: the Super Bowl surpasses New Year’s Eve as the top, at-home, party event. *Id.* The Super Bowl ranks second, behind Thanksgiving, as the largest food consumption day. *Id.* Of the ten most watched television moments of all time, nine include Super Bowl broadcasts. *Id.* During Super Bowl weekend, the sale of large screen televisions increases by a factor of five. *Id.* Super Bowl weekend records the least number of weddings than any other calendar date. *Id.*

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

<sup>6</sup> Coward, *supra* note 1.

increase fans' enjoyment and provide increased access to the game.<sup>7</sup> In January of 2004, from the Orleans to the Aladdin, from the Stardust to the Palms, the city of Las Vegas was preparing for one of its greatest draws of the year.

In a nationally aired commercial, still-images of a crowded football stadium were narrated with the following: "[t]oday they're playing the biggest game of the year. Hundreds of thousands of fans are on the edge of their seats, living and dying with every play, going nuts on every snap."<sup>8</sup> As a scene of cheering fans in the stadium faded into an image of the desert skyline, the commercial ended: "[i]f only it was this exciting at the game in Houston."<sup>9</sup>

*Rule 3: "Knowing who is invited and who will be attending can help you to decide the theme, the menu, and the level of sophistication."*<sup>10</sup>

For the past decade, the city of Las Vegas has been a desert oasis for football fans who cannot find tickets to the big game.<sup>11</sup> During this year's Super Bowl, an estimated 274,000 people chose the city as their party headquarters, over twice the amount of people that traveled to the host city, Houston, Texas.<sup>12</sup> The appeal lies

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<sup>7</sup> Dana Wagner, *NFL Cracking Down On Game Parties In Vegas*, KVBC-TV, available at <http://www.kvbc.com/Global/story.asp?s=%20%201624444> (last visited Aug. 13, 2004). One couple, who traveled from Albuquerque, New Mexico, to Las Vegas, Nevada, to watch the game summed up the sentiment of those who travel for a free television broadcast, "It's more realistic on a big screen. What if we get a bad seat? At least on a big screen, you can see it from far back if you get a bad seat." *Id.*

<sup>8</sup> Rebecca Flass, *Vegas Tourism's Super Bowl Ads Aren't on CBS*, Adweek, Jan. 13, 2004, available in LEXIS, News & Business, News, By Individual Publication, Adweek (last visited Oct. 24, 2004). Two versions of the commercial were made and constituted a \$1.5 million effort by the Las Vegas Convention & Visitors Authority to promote the city as an alternate hot spot to the Super Bowl's Houston location. *Id.* The commercials ran on Bravo, Comedy Central, E!, ESPN, ESPN 2, and MSNBC. *Id.* The commercials came on the heels of last years rejection by the NFL to air any Las Vegas related advertisements during its Super Bowl. *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> Coward, *supra* note 1.

<sup>11</sup> Christina Almelda, *Vegas Hotels Canceling Super Bowl Parties* (Jan. 31, 2004) [hereinafter *Vegas Canceling*], available at <http://story.news.yahoo.com/news>. Casino Super Bowl parties have been held in Las Vegas for approximately ten years. *Id.* See also Liz Benston, *Casinos Cash in on Super Bowl Fans*, Casino City Times, (Jan. 30 2004), available at [http://www.usatoday.com/news/nation/2004-01-31-vegas-super-bowl-parties\\_x.htm](http://www.usatoday.com/news/nation/2004-01-31-vegas-super-bowl-parties_x.htm) (Jan. 31, 2004) (last visited Oct. 24, 2004). Bill Mandel, publisher of Viva Las Vegas consumer newsletter stated, "Everybody comes out [to Las Vegas] for the Super Bowl . . . [y]ou're better off watching the game in Las Vegas for the social aspect. Where else can you see the game and get food and drinks for 10 bucks?" *Id.* "The NFL has been issuing letters to casinos and other venues, warning them of potential copyright infringement if they turn a Super Bowl party into something resembling a Pay Per View event." *Id.* Interestingly however, this is certainly not the first time that people have organized out-of-home viewings. In 1962, one group, in order to avoid "blacked out" television broadcasts, organized trips to watch a football game. See *Blaich v. NFL*, 212 F. Supp. 319, 324 n.12 (S.D.N.Y. 1962) "One enterprising company has arranged a package tour from New York to Philadelphia and return to view the game on television at Philadelphia at a price of \$ 15, to include brunch." *Id.*

<sup>12</sup> Benston, *supra* note 11. An estimated 274,000 Super Bowl fans made the weekend trip to Las Vegas, based on "on an average hotel occupancy rate of 91.7 percent -- up from 256,000 visitors and an average occupancy rate of 88.2 percent last year, according to the Las Vegas Convention and Visitors Authority." *Id.* [A]ccording to figures from the Gaming Control Board, bets placed on the

deeper than wagering on a winning team.<sup>13</sup> Las Vegas has vigorously promoted itself as an alternate gathering spot for numerous events, ranging from the National Basketball Association finals and Major League Baseball's World Series, to the Grammy Awards and Academy Awards.<sup>14</sup>

*Rule 4: "[T]here is nothing worse than being interrupted in the middle of the game . . . ."*<sup>15</sup>

Only days before kickoff, proprietors within several cities began receiving cease-and-desist letters from the NFL.<sup>16</sup> The NFL claimed that proprietors' Super Bowl parties constituted "unauthorized use of NFL intellectual property."<sup>17</sup> According to the NFL, determining factors of infringement include: "the location's size, whether TV screens were larger than 55 inches, and whether people had to pay to get in."<sup>18</sup> In the wake of the sudden restrictions, some event organizers scrambled to comply with the NFL's demands, while others simply had to shut down.<sup>19</sup>

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game generated \$73 million. *Id.* Visitors are projected to spend "\$97 million on rooms, dining, retail and other non gambling activities, up from \$90.8 million a year ago." *Id.* Non-gambling revenue is due greatly to "the proliferation of parties and other events" that has steadily increased every year. *Id.*

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

<sup>14</sup> Flass, *supra* note 8.

<sup>15</sup> Coward, *supra* note 1.

<sup>16</sup> *Vegas Canceling*, *supra* note 11. While the letters generated the most attention in Las Vegas, proprietors in other cities received the NFL's letter as well, including: Charlotte, North Carolina; Houston, Texas; and Boston, Massachusetts. *Id.*

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

<sup>18</sup> *Id.* While the author of this Comment did contact the NFL's legal counsel and spoke with the author of these letters, a requested copy was denied. However, the NFL's counsel stated that the letter simply informed the recipient of 17 U.S.C. § 110(5) (A) and (B). *See Vegas Canceling*, *supra* note 11. Mayor Oscar Goodman believed Las Vegas was being unfairly targeted, charging that the league had allowed "a condition to exist for the past 10 years and then they want to change the rules two days before." *Id.* NFL spokesman, Brian McCarthy, denied Las Vegas was being singled out, noting the other cities which had received the letter. *Id.* *See also* Ralph Siraco, *NFL's Late Hit on Casino Isn't the First*, Daily Racing Form, Jan. 31, 2004, available in LEXIS, News & Business, Wire Service Stories (last visited Oct. 24, 2004). The NFL and Las Vegas have battled primarily over gambling and advertising in the past. *Id.* The city has made numerous attempts to place ads during football games, attempts the league has repeatedly rejected, in order to maintain a distance from images of gambling. *Id.* However, several years ago the NFL began charging Nevada casinos a fee for showing a full schedule of games. *Id.* While casinos first resisted the payments, proprietors eventually acquiesced. *Id.*

<sup>19</sup> Las Vegas Review Journal, *Super Bowl Parties* (Feb. 1, 2004), available at <http://www.reviewjournal.com/sports/superbowl/parties.html> (last visited Aug. 13, 2004). There were approximately four Las Vegas hotels that publicly cancelled their Super Bowl parties. *Id.* Hotels such as the Aladdin and Luxor simply stated that "[d]ue to restrictions from the National Football League," the hotel's party would be cancelled. *Id.* The Orleans cancelled its party, which included the band Blue Oyster Cult, but stated that the game could still be watched in the casino, which would offer food and beverage specials. *Id.* The Palms cancelled its party in Brenden Theatres, but stated that "guests who have purchased tickets may watch the game on large screen televisions in an alternate venue at no charge and will receive free hot dogs and free draft beer." *Id.* *See also* Wagner, *supra* note 7. In light of those who ignored the NFL's letter, the league warned that it planned on having "enforcement people" at the targeted hotel casinos. *Id.* Any establishment found to be in breach could expect a lawsuit to be filed. *Id.* *See also Vegas Canceling*, *supra* note 11.

*Copyright Law: From Music to Television*

The confusion generated by the NFL's actions is rooted in laws regarding music. The fundamental issue is the determination of what constitutes a "public performance."<sup>20</sup> In 1998, Congress produced its most recent refinement of the public performance doctrine, The Fairness in Music Licensing Act (hereinafter FMLA).<sup>21</sup> Included was a restriction on televisions, specifically, those with a diagonal screen size greater than fifty-five inches.<sup>22</sup> The NFL's interpretation of the FMLA led it to believe that the casinos' use of large-screen televisions was an infringement upon its intellectual property rights.<sup>23</sup>

The law's arrival at its current state is a result of following a long and embattled path through both the courts and Congress. The goal of this comment is to explore the evolution of the modern public performance doctrine and analyze the laws that have upset the delicate balance of copyright law.

Part A of the background section provides a brief historical overview of copyright law before 1976,<sup>24</sup> beginning with the Constitution. Part B examines the first United States Supreme Court cases to deal with rising technology and the creation of a new public performance doctrine. Part C discusses the 1976 Copyright Act; it will examine the fundamental nature of the doctrinal shift in copyright law, as well as the creation of 17 U.S.C. § 110(5). Part D then discusses the additions made to § 110(5) in 1998, including the fifty-five inch screen limitation as initially put forth and lobbied for by special-interest groups.

Part III uncovers the key difference between free radio and television broadcasts not contemplated during the creation of 1976 Copyright Act. Part IV then examines the fair use exemptions and discusses how each is inadequate and perhaps even unconstitutional. Part V applies the fair use analysis specifically to circumstances of the Las Vegas casinos. Finally, Part VI explores an equitable solution achieved by redrafting the public performance doctrine.

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Promoter Todd Krohn estimated the cancellation cost to his company, T & J Trust, at over \$100,000. *Id.* The party was set to host 6,000 people at \$45 per ticket. *Id.*

<sup>20</sup> 17 U.S.C. § 101 (2004). The simplest illustration of a public performance is a singer performing on stage in front of a live audience. The significance is that when the performance consists of a copyrighted work, in this case a copyrighted song, the author of that song (the copyright holder) is entitled to a royalty payment from the performer.

<sup>21</sup> See Fairness in Music Licensing Act of 1998, Pub. L. No. 105-298, 112 Stat. 2830-31 (1998) (codified in principle part at 17 U.S.C. § 110(5)(B) (2000)).

<sup>22</sup> *Id.* See 17 U.S.C. § 110(5)(B)(i)(II)(2000).

<sup>23</sup> See *Vegas Canceling*, *supra* note 11. The NFL also took issue with casinos charging admission for "something we are offering for free." *Id.* Once the admission fees to the parties were waived, the television size became the primary issue. *Id.*

<sup>24</sup> In 1976 Congress undertook extensive efforts to create a comprehensive body of copyright law.

## I. BACKGROUND

*A. Copyright Law Before 1976*

The foundation of all patent and copyright laws is the United States Constitution.<sup>25</sup> The Constitution states, "Congress shall have the power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."<sup>26</sup> This simple declaration charged Congress with a complex task: to protect the genius of an author, while promoting the progress of an enlightened society.<sup>27</sup> In order to strike a balance between those ideals, it became necessary to enact laws capable of providing both a "limited monopoly"<sup>28</sup> and sufficient public access.<sup>29</sup> While an author maintains a general right of exclusion,<sup>30</sup> a system of fair compensation provides incentive to share the authored work with the public.<sup>31</sup>

For over one hundred years, Congress intentionally left the copyright laws vague and charged the courts with defining the subtle boundaries.<sup>32</sup> It was not until 1897 that Congress began regulating "public performance" of a copyrighted work.<sup>33</sup> The invention of the radio allowed performances historically relegated to the stage to be broadcast to the masses. As a result, the potential for royalties caused copyright holders to question the extent to which a radio transmission was a "public performance".

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<sup>25</sup> U.S. CONST. art. I, § 8, cl. 1, 8.

<sup>26</sup> *Id.*

<sup>27</sup> *See* *Stewart v. Abend*, 495 U.S. 207, 229 (1990).

Although dissemination of creative works is a goal of the Copyright Act, the Act creates a balance between the artist's right to control the work during the term of the copyright protection and the public's need for access to creative works. The copyright term is limited so that the public will not be permanently deprived of the fruits of an artist's labors.

*Id.*

<sup>28</sup> *Id.* at 229.

<sup>29</sup> *Id.* at 229.

<sup>30</sup> *See generally* *CSU, L.L.C. v. Xerox Corp.*, 203 F.3d 1322, 1329 (2000) ("exclusionary conduct can include a monopolist's unilateral refusal to license a copyright . . .").

<sup>31</sup> *See* *Eldred v. Ashcroft* 537 U.S. 186, 219 (2003) (holding that, "[i]ndeed, copyright's purpose is to *promote* the creation and publication of free expression.").

<sup>32</sup> H.R. REP. NO. 94-1476, at 51 (1976).

<sup>33</sup> *See* *White-Smith Music Publ'g Co. v. Apollo Co.*, 209 U.S. 1 (1908). There, the court considered the nature of perforated paper rolls used in mechanical "player pianos." *Id.* at 10. The rolls were made by defendant, and each perforation represented a harmonic note of the copyrighted musical composition. *Id.* at 11. Perhaps in one of the first copyright cases involving a remote performance, the court stated:

The amendment of § 4966 by the act of January 6, 1897, 29 Stat. 481, 3 U.S. Comp. Stat. 3415, providing a penalty for any person publicly performing or representing any dramatic or musical composition for which a copyright has been obtained . . . . The purpose of the amendment evidently was to put musical compositions on the footing of dramatic compositions so as to prohibit their public performance.

*Id.* at 16. However, the court ultimately held the rolls to be non-infringing. *Id.*

*B. Judicial Analysis of the Performance Doctrine*

1. *Buck v. Jewell-LaSalle Realty Co.*

One of the first major cases to deal with the public performance doctrine was *Buck v. Jewell-LaSalle Realty Co.*<sup>34</sup> The American Society of Composers Authors and Publishers (hereinafter “ASCAP”)<sup>35</sup> sued the Jewell-LaSalle Realty Company (hereinafter “LaSalle”).<sup>36</sup> At the time, LaSalle operated the LaSalle Hotel in Kansas City, Kansas.<sup>37</sup> The hotel had a central radio-receiving unit that played music throughout the lobby and private guest rooms.<sup>38</sup>

Wilson Duncan operated an unlicensed radio station.<sup>39</sup> The station repeatedly broadcasted plaintiff’s copyrighted songs, “Just Imagine” and “I’m Winging Home (Like a Bird that is on the Wing),” which were subsequently played over the LaSalle radio.<sup>40</sup> Plaintiff contended that the broadcast of his copyrighted music via radio waves constituted an infringement by the radio station and contributory infringement by the LaSalle Hotel.<sup>41</sup>

Under the public performance doctrine of the 1909 Copyright Act, a copyright holder had exclusive rights “[t]o perform the copyrighted work publicly for profit if it be a musical composition.”<sup>42</sup> Under this guidance, both the district court<sup>43</sup> and the Supreme Court<sup>44</sup> held that the defendant radio station had publicly performed the author’s compositions without a proper license.<sup>45</sup>

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<sup>34</sup> *Buck v. Jewell-LaSalle Realty Co.*, 283 U.S. 191 (1931).

<sup>35</sup> The American Society of Composers, Authors, and Publishers (hereinafter “ASCAP”), Broadcast Music, Inc. (hereinafter “BMI”), and The Society of European Stage Authors and Composers are collectively known as “royalty societies.” *See generally About ASCAP*, at <http://www.ascap.com/about/> (last visited Aug. 13, 2004). ASCAP, created in 1914, is perhaps best described in their own words:

ASCAP is a membership association of over 190,000 U.S. composers, songwriters, lyricists, and music publishers of every kind of music. ASCAP protects the rights of its members by licensing and distributing royalties for the non-dramatic public performances of their copyrighted works. ASCAP’s licensees encompass all who want to perform copyrighted music publicly.

*Id.*

<sup>36</sup> *Jewell-LaSalle*, 283 U.S. at 195.

<sup>37</sup> *Id.*

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

<sup>39</sup> *Id.*

<sup>40</sup> *Buck v. Duncan*, 32 F.2d 366, 368 (D. Mo. 1929). *Buck v. Duncan* was the district court case ultimately heard by the Supreme Court as *Buck v. Jewell-LaSalle Realty Co.* *See Jewell-LaSalle*, 283 U.S. at 195.

<sup>41</sup> *Duncan*, 32 F.2d 366 at 368.

<sup>42</sup> *Id.* *See* Copyright Act of 1909, Pub. L. No. 349, 35 Stat. 1075 (1909) (replaced by the Copyright Act of 1976).

<sup>43</sup> *Duncan*, 32 F.2d at 368.

<sup>44</sup> *Buck v. Jewell-LaSalle Realty Co.*, 283 U.S. 191, 198 (1931).

<sup>45</sup> *Id.* *Duncan*, 32 F.2d at 368.



Often misinterpreted, *Jewell-LaSalle* held that the radio station's liability affected subsequent receivers of the unlicensed transmission.<sup>46</sup> At the district level, the court interpreted the radio station's broadcast as a distinct and separate act from LaSalle's radio reception.<sup>47</sup> The district court held the radio station liable; however, it concluded that the hotel's "reception of a musical composition on a radio receiver [was] not a performance at all."<sup>48</sup>

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<sup>46</sup> See H.R. REP. NO. 94-1476 (1976). Congress later took the *Jewell-LaSalle* opinion as its basis for the creation of 17 U.S.C. § 110(5). *Id.* In the legislative history of the 1976 Copyright Act, Congress stated:

For more than forty years the *Jewell-LaSalle* rule was thought to require a business establishment to obtain copyright licenses before it could legally pick up any broadcasts off the air and re-transmit them to its guests and patrons. As reinterpreted by the *Aiken* decision, the rule of *Jewell-LaSalle* applies only if the broadcast being retransmitted was itself unlicensed.

*Id.* However, the *Jewell-LaSalle* court plainly states, "[i]f the copyrighted composition had been broadcast by Duncan with plaintiffs' consent, a license for its commercial reception and distribution by the hotel company might possibly have been implied." *Id.* at 199 n.5. The court notes however, "Duncan was not licensed; and the position of the hotel company is not unlike that of one who publicly performs for profit by the use of an unlicensed phonograph record." *Id.* "[W]e have no occasion to determine under what circumstances a broadcaster [would] be held to be a performer, or the effect upon others of his paying a license fee." *Id.* at 198. The court calls the reader to compare the outcome of *Buck v. Debaum*, 40 F.2d 734 (S.D. Cal. 1929), which does adjudicate the "licensed broadcaster" scenario. *Id.* at 199 n.5. The *Debaum* court held:

[H]ere the broadcasting station was licensed and expressly authorized by owners of the copyright to publicly perform for profit, by broadcasting or otherwise, the copyrighted musical composition, and, in my opinion, it is the grant of such privilege or license by the owners of the copyright to the broadcasting station that is the determining factor that disables the complainants herein from enjoining or preventing the defendant from "picking up" through his radio receiving set the "Indian Love Call," and imparting the same audibly to the patrons of his cafe . . . . It seems to me to be clear that, when plaintiffs licensed the broadcasting station to disseminate the "Indian Love Call," they impliedly sanctioned and consented to any "pick up" out of the air that was possible in radio reception.

*Debaum*, 40 F.2d at 735.

<sup>47</sup> See *Debaum*, 40 F.2d at 735.

<sup>48</sup> *Buck v. Duncan*, 32 F.2d 366, 367 (D. Mo. 1929). The *Duncan* court found:

The right to perform a musical composition is the right to translate that musical composition into waves of sound or waves of ether for the enjoyment of those who are enabled either by natural or artificial means to receive the auditory sensations those waves are calculated to produce. The right to perform a musical composition does not carry with it a proprietary interest in the waves that go out upon the air or upon the ether. They are as much the common property of all as the sunshine and the zephyr.

If I throw open a window so that I can hear the music of a band passing by, am I producing that music? Am I then the performer or participating in the performance? If I lift a telephone receiver and hear the voice of a friend, am I producing that voice? Is it my speech or his? If in perfect analogy to these illustrations, by mechanical means, I receive as music what has been produced elsewhere in such a way that it penetrates my house, I am not the performer who has produced that music.

*Id.*

The Supreme Court's analysis differed sharply from the lower court's interpretation. The Court viewed the broadcast as one successive transmission.<sup>49</sup> This meant that liability from an unlicensed broadcast would carry to each subsequent receiver of that broadcast because "[i]ntention to infringe [is] not essential under the [1909 Copyright] Act," so long as "the music [is] produced by instrumentalities under [the listener's] control."<sup>50</sup>

Thus, reception of an unlicensed transmission was an infringement regardless of the receiver's knowledge that the transmission was unlicensed. This principal was reinforced by the Court in an often-overlooked footnote, which states that a licensed radio transmission might imply a license for public reception.<sup>51</sup> The Court's reasoning came from a strict interpretation of the 1909 Copyright Act. The statute did not explicitly state that "a single rendition of a copyrighted selection [cannot result] in more than one public performance for profit."<sup>52</sup> Thus, "[n]o reason is suggested why there may not be more than one liability."<sup>53</sup>

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<sup>49</sup> *Jewell-LaSalle*, 283 U.S. at 198. The Court stated that reception, and thus performance, of an unauthorized transmission incurs liability, regardless of the party's willfulness or knowledge of the act. *Id.* at 198-199.

<sup>50</sup> *Id.* at 201. Under this logic, the court suggested that to be free of liability meant keeping one's radio off. *Id.* This also gave rise to the multiple performance doctrine, wherein a copyright holder could demand payment from every entity that in any way comes in contact with the transmitted signal, regardless of whether it is converted to an audible form. *Id.* The Court in *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 162-163 (1975), stated:

[T]o hold that all in Aiken's position "performed" these musical compositions would be to authorize the sale of an untold number of licenses for what is basically a single public rendition of a copyrighted work. The exaction of such multiple tribute would go far beyond what is required for the economic protection of copyright owners, and would be wholly at odds with the balanced congressional purpose behind 17 U.S.C. § 1.

*Id.* See also *David v. Showtime/Movie Channel, Inc.*, 697 F. Supp. 752, 759 (S.D.N.Y. 1988) ("[I]t seems apparent from the scope of the examples provided in the legislative history that Congress intended the definitions of 'public' and 'performance' to encompass each step in the process by which a protected work wends its way to its audience."). See also *Testimony Before the House Small Business Committee on Music Licenses: Testimony of Stephen Barba President The Balsams Grand Resort Hotel* (May 8, 1996) wherein Mr. Barba stated:

I want to give you an example to be sure you understand what I mean by unfair "double dipping." Think about when you see Michigan State's marching band play a song at halftime of a nationally televised football game. Now guess how many times ASCAP and BMI collect fees when that song is played over the air. Once? Twice? Three times? No, they collect fees five times from five different sources once each from the stadium, the national TV network, the local TV station, the local cable system, and finally from the bar that is showing the game. That's not double dipping, folks, that's quintuple dipping!

*Id.*

<sup>51</sup> See *Buck v. Jewell-LaSalle*, 283 U.S. 191, 199 (1931) (noting that if the radio station had been licensed, the hotel might have had an implied license).

<sup>52</sup> *Id.* at 198. The court notes that:

While this may not have been possible before the development of radio broadcasting, the novelty of the means used does not lessen the duty of the courts to give full protection to the monopoly of public performance for profit which Congress has secured to the composer.

*Id.*

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

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

Forty-four years after *Jewell-LaSalle*, the Supreme Court addressed a case factually identical, less one essential element: this time, the radio broadcast was licensed. In *Twentieth Century Music Corp. v. Aiken*,<sup>54</sup> the proprietor of a small fast-food business, George Aiken, installed four speakers in the ceiling of his restaurant.<sup>55</sup> As in *Jewell-LaSalle*, the speakers were connected to a central radio.<sup>56</sup>

On March 11, 1972, Mary Bourne's "Me and My Shadow," and Twentieth Century Music's "The More I See You," were broadcast over the radio and received in Aiken's restaurant.<sup>57</sup> Both copyright owners were members of ASCAP, which had licensed the performance to a local radio station.<sup>58</sup> Aiken, however, did not hold an individual license to perform the works.<sup>59</sup> When an ASCAP representative in Aiken's restaurant heard the songs, ASCAP commenced a copyright infringement lawsuit.<sup>60</sup>

Judicial precedent had firmly established that a radio broadcast was a "public performance."<sup>61</sup> The question was whether a broadcaster's license implied authorization of public reception.<sup>62</sup> The Court reasoned that if a radio station was the "live performer," then "those who [listened] to the broadcast" were akin to the audience.<sup>63</sup> At no point was it ever "contemplated that the members of the audience who heard the composition would themselves also be simultaneously 'performing,' and thus also guilty of infringement."<sup>64</sup> The Court found Mr. Aiken not liable because he was a passive listener who had not performed the songs.<sup>65</sup>

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<sup>54</sup> *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151 (1975).

<sup>55</sup> *Id.* at 152.

<sup>56</sup> *Id.* (stating that Aiken would turn on the radio "each morning at the start of business. Music, news, entertainment, and commercial advertising broadcast by radio stations [were] thus heard by Aiken, his employees, and his customers during the hours that the establishment [was] open for business").

<sup>57</sup> *Id.* at 152-53.

<sup>58</sup> *Id.* at 153.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 158.

<sup>62</sup> *Id.* at 157.

<sup>63</sup> *Id.* at 159.

<sup>64</sup> *Id.* at 157. *See also* *Teleprompter Corp. v. CBS*, 415 U.S. 394 (1974) (holding that the importation of distant cable signals by local CATV (cable stations) is not a performance and thus subsequent viewing by individuals is not a public performance); *Fortnightly Corp. v. United Artists*, 392 U.S. 390 (1968). The court in *Fortnightly* stated:

The television broadcaster in one sense does less than the exhibitor of a motion picture or stage play; he supplies his audience not with visible images but only with electronic signals. The viewer conversely does more than a member of a theater audience; he provides the equipment to convert electronic signals into audible sound and visible images. Despite these deviations from the conventional situation contemplated by the framers of the Copyright Act, broadcasters have been judicially treated as exhibitors, and viewers as members of a theater audience. Broadcasters perform. Viewers do not perform. Thus, while both broadcaster and viewer play crucial roles in the total television process, a line is drawn between them. One is treated as active performer; the other, as passive beneficiary.

*Id.* at 398-99. *See also* *Buck v. Debaum*, 40 F.2d 734, 735 (S.D. Cal. 1929) ["One who manually or by human agency merely actuates electrical instrumentalities, whereby inaudible elements that are

### 3. Aiken Preserves the Jewell-LaSalle Holding

The Court reconciled its opinion in *Aiken* with its previous holding in *Jewell-LaSalle*.<sup>66</sup> The crucial distinction was that in *Jewell-LaSalle* “the broadcaster of the musical composition was not licensed to perform” the songs.<sup>67</sup> Otherwise, “the answer to [the] certified question might have been different if the broadcast itself had been authorized by the copyright holder.”<sup>68</sup> Thus, *Aiken* did not overrule *Jewell-LaSalle*; rather, it distinguished and preserved *Jewell-LaSalle* based on particular facts.<sup>69</sup>

#### C. The 1976 Copyright Act

The 1976 Copyright Act reflected a fundamental shift in attitude toward the public performance doctrine.<sup>70</sup> Congress eliminated the judicial distinction of

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omnipresent in the air are made audible to persons who are within hearing, does not 'perform' within the meaning of the Copyright Law.”]; *Jerome H. Remick & Co. v. General Electric*, 16 F.2d 829, 829 (S.D.N.Y. 1926) [“Certainly those who listen do not perform, and therefore do not infringe.”].

<sup>65</sup> *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 164 (1975).

<sup>66</sup> *Id.* at 160-61.

<sup>67</sup> *Id.* at 160.

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

<sup>69</sup> Looking beyond *stare decisis*, the *Aiken* court considered the practical implications of holding for ASCAP. *Id.* at 162. Extending the performance definition to include the listener, “would result in a regime of copyright law that would be both wholly unenforceable and highly inequitable.” *Id.* A listener in Aiken’s situation could never be free from liability, unless he simply kept his radio off. *Id.* Although he might obtain a performance license from ASCAP, it would *only* protect him from infringing on ASCAP members. *Id.* Unaffiliated copyright holders could independently license with a radio station. *Id.* Extending the performance definition to a person like Mr. Aiken would force individual licenses to be obtained from every independent copyright holder on the radio. *Id.* Not only was this impractical, but it nearly impossible. *Id.* The court also concluded that a radio broadcast of a song was a single public performance. *Id.* at 163-64. Authorizing copyright holders to exact royalty payments from anyone receiving a broadcast would allow for an “untold number of licenses.” *Id.* at 163. It would exceed the fundamental intent of copyright law by shifting the balance of a copyright holder’s limited monopoly over the interest of public access. *Id.* Congress stated that:

The main object to be desired in expanding copyright protection accorded to music has been to give to the composer an *adequate* return for the value of his composition, and it has been a serious and a difficult task to combine the protection of the composer with the protection of the public, and to so frame an act that it would accomplish the double purpose of securing to the composer an adequate return for all use made of his composition and at the same time prevent the formation of oppressive monopolies, which might be founded upon the very rights granted to the composer for the purpose of protecting his interests.

*Id.* at 163-64 (quoting H.R. REP. NO. 2222, 60th Cong. (1909)(emphasis added)). The equitable solution, therefore, was to limit the performance definition to only include the broadcaster. Thus, a radio station would license and pay royalties to the copyright holder. The listening audience would then be free to use radios in public and private settings without fear of liability.

<sup>70</sup> It has been established in this Comment that the *Jewell-LaSalle* and *Aiken* decisions do not conflict, rather they are based on significantly different facts. However, Congress’ interpretation differed quite dramatically. See H.R. REP. NO. 94-1476 (1976). It found that “[t]he majority of the

broadcasters as performers and receivers as non-performers.<sup>71</sup> The new definition of a "public performance" in 17 U.S.C. § 101 stated that the performance began with the original act and extended through all transmissions until perceived by the recipient.<sup>72</sup> The performance became public when it occurred 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 [were] gathered."<sup>73</sup>

The definition makes virtually all receptions of radio or television broadcasts outside of one's private use public performances and imposes liability accordingly.<sup>74</sup> To counter this sweeping effect, Congress created 17 U.S.C. § 110, which limited the author's exclusive right to perform or display his work.<sup>75</sup> The exemptions in § 110 includes displays or transmissions for educational purposes,<sup>76</sup> for religious purposes,<sup>77</sup> for charitable purposes,<sup>78</sup> at sales conventions,<sup>79</sup> performances designed for handicapped persons,<sup>80</sup> and for nonprofit veteran's organizations.<sup>81</sup>

Supreme Court in the Aiken case based its decision on a narrow construction of the word 'perform' in the 1909 statute. This basis for the decision is completely overturned by the present bill and its broad definition of 'perform' in section 101." *Id.* Instead, Congress accepted that "the traditional, pre-Aiken, interpretation by means other than a home receiving set, or further [sic] transmission of a broadcast to the public, is considered an infringing act." *Id.* Compare H.R. REP. NO. 94-1476 with *Teleprompter Corp. v. CBS*, 415 U.S. 394 (1974) (building a community antenna to receive and retransmit television signals to one's home does not alter the person's status as a "nonperformer") and *Fortnightly Corp. v. United Artists*, 392 U.S. 390 (1968) ("Broadcasters perform. Viewers do not perform.") and *Buck v. Debaum*, 40 F.2d 734 (S.D. Cal. 1929) ("One who [turns on a radio], does not 'perform' within the meaning of the Copyright Law.") and *Jerome H. Remick & Co. v. GE*, 16 F.2d 829 (S.D.N.Y. 1926) ("Certainly those who listen do not perform, and therefore do not infringe.").

<sup>71</sup> See H.R. REP. NO. 94-1476 (1976).

<sup>72</sup> 17 U.S.C. § 101 (2000) (stating "by means of any device or process," which would include "all conceivable forms and combinations of wires and wireless communications media, including . . . radio and television").

<sup>73</sup> *Id.* Here, the definition of family "would include an individual living alone, so that a gathering confined to the individual's social acquaintances would normally be regarded as private." *Id.* See generally John Kheit, *Public Performance Copyrights: A Guide to Public Place Analysis*, RUTGERS COMPUTER & TECH. L.J. 1 (1999) (discussing through case law analysis the boundaries of what constitutes a "public performance," "public display," and "family circle.").

<sup>74</sup> See 17 U.S.C. § 504 (2000). Under this section of the copyright code entitled, "Remedies for Infringement: Damages and Profits," the injured party may elect to recover actual damages and profits made by the infringer, or statutory damages. *Id.* Actual damages are computed based on the profits gained by infringer's appropriation of the author's work. *Id.* Any time before final judgment however, the plaintiff may elect to recover statutory damages ranging from \$750 to \$30,000 determined at the court's discretion. *Id.* Upon a showing of willful infringement, the statutory limit increases to \$150,000, whereas unknowing infringement lowers the minimum damages to \$200. *Id.*

<sup>75</sup> As created in 1976, 17 U.S.C. § 110(5) read:

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) (1976)

<sup>76</sup> 17 U.S.C. §§ 110(1), 110(2) (2000).

<sup>77</sup> 17 U.S.C. § 110(3) (2000).

<sup>78</sup> 17 U.S.C. § 110(4) (2000).

Under 17 U.S.C. § 110(5), Congress created an exemption for broadcasts received in public.<sup>82</sup> The aim was to exempt the use of commonly sold entertainment equipment, whose “secondary use” would be so minimal that it did not require the payment of a royalty.<sup>83</sup> This assumed that home entertainment equipment used in commercial establishments would bring an added benefit to those establishments, yet the equipment’s diminutive size would ensure that the benefit would never reach the point at which an author expects compensation.<sup>84</sup> Commercial establishments utilizing receivers exceeding the “home-style” threshold would be required to pay a license to render the copyrighted work.<sup>85</sup>

Unfortunately, the legal simplicity offered by the court’s public performance doctrine was lost in the vagary of Congress’ “home-style” statute.<sup>86</sup> Interpreting the act required a proprietor to know if their electronic equipment was similar to that

<sup>79</sup> 17 U.S.C. § 110(6) (2000). This statute is less of an exemption and focuses rather on limiting the liability of event organizers of sale conventions. *Id.* The statute limits the organizer’s liability, but does not provide any performance exemptions for the individual concessionaires. *Id.* Under 17 U.S.C. § 110(7) (2000), the salesman who turns on a radio or television for a customer, with the sole purpose of demonstrating the devices’ features, or selling the aforesaid music, is free of liability. *Id.*

<sup>80</sup> 17 U.S.C. §§ 110(8), 110 (9) (2000).

<sup>81</sup> 17 U.S.C. § 110(10) (2000).

<sup>82</sup> 17 U.S.C. § 110(5) (2000).

<sup>83</sup> *See* H.R. REP. NO. 94-1476 (1976). The intent by Congress in crafting the Home Style Act was to “exempt from copyright liability anyone who merely turns on, in a public place, an ordinary radio or television receiving apparatus of a kind commonly sold to members of the public for private use.” *Id.*

<sup>84</sup> The difficulty at establishing the limit of secondary use is underlined by the beliefs of the parties involved. ASCAP believes all use is significantly beneficial, claiming that, “Music is a vital part of the total service businesses offer to customers. ASCAP’s licensees recognize that using music benefits their businesses because music, like other amenities or products, pays off in heightened customer satisfaction, increased profits, and improved employee morale and productivity.” *See About ASCAP Licensing*, at <http://www.ascap.com/licensing/about.html> (last visited Sept. 25, 2004). ASCAP also asserts, “the music tempo is used to influence your buying decisions at the supermarket, clothing or other store [sic].” *Id.* Also, “[m]usic-on-hold makes the time you are on hold [on the telephone] pass more quickly and pleasantly.” *Id.* ASCAP further delivers its belief by asking, “[h]ave you ever been at a restaurant and wondered why it was so uncomfortable only to later realize it was because you thought everyone could overhear your conversation? Music surrounds you, creating the privacy you desire.” *Id.* Restaurant owners undoubtedly question the benefit assumed by songwriters, pointing out that no studies have ever quantitatively measured all of ASCAP’s assumed benefits. *See Hearing of the Courts and Intellectual Prop. Subcomm. of the House Judiciary Comm.*, 104th Cong. (1997) [hereinafter *Music Licensing Hearings*]. Yet, in direct contradiction of ASCAP’s assumption of consumer “desire,” one Congressman stated during hearings regarding the Fairness in Music Licensing Act, “I’ve got to confess my own bias here. When I go into a restaurant I either want to talk to somebody or read. And I would probably pay more if they’d shut the darn thing [radio] off.” *Id.*

<sup>85</sup> *See Music Licensing Hearings*, *supra* note 84.

<sup>86</sup> *See, e.g.,* Jerome H. Remick & Co. v. GE, 16 F.2d 829 (“Certainly those who listen do not perform, and therefore do not infringe. Can it be said with any greater reason that one who enables others to hear participates in the unauthorized performance, so as to be a contributory infringer? Surely not . . .”). *See also* Buck v. Debaum, 40 F.2d 734, 735 (holding that a listener does not perform). *Compare* H.R. REP. NO. 94-1476 (1976). The 1976 Copyright act shifted the clear distinction between a performer and non-performer to include the listener. *Id.* The new distinction rested on a proprietor’s equipment. *Id.* A legislative history shows that Congress could clarify home-style only as “small commercial establishments whose proprietors merely bring onto their premises standard radio or television equipment.” *Id.*

used in the surrounding neighborhood<sup>87</sup> or behind the closed doors of private homes. This amounted to congressionally mandated clairvoyance on which royalty societies were able to capitalize.<sup>88</sup> If a plaintiff could show that a proprietor's equipment was either modified or more sophisticated than the most commonly used equipment in private homes at that time, the plaintiff would prevail.<sup>89</sup>

#### *D. The 1998 Fairness in Music Licensing Act*

##### *1. A Limited-Use Statute*

By the 1990's, influential copyright holders feared the release of their works into the public domain.<sup>90</sup> This prompted influential companies to lobby Congress to pass the Sonny Bono Copyright Term Extension Act.<sup>91</sup> In a strategic move, the National Restaurant Association<sup>92</sup> seized the bill in Congress to leverage power away from what it viewed as predatory tactics on the behalf of royalty societies.<sup>93</sup> Congress

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<sup>87</sup> See *NFL v. Rondor, Inc.*, 840 F. Supp. 1160, 1170 (N.D. Ohio 1993). Both plaintiffs and defendants undertook surveys to prove to the court whether a bar's antenna equipment was of the type used in the common home. *Id.* Evidence consisted of a "visual survey within the neighborhoods in the general vicinities of the defendant establishments." *Id.* The "initial survey of 1,366 homes looked for external antennas, rotors, and preamplifiers . . . an expanded survey of 4,776 homes was completed by automobile, of which 2,223 [homes] had exterior antennas." *Id.*

<sup>88</sup> See 2-8 NIMMER ON COPYRIGHT § 8.18 (2003). "Following enactment of the 1976 Act, Section 110(5) became a lightning rod for litigation, which continued unabated during the first two decades that the Act remained in effect." *Id.*

<sup>89</sup> It is difficult to determine the local standard because such determination requires interrupting the privacy of a person's home. The standard simply cannot be identified, even by plaintiffs. See generally *Music Licensing Hearings*, *supra* note 84. There has been testimony regarding the licensing practices of music royalty societies and their diverging opinions on what is home-style. *Id.* "ASCAP and BMI take the position in various negotiations [,] or how they seek licensing fees [,] that it's either a 27-inch TV set or a 36-inch TV set. The societies themselves don't agree." *Id.*

<sup>90</sup> See Dennis Harney, *Mickey Mousing The Copyright Clause of the U.S. Constitution: Eldred v. Reno*, 27 DAYTON L. REV. 291 (2002). One of the most prominent supporters of the extension of the copyright monopoly was the Disney Corporation. *Id.* Its goal was to keep its character, Mickey Mouse, from being freely used in the public domain, which in 1998 helped generate \$8 billion for the Disney Corporation. *Id.* at 304 n.83.

<sup>91</sup> Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified as amended 17 U.S.C. §§ 108, 203, 301-04) [hereinafter *CTEA*].

<sup>92</sup> See generally *Music Licensing Hearings*, *supra* note 84. The primary organization of restaurant proprietors was the National Restaurant Association. *Id.* They were part of a "Music Licensing Fairness Coalition" which represented restaurants, taverns, retail stores, and other establishments. *Id.*

<sup>93</sup> See *Music Licensing Hearings*, *supra* note 84. During committee meetings concerning the Fairness in Music Licensing Act, it was suggested by Mr. Holyfield, speaking on behalf of ASCAP, that,

ASCAP has repeatedly tried to negotiate a commercial settlement with the [National Restaurant Association] as it has successfully done with the National Licensed Beverage Association and dozens and dozens of other organizations. But officials of the [National Restaurant Association] told us in 1995: We do not wish

found itself hosting a settlement agreement between songwriters and restaurant proprietors.<sup>94</sup> The result was a statute specifically limited to the use of music broadcast over radio and television.<sup>95</sup>

## 2. Specific Limitations

The statute, 17 U.S.C. § 110(5)(B), is split into two subsections, addressing restaurants and “establishments,” the only difference being the size of the building.<sup>96</sup> Establishments may be up to 2,000 square feet before § 110(5)(B) applies.<sup>97</sup> Restaurants are afforded 3,750 square feet.<sup>98</sup> Any building under the respective size limitations theoretically could have unrestricted use of television and radio broadcasts.<sup>99</sup> Buildings above the stated size thresholds must adhere to a number of specific limitations.<sup>100</sup> Under the statute’s provisions, both restaurants and establishments are limited to a total of six loudspeakers, with only four placed in any one room or adjoining outdoor space.<sup>101</sup> They are also limited to a total of four televisions, with a maximum of only one per room.<sup>102</sup> Furthermore, none of the televisions can have a diagonal screen size greater than fifty-five inches.<sup>103</sup>

Finally, § 110(5)(A) includes two important prohibitions.<sup>104</sup> Proprietors may not directly charge patrons to see or hear a broadcast.<sup>105</sup> Likewise, proprietors cannot

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to negotiate with you under any circumstances. They still refuse to negotiate.

They insist on legislation in what should be a commercial dispute.

*Id.* The seizure of the Copyright Term Extension Act stalled passage of the bill for more than three years. *See* 2-8 NIMMER ON COPYRIGHT § 8.18 (2003).

<sup>94</sup> *See* 2-8 NIMMER ON COPYRIGHT § 8.18(2)(a) (2003).

<sup>95</sup> *Id.* at § 8.18(b)(i) First, the 1998 Act “is limited to the realm of music.” *Id.* Why then does the act include explicit limitations on televisions? Because the audio component of a television broadcast can include nondramatic musical works. *Id.* For example, if a television broadcast includes a copyrighted song or a movie soundtrack, the exemption applies. *Id.* This also means, “that the exemption here will not apply to other copyrighted aspects of the audiovisual work at issue. . . such as football games.” *Id.*

<sup>96</sup> 17 U.S.C. § 110(5)(B)(i) (2000).

<sup>97</sup> 17 U.S.C. § 110(5)(B)(iii) (2000).

<sup>98</sup> 17 U.S.C. § 110(5)(B)(ii) (2000).

<sup>99</sup> *See Music Licensing Hearings, supra* note 84.

REP. GOODLATTE: Is there a size of bar or tavern below which there is no fee?

MS. LEACH: For live or previous --

REP. GOODLATTE: No, for radios and television.

MS. LEACH: Yes. That's the 3,500 square feet. If they are below that and they only have radio and television, they are totally exempt from licensing fees.

*Id.*

<sup>100</sup> 17 U.S.C. § 110(5)(B) (2000).

<sup>101</sup> 17 U.S.C. § 110(5)(B)(i)(I) (2000).

<sup>102</sup> 17 U.S.C. § 110(5)(B)(i)(II) (2000).

<sup>103</sup> 17 U.S.C. § 110(5)(B)(i)(II) (2000).

<sup>104</sup> 17 U.S.C. § 110(5)(A) (2000).

<sup>105</sup> 17 U.S.C. § 110(5)(A)(i) (2000).



make further retransmissions to the public.<sup>106</sup> Unlike § 110(5)(A), § 110(5)(B) explicitly states that all broadcasted works must be licensed by the author.<sup>107</sup>

## II. ANALYSIS

After studying viewing habits, utilizing ratings technology, and feeling economic pressure, the NFL turned to copyright law as a means to an end. It capitalized on Congress' ever-increasing shift of copyright laws that favor the interests of the author at the direct expense of the public. For business proprietors in the city of Las Vegas, who expected almost \$100 million in non-gambling revenue during Super Bowl weekend,<sup>108</sup> this expense has become very real.

Current copyright laws inadequately protect fair-use of television broadcasts because those laws were written by and for the music industry.<sup>109</sup> This creates a three-fold problem. First, copyright laws fail to account for the differences in payment structure between free radio and television broadcasts.<sup>110</sup> This allows copyright owners to influence how the public watches television. Second, there is an inherent assumption that the author of a copyrighted work will grant a license for a public performance in return for a royalty payment.<sup>111</sup> This shortsighted assumption allows broadcasters the power to control where the public watches television.<sup>112</sup> Third, remaining law designed to protect the fair-use of non-music television broadcasts (such as sporting events), is unconstitutionally vague and discriminatory.

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<sup>106</sup> 17 U.S.C. § 110(5)(A)(ii) (2000).

<sup>107</sup> *Id.* What is unclear however, is how the new statute alters § 110(5)(A). Under 17 U.S.C. § 110(5) two subsections now exist, one exempting home-style equipment while the other exempts an arbitrary number of speakers and televisions in a room. While section (B) is rigid in its fifty-five inch limitation, section (A), the home-style act, is a sliding scale, determined by the most common device used. Thus, it is conceivable that a sixty-inch television could be home-style, and its use would run in conflict with section (B).

<sup>108</sup> Benston, *supra* note 11.

<sup>109</sup> See Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 885-86 (1987). Almost a decade before the *Aiken* decision, the Register of Copyrights was drafting sections of what would become the 1976 Copyright Act. *Id.* Although the initial drafts of the performance definition were similar to the 1909 Act, industry representatives were able to influence the narrower fair-use exemptions of the 1976 Act, as well as inflate "expansive definitions of 'perform' and 'perform publicly.'" *Id.*

<sup>110</sup> Although the relationship between a copyright owner, broadcaster, and advertiser are generally the same between radio and television, the method of collecting viewer ratings is different. See discussion *infra* Part III.B.

<sup>111</sup> See *United States v. ASCAP*, 2001 U.S. Dist. LEXIS 23707, \*10-11 (S.D.N.Y. 2001). Music royalty societies, such as ASCAP, may not deny a license "in order to exact additional consideration for the performance thereof, or for the purpose of permitting the fixing or regulating of fees for the recording or transcribing of such work . . . ." *Id.* This provision does not restrict ASCAP from denying a license upon the direct order of an individual songwriter, "in order reasonably to protect the work against indiscriminate performances . . . ." *Id.*

<sup>112</sup> This is accomplished by simply denying commercial properties the right to perform the author's televised work.

*A. Copyright Law was not Designed for Television*

The increasingly restrictive regime of copyright law is captained by the music industry.<sup>113</sup> Prior to the 1976 Copyright Act, the judiciary had a fundamental belief that public reception of radio was not a “public performance.”<sup>114</sup> Courts cited the fact that songwriters received adequate return from broadcasters for the use of their music.<sup>115</sup> It is illogical and inequitable to alter the definition of “public performance” to include the listener as a performer.<sup>116</sup> Unfortunately, once the public performance definition left the judiciary for a legislative makeover, it became susceptible to the changes demanded by special interest groups.<sup>117</sup>

Congress rationalized its new public performance definition with a distorted view of the Supreme Court’s own dicta.<sup>118</sup> Based on the *Jewell-LaSalle* and *Aiken* opinions, which dealt solely with the use of radio, Congress produced a broad statute. The scope of the statute extends to “an ordinary radio or television receiving apparatus.”<sup>119</sup>

Like the FMLA, the inclusion of television restrictions was of key interest to royalty societies, such as ASCAP and BMI, who wanted control of their compositions within television broadcasts.<sup>120</sup> However, the inclusion failed to appreciate the fundamentally different business structures of radio and television.

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<sup>113</sup> See generally Litman, *supra* note 109.

<sup>114</sup> See *Buck v. Debaum*, 40 F.2d 734, 735 (S.D. Cal. 1929) (“One who manually or by human agency merely actuates electrical instrumentalities, whereby inaudible elements that are omnipresent in the air are made audible to persons who are within hearing, does not ‘perform’ within the meaning of the Copyright Law.”); *Jerome H. Remick & Co. v. General Elec.*, 16 F.2d 829, 829 (S.D.N.Y. 1926) (“Certainly those who listen do not perform, and therefore do not infringe.”).

<sup>115</sup> *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151 (1975):

[T]o hold that all in Aiken’s position “performed” these musical compositions would be to authorize the sale of an untold number of licenses for what is basically a single public rendition of a copyrighted work. The exaction of such multiple tributes would go far beyond what is required for the economic protection of copyright owners. . . .

*Id.* at 163. Recent courts, even under the multiple performance doctrine warned of in *Aiken*, echo this same sentiment:

Given the fact that a radio station (like “The Mix” here) has already presumptively paid a licensing fee to play its music, small business establishments like the Port Town Family Restaurant should not have to add to that royalty. One would think that Lionel Ritchie, Billy Joel, the Eagles, and the other artists here should be content with only one payment per performance.

*Cass County Music Co. v. Muedini*, 821 F. Supp. 1278, 1282-83 (E.D. Wis. 1993).

<sup>116</sup> *Aiken*, 422 U.S. at 162-63. The court argues that a person innocently turning on the radio would have no sure way of protecting against liability, short of keeping the unit off. *Id.*

<sup>117</sup> See generally Litman, *supra* note 109.

<sup>118</sup> H.R. REP. NO. 94-1476 (1976). When Congress utilized Supreme Court case law, respective of the case’s controlling facts, it engaged in a dangerous legislative practice. Namely, it legitimized unjust statutes by relying on manipulated common law interpretations.

<sup>119</sup> See 17 USC § 110(5)(A) (2000) (emphasis added).

<sup>120</sup> See *Music Licensing Hearings*, note 84.

### *B. Payment System*

For radio and television to remain free, a copyright holder must sell certain rights that grant the broadcaster use of the copyrighted work.<sup>121</sup> The broadcaster then recoups costs and generates revenue by selling advertising time.<sup>122</sup> Prices for both the copyrighted work and advertising time depend on the popularity of the copyrighted work.<sup>123</sup> Measurement of popularity varies from radio to television. Radio's primary source of data comes from public surveys,<sup>124</sup> while television's data source is "Nielsen Ratings."<sup>125</sup> The key difference is that Nielsen Ratings depend on an electronic monitoring device attached to a television.<sup>126</sup> Thus, television ratings give little weight to what a person actually watches, and instead monitor what a specific television displays.<sup>127</sup>

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<sup>121</sup> See *Teleprompter Corp. v. CBS*, 415 U.S. 394, 411-12 (1974). The court explaining the economic relationship of free television between the viewer, broadcaster, and advertiser:

Unlike propagators of other copyrighted material, such as those who sell books, perform live dramatic productions, or project motion pictures to live audiences, holders of copyrights for television programs or their licensees are not paid directly by those who ultimately enjoy the publication of the material -- that is, the television viewers -- but by advertisers who use the drawing power of the copyrighted material to promote their goods and services. Such advertisers typically pay the broadcasters a fee for each transmission of an advertisement based on an estimate of the expected number and characteristics of the viewers who will watch the program. While, as members of the general public, the viewers indirectly pay for the privilege of viewing copyrighted material through increased prices for the goods and services of the advertisers, they are not involved in a direct economic relationship with the copyright holders or their licensees.

*Id.*

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

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

<sup>124</sup> See *Radio Ratings*, at [http://www.slcc.edu/comm/telelab/radio\\_ratings.htm](http://www.slcc.edu/comm/telelab/radio_ratings.htm) (last visited Aug. 13, 2004). Although television has grown on a national scale, much of today's radio programming remains at the local level. *Id.* Companies such as Arbitron and Birch Radio specialize in conducting local surveys. *Id.* See also *RADAR and Nationwide: A Brief Guide to Understanding Arbitron's Network Radio Ratings Services*, available at <http://www.arbitron.com/downloads/RADARNationwideComparagraph.pdf> (last visited Aug. 13, 2004). Arbitron issues reports four times a year on national research of radio listeners. *Id.* The listeners record their usage in a diary which is periodically collected for analysis. *Id.* The survey sample can contain 400,000 diary keepers at any given time. *Id.*

<sup>125</sup> See Nielsen Media, *What TV Ratings Really Mean (and Other Frequently Asked Questions)*, at <http://www.nielsenmedia.com/whattratingsmean/> (last visited Aug. 13, 2004) [hereinafter *What Ratings Mean*]. Nielsen Media Research uses a sample of 5,000 households of the 99 million television homes to electronically collect data from willing participants. *Id.* The measurements do not factor qualitative evaluations, such as a person's interest in a program, merely if the program is being displayed. *Id.* Nielsen Media does employ the use of diaries, however their primary role is to verify the electronic data. *Id.*

<sup>126</sup> *Id.* Nielsen Media Research calls this unit the "People Meter."

<sup>127</sup> Since the "People Meter" is a device installed on a home television set, all other viewing outside the home is not captured, unlike radio surveys. See *What Ratings Mean*, *supra* note 125. Even if the television is on, periodic flashing buttons appear, which must be pressed, to ensure the person is still watching. *Id.*

Although the majority of people watch television at home, sports broadcasting tends to be an anomaly, generating an increased number of out-of-home viewers.<sup>128</sup> The NFL claims that this trend artificially decreases their television ratings, and thus, their bottom line.<sup>129</sup> If any of the approximately 5,000 Nielsen monitored televisions are supplanted by out-of-home viewing, the NFL's theory may hold true. Furthermore, Nielsen monitored families are under no obligation to view programs only on their home-monitored equipment.<sup>130</sup> The NFL's concern is purely economic.<sup>131</sup> Artificially low ratings drop the price advertisers are willing to pay to

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<sup>128</sup> Although this Comment is unable to provide statistical backing, simple logic underscores the point. Increased sports broadcasting has created what is commonly referred to as a "sports bar." Likewise, there is no such thing as a "soap-opera bar," "evening news bar," or "prime-time evening sitcom bar." The absurd sounding nature of the aforementioned concepts highlights a key point: that many perceive one genre of television to be more enjoyable when watched on a television outside of one's home.

<sup>129</sup> Jeff Simpson, *Copyright Challenge: Parties Get Bowled Over*, at [http://www.reviewjournal.com/lvrj\\_home/2004/Jan-31-Sat-2004/news/23118853.html](http://www.reviewjournal.com/lvrj_home/2004/Jan-31-Sat-2004/news/23118853.html) (last visited Aug. 13, 2004). NFL spokesman, Brian McCarthy defended the leagues cease and desist orders, explaining that, "[w]hat's happening is that these establishments are charging admission for something we provide for free . . . [t]he viewers (at these events) are not captured in ratings. That, in turn, hurts our advertisers." *Id.*

<sup>130</sup> The author of this Comment contacted Nielsen Media Research to ask whether mass out-of-home viewing could possibly have an adverse effect on ratings and whether safeguards existed to prevent or record such activity. A research representative concluded that while there is no indication that out-of-home viewers have altered the ratings, it stands as a possibility. Those families randomly chosen to be monitored are free to watch television at bars or restaurants, and such viewership is not recorded.

<sup>131</sup> An examination of some of the numbers leading into the 2004 Super Bowl may shed light on the NFL's actions. Since 1967, advertising rates have steadily increased.

<u>Year</u>	<u>Cost Per 30-Second Commercial</u>
2004	\$2,300,000
2003	\$2,150,000
2002	\$2,200,000
2001	\$2,200,000
2000	\$2,100,000
1999	\$1,600,000
1998	\$1,300,000
1997	\$1,200,000
1996	\$1,085,000

See *Your Cornucopia of Super Bowl Facts*, at [http://www.medialifemagazine.com/news2004/jan04/jan26/5\\_fri/news3friday.html](http://www.medialifemagazine.com/news2004/jan04/jan26/5_fri/news3friday.html) (last visited Aug. 13, 2004) (citing Nielsen Media Research). Despite increasing advertising costs, television ratings have been somewhat flat since 1999 with small spikes occurring with close games. *Id.*

<u>Year</u>	<u>Rating</u>	<u>Share</u>
2004	41.4	63
2003	40.7	61
2002	40.4	61
2001	40.4	61
2000	43.2	62
1999	40.2	61
1998	44.5	67
1997	43.3	65
1996	46.1	72

television networks on the presumption that fewer people will see their commercials.<sup>132</sup> This in turn directly lowers the amount of money a network will pay for the NFL's broadcast.<sup>133</sup>

### C. Assumption of Licensing

The 1976 Copyright Act limits the use of equipment in commercial establishments.<sup>134</sup> The assumption was that the copyright owner would always be willing to license the work if the proprietor was willing to pay.<sup>135</sup> While this has historically been true for music licensing,<sup>136</sup> the economics of television dictate otherwise.

The NFL believes that licensing of out-of-home viewings runs directly counter to their business interests.<sup>137</sup> Even if Las Vegas casinos did pay a licensing fee, it is doubtful the NFL could ever collect enough in fees to displace long-term losses in network revenue from declining viewer ratings.<sup>138</sup> Instead, the NFL would ideally

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*See Super Bowl TV Ratings, available at* [http://www.washingtonpost.com/wp\\_srv/sports/nfl/longterm/2004/superbowl/tvratings.html](http://www.washingtonpost.com/wp_srv/sports/nfl/longterm/2004/superbowl/tvratings.html) (last visited Aug. 13, 2004). The question logically becomes, how long can television networks sustain increased prices on advertising time in light of unchanged ratings? Although the copyright owner, being the NFL, can not regulate the suspense of the game, they can try to influence where people watch their broadcast. *See also Bowl Ad Prices Set New Record, available at* <http://www.med.sc.edu:1081/superbowl2004.htm> (last visited Jan. 12, 2004). AdAge.com, an advertising journal, cited "grumbling grow[ing] about the effectiveness and cost-efficiency of network TV," as advertising sales slowed only weeks prior to the Super Bowl. *Id.* Although the game defies market trends, there is overall "serious erosion among viewers" of broadcast television. *Id.* *See also* Michael Hiestand, *Super Bowl Hype: Part of the Game, available at* [http://www.usatoday.com/sports/football/super/2004-01-20-focus\\_x.htm](http://www.usatoday.com/sports/football/super/2004-01-20-focus_x.htm) (last visited Jan. 26, 2004). "CBS' main concern . . . was getting the 'dramatic' financial boost of Super Bowl teams where it owns local stations. CBS got one, in Boston." *Id.* Of the four cities to receive letters from the NFL, Charlotte and Boston's respective football teams were competing, Houston was the hosting city, and Las Vegas has been the traditional magnet where people travel to watch the game. These cities may have been the most likely to see an increase in out-of-home viewings.

<sup>132</sup> *See* Teleprompter Corp. v. CBS, 415 U.S. 394, 411-12 (1974) (Explaining the economic relationship between the copyright author, the television network, advertisers, and the public).

<sup>133</sup> *Id.*

<sup>134</sup> 17 U.S.C. § 110(5) (2000).

<sup>135</sup> *See* United States v. ASCAP, 2001 U.S. Dist. LEXIS 23707, \*10-11 (S.D.N.Y. 2001). Music royalty societies, such as ASCAP, may not deny a license "in order to exact additional consideration for the performance thereof, or for the purpose of permitting the fixing or regulating of fees for the recording or transcribing of such work . . ." *Id.* *See also* Shubha Ghosh, *Deprivatizing Copyright*, 54 CASE W. RES. L. REV. 387, 387-91 (2003). The idea that law currently embraces a laissez-faire approach to intellectual property to promote the public good is debatable, but it was the cornerstone of Madison's inclusion of Copyright law in the Constitution. *Id.* Copyright law was not intended to be a strict property right, as applied to a land based economy, but a regulatory mechanism to reward authors for enriching the public. *Id.* *See generally* H.R. REP. NO. 94-1476 (1976). Although not explicitly stated, the intention of expanding copyright law was not to prevent works from entering the public, but rather to give authors greater power to secure payment. *Id.*

<sup>136</sup> *See* ASCAP, 2001 U.S. Dist. LEXIS at \*10-11.

<sup>137</sup> *See* *What Ratings Mean*, *supra* note 125.

<sup>138</sup> *See* Soonhwan Lee, D.S.M. and Hyosung Chun, M.S.S., *Economic Values of Professional Sport Franchises in the United States*, 5 U.S. SPORTS ACAD. 3 (Fall 2002), *available at*

keep 1,000 people in front of 1,000 televisions rather than 1,000 people in front of one, unmonitored television.<sup>139</sup> This model awards the author that can control the demographics of his audience by dictating how and where free broadcasting is viewed.<sup>140</sup> It means that the author benefits from forcing viewers to stay at home.

#### *D. The New Role of Exemptions*

When a business proprietor is eager to become a licensee, but the licensor is unwilling to grant a license, the exemptions in 17 U.S.C. § 110(5) take on an added meaning.<sup>141</sup> Instead of being the demarcation of what is or is not free, the statute becomes the absolute boundary of liability, the point at which public liberties in free broadcasting cease. Unfortunately, the proprietor must consider exemptions, which, in addition to being unconstitutionally vague, fail to serve the public good.

### III. INADEQUATE EXEMPTIONS IN 17 U.S.C. § 110(5)

#### *A. The Fairness in Music Licensing Act*

The NFL has stated that their broadcasts may not be displayed on a television larger than fifty-five inches without authorization.<sup>142</sup> Although the fifty-five inch

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[http://www.thesportjournal.org/2002Journal/Vol5\\_No3/economic\\_values.asp](http://www.thesportjournal.org/2002Journal/Vol5_No3/economic_values.asp) (last visited Aug. 13, 2004). The NFL signed a seven-year contract with four networks for the television rights of their football games. *Id.* The total contract price amounts to \$17.6 billion. *Id.*

<u>Network</u>	<u>Years Covered</u>	<u>Avg. Cost Per Year</u>	<u>Total Cost</u>
ABC (Mon. Night)	1998 - 2005	\$550 million	\$4.4 billion
FOX (NFC)	1998 - 2005	\$550 million	\$4.4 billion
CBS (AFC)	1998 - 2005	\$500 million	\$4.0 billion
ESPN (Sun. Night)	1998 - 2005	\$600 million	\$4.8 billion

*Id.* Considering an average yearly payment of \$2.5 billion dollars, it is inconceivable that commercial proprietors could generate enough in licensing fee to replace lost network revenue.

<sup>139</sup> See *What Ratings Mean*, *supra* note 125. The practice of monitoring equipment rather than people fails to account for the simultaneous viewing of programs by large numbers of people. See also *Vegas Canceling*, *supra* note 11. The Aladdin hotel casino Super Bowl party was to be held in a 7,000-seat theater. *Id.* The Orleans hotel casino expected 6,000 in attendance at its Super Bowl party. *Id.* These two Las Vegas parties alone would place 13,000 people in front of two unmonitored televisions. These numbers are significant in light of Nielsen Media Research's national survey pool of only 5,000 televisions. *Id.*

<sup>140</sup> *Id.* The NFL thus uses its copyright monopoly to selectively restrict public use in an effort to influence the national broadcast television market. *Id.* While the NFL would be the beneficiary, so too would the league's contractual partner, the television network, by helping to substantiate increasing advertising costs. *Id.*

<sup>141</sup> 17 U.S.C. § 110(5) contains the fair-use exemptions for television and radio broadcasts under the Home-Style Act and the Fairness in Music Licensing Act. See 17 U.S.C. § 110(5) (2000).

<sup>142</sup> *Vegas Canceling*, *supra* note 11.

limit does originate from 17 U.S.C. § 110(5)(B), the law is generally inapplicable to a sports broadcast.<sup>143</sup>

In the absence of any judicial precedent interpreting § 110(5)(B), a proper statutory interpretation is guided by the language itself, unless the legislative history clearly indicates an opposing view.<sup>144</sup> Starting with the language itself, § 110(5)(B) exempts a public performance if the performance or display is by audiovisual means and no such audiovisual device has a diagonal screen size greater than fifty-five inches.<sup>145</sup>

Despite the statute's lucid wording, the exemption is much more narrowly tailored than one might suspect.<sup>146</sup>

### 1. *The Drafters*

The most conspicuous evidence of the legislative intent behind § 110(5)(B) lies in the identity of the parties present during the sessions that produced the FMLA. The statute was drafted as an agreement between the National Restaurant Association and ASCAP.<sup>147</sup> Notably absent were any copyright holders of non-musical works. Considering the parties involved, the drafters had a limited standing to negotiate solely the licensing of music within radio and television. Although Congress enacted the law, there is little evidence that Congress played any role in inserting its own provisions.<sup>148</sup>

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<sup>143</sup> See NIMMER ON COPYRIGHT § 8.18 (2004).

As its title implies, the Fairness In Music Licensing Act of 1998 is limited to the realm of music. Specifically, the only works exempted under the provision added by this amendment are nondramatic musical works. In this regard, the protection is much narrower than Section 110(5) as originally drafted, which applies any time a home-style radio or television is turned on regardless of whether the works thereby affected are nondramatic musical or dramatic musical, or indeed audiovisual or other works, such as the football games. . . .

*Id.* at (C)(2)(b)(i).

<sup>144</sup> *RIAA v. Diamond Multimedia Sys.*, 29 F. Supp. 2d 624 (C.D. Cal. 1998). Because the Court has no precedent to guide its interpretation of the AHRA, the Court begins its analysis with the "familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Id.* at 627-28. See also *Eldred v. Ashcroft*, 537 U.S. 186, 210 (2003) ("In surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which represent the considered and 'collective understanding of those [members of Congress] involved in drafting and studying proposed legislation."); *Garcia v. United States*, 469 U.S. 70, 76 (1984) (quoting *Zuber v. Allen*, 396 U.S. 168, 186 (1969)); *Continental Cablevision, Inc. v. Poll*, 124 F.3d 1044, 1049 (9th Cir. 1997) (quoting *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102 (1980)).

<sup>145</sup> 17 U.S.C. § 110(5)(B).

<sup>146</sup> See *Music Licensing Hearings*, *supra* note 84.

<sup>147</sup> *Id.*

<sup>148</sup> See 2-8 NIMMER ON COPYRIGHT § 8.18 (2003). There is some contention as to whether the House or Senate altered the provision concerning further transmissions to the public; however, it is of little relevance. *Id.*

## 2. *The Testimony*

The Congressional testimony relating to the FMLA clearly indicates that § 110(5)(B) was intended to apply exclusively to copyrighted music played over radio, television or film broadcasts.<sup>149</sup> The limited scope of the FMLA is evidenced by the lengthy Congressional hearings regarding the songwriters' interests.<sup>150</sup>

During Congressional testimony, counsel for ASCAP, Mr. Frederick Kaningsberg, made multiple references to § 110(5)(B) as it applied to radio and television music.<sup>151</sup> In one statement, he remarked: "On the radio and TV *music* front, the legislation would exempt any use of radio or TV *music*."<sup>152</sup> In another comment regarding the FMLA, Mr. Kaningsberg stated: "the bill only, I think, addresses the radio and TV music issue."<sup>153</sup> Finally, in a comment that directly questioned the FMLA's restriction on fifty-five inch televisions, Mr. Kaningsberg described the goal of § 110(5)(B) as having "the ability to be flexible and respond to the needs of the *users of music* and the needs of the *songwriters*."<sup>154</sup>

The legislative language here is indisputable: the intent behind § 110(5)(B) is to protect against the exploitation of a songwriter's property within a television or radio broadcast. Thus, the NFL cannot claim injury under this statute because its copyrighted work falls outside the narrow scope of the law. Furthermore, the NFL lacks legal standing to enforce the law against Las Vegas proprietors.

Yet, declaring § 110(5)(B) inapplicable may not be entirely correct. Although the Super Bowl is an athletic event, the televised program is filled with copyrighted music. Most of the music is generated within the football stadium to rally the fans during pre-game shows, in between plays, after touchdowns, during time outs, and at post-game victory celebrations. The network adds a significant amount of music as well, including network theme songs and jingles used when fading in and out of commercial breaks. Outside of this, the broadcast only contains scattered moments of a purely athletic event devoid of any music heard over the television. This implies that songwriters of the performed works would have a licensing interest.

Thus, Las Vegas casinos could seek a license, but from the applicable licensor, who would be ASCAP, and not the NFL. Ironically, the license would simply grant casinos indemnity from whatever copyrighted songs the NFL broadcasts and that were subsequently played on a television larger than fifty-five inches.<sup>155</sup> The link between music and a songwriter's interest in a television's size is tenuous at best,

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<sup>149</sup> See *Music Licensing Hearings*, *supra* note 84.

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

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

<sup>152</sup> *Id.* (emphasis added).

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* (emphasis added).

<sup>155</sup> See ASCAP, *Frequently Asked Questions About ASCAP Television Licensing*, at <http://www.ascap.com/licensing/tvfaq.html> (last visited Sept. 27, 2004). An ASCAP license for television use grants the user, "[t]he right to perform music in commercials and jingles . . . [and] an indemnity if a claim for infringement is made against you, your staff or your advertisers based on the performance of our member's works." *Id.*



and is more likely indicative of the music industries' demagogic control over broad aspects of copyright law.<sup>156</sup>

A license needed to display the NFL's broadcast is an entirely different license altogether. In light of the NFL's unwillingness to license the event, the demarcation of free-use and copyright liability is determined by the predecessor of the FMLA, specifically, the Home-Style Act.<sup>157</sup>

### *B. The Home-Style Act*

The second exemption in § 110(5), under subsection (A), is known as the Home-Style Act.<sup>158</sup> A case history of the statute uncovers a judicial lineage marred by inconsistent holdings,<sup>159</sup> calls of unconstitutionality,<sup>160</sup> and eventual steps by Congress to circumvent the statute's effect altogether.<sup>161</sup> Although the FMLA has supplanted much of the Home-Style Act, the old law retains authority outside the realm of music.<sup>162</sup> As it remains, the statute should be struck down as unconstitutionally vague, indeterminable and discriminatory.

#### *1. Void-for-Vagueness*

The "void-for-vagueness" doctrine dictates that the government must enact laws that allow a person of ordinary intelligence "to know what is prohibited, so that he may act accordingly."<sup>163</sup> When applied to civil statutes, courts use a lower level of

<sup>156</sup> See *Music Licensing Hearings*, *supra* note 84. In arguments concerning the implementation of regulations regarding screen size by ASCAP, one commentator noted that, "the primary significance of the large screen is a larger picture, not more prominent music." *Id.* Despite this lucid argument, ASCAP is able to limit television screen size. See 17 U.S.C. § 110(5)(B).

<sup>157</sup> See generally 17 U.S.C. § 110(5)(A).

<sup>158</sup> Although the home-style exemption has been extensively employed as a fair-use defense to the public use of music, judicial interpretations concerning the public use of television remain extremely limited. At the time of this writing, there are no cases available in which a non-music copyright owner (such as the NFL) has filed suit against a proprietor for the public use of programming on a television, simply because the television screen was too big, or did not fit the within the home-style exemption. This should not be confused with a number of cases regarding the reception of "blacked out" football games. See *e.g.* *NFL v. McBee & Bruno's, Inc.*, 792 F.2d 726 (8th Cir. 1986).

<sup>159</sup> See discussion *infra* Part IV.B.4.

<sup>160</sup> See *United States Shoe Corp.*, 678 F.2d 816, 817 (9th Cir. 1982) (explaining appellant Shoe Corp.'s assertion that the home-style act was unconstitutionally vague); *Merrill v. County Stores, Inc.*, 669 F. Supp. 1164 (D.N.H. 1987) (explaining defendant's assertion that the Home-Style Act was unconstitutionally vague and a lack of legislative history to make the law intelligible); *Springsteen v. Plaza Roller Dome, Inc.*, 602 F. Supp. 1113, 1115 (M.D.N.C. 1985) ("The meaning of [the home-style act's] statutory language is far from clear, and its reach has scarcely been tested in the courts.").

<sup>161</sup> See generally discussion *supra* Part II.D. (discussing the 1998 Fairness In Music Licensing Act).

<sup>162</sup> The Home-Style Act covers the general use of radios and televisions in public settings. It covers both audio and audiovisual broadcasts. See discussion *supra* Part IV.B.

<sup>163</sup> See *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972).

scrutiny, validating all laws that otherwise do not rise to the level of being “so vague and indefinite as [to] really [provide] no rule at all.”<sup>164</sup>

In 1982, *BMI v. United States Shoe Corp.* was one of the first cases to deal with the scope of the Home-Style Act.<sup>165</sup> It was also one of the first cases to defend the constitutionality of the statute.<sup>166</sup> In succinct terms, the court held that the statute was not void-for-vagueness because its requirements could be understood and applied by a person of ordinary intelligence.<sup>167</sup> Twenty-two years of hindsight have proven otherwise.

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It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute “abut[s] upon sensitive areas of basic First Amendment freedoms,” it “operates to inhibit the exercise of [those] freedoms.” Uncertain meanings inevitably lead citizens to “steer far wider of the unlawful zone” . . . than if the boundaries of the forbidden areas were clearly marked.

*Id.*

<sup>164</sup> See *Columbia Natural Resources v. Tatum*, 58 F.3d 1101, 1108 (6th Cir. 1995). The statute does not have to reach the level of “mathematical precision,” however, it must dictate a standard of conduct. *Id.* *Bloomsburg Landlords Ass'n v. Town of Bloomsburg*, 912 F. Supp. 790 (M.D. Pa. 1995). “Civil statutes which do not impact on First Amendment rights survive constitutional scrutiny so long as they are not ‘so vague and indefinite as really to be no rule at all’ or are not ‘substantially incomprehensible.’” *Id.*

<sup>165</sup> See generally *BMI v. United States Shoe Corp.*, 678 F.2d 816 (9th Cir. 1982).

<sup>166</sup> *Id.* at 817. “There is no merit in appellants’ contention that the provision ‘commonly used in private homes’ renders the Act void for vagueness. We believe that a person of ordinary intelligence can understand and apply the requirements of the Act.” *Id.*

<sup>167</sup> *Id.* Assuming it would be reasonable to conclude that a federal judge is a man of at least ordinary intelligence, able to know the limits of what a statute proscribes, consider *Cass County Music Co. v. Muedini*, 821 F. Supp. 1278 (E.D. Wis. 1993). “When I heard this case in a summary fashion at a scheduled default judgment hearing on February 2, I expressed surprise that the situation as presented violated the law [and after reading attorney briefs] I am still not convinced that the defendant has violated the law.” *Id.* at 1280. The court concluded that “The Port Town Family Restaurant’s Realistic Model No. STA-700 AM/FM stereo receiver fits under this definition [of an ordinary home-style receiver].” *Id.* at 1282. Compare this conclusion and interpretation of the Home-Style Act with the holding of the appellate court in *Cass County Music Co. v. Muedini*, 55 F.3d 263, 269 (7th Cir. 1994):

[W]ith the 70-V transformer attached to each speaker, the nominal impedance load level presented to the amplifier in the receiver is increased (from 8 ohms to approximately 10,000 ohms), consequently allowing for the use of small and moderate gauge speaker cable runs of up to 1000 feet without appreciable signal degradation. Additionally, because of the implementation of the transformers in the system configuration, the receiver effectively can power up to forty speakers wired in parallel, thirty-six speakers more than the receiver was designed to handle without overloading . . . . The parallel wiring of the speakers allows for easy installation of additional speakers at a later date. The set-up, known as a

The Home-Style Act is intrinsically flawed because it does not contain any language that can properly be considered “law.” Instead, the statute commands a person to determine the definition of the law on his own. This means a person must accurately determine the size and configuration of the most popular home-electronics equipment behind the closed doors of private homes.<sup>168</sup> Congress passed its burden of determining the scope of the law to the citizen; and with that burden, a litany of injustices.<sup>169</sup>

## 2. *Intrusion into the Tranquility of the Home*

The Home-Style Act reeks of government-sanctioned intrusion into the privacy of the home. The stark reality is that the phrase, “type commonly used in private homes,” is a variable that must be determined in order to define the boundary of liability.<sup>170</sup> The variable of this equation however, can only be accurately solved with a neighborhood survey that asks people a number of questions regarding their television sets.<sup>171</sup> Pertinent questions could include: the kind of television used;<sup>172</sup>

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distributed 70-volt system . . . clearly is used beyond the normal limits of its capabilities.

*Id.* The in-depth description of the radio's electrical capabilities stretches beyond what a person of ordinary intelligence would be expected to know. Indeed, the court's analysis becomes extremely tenuous when expert witnesses are relied upon to testify on the specifications of electrical devices. This detailed level of technical scrutiny is notably absent from the statute and legislative history.

<sup>168</sup> See generally 17 U.S.C. § 110(5)(A) (2000). The law limits a person to a “receiving apparatus of a kind commonly used *in* private homes . . .” *Id.* (emphasis added).

<sup>169</sup> The vagueness standard becomes particularly important when it produces a chilling effect on First Amendment protections involving free speech. See *Reno v. ACLU*, 521 U.S. 844, 885 (1997) (explaining that the vagueness of the Home-Style Act sets a “net large enough to catch all possible offenders and leave[s] it to the courts to step inside and say who could be rightfully detained and who should be set at large. This . . . to some extent, substitut[es] the judicial for the legislative department of the government.” (citing *United States v. Reese*, 92 U.S. 214 (1876))).

The danger is that protected speech will be silenced as business proprietors err of the side of caution or avoid speech altogether. See 16A Am. Jur. 2d Constitutional Law § 410 (2004) (noting that “reasonable certainty in statutes is more essential than usual when vagueness might induce individuals to forgo their First Amendment rights for fear of violating an unclear law.”). Such laws that tread on First Amendment rights “cannot be justified if it could be avoided by a more carefully drafted statute.” *ACLU*, 521 U.S. at 874. Although this occurred to some degree with the FMLA, the Home-Style Act is still in effect in certain instances such as public performances.

<sup>170</sup> See generally *Music Licensing Hearings*, *supra* note 84. There was testimony regarding the licensing practices of music royalty societies, and their diverging opinions on what is home-style. “ASCAP and BMI take the position in various negotiations[,] or how they seek licensing fees[,] that it's either a 27-inch TV set or a 36-inch TV set. The societies themselves don't agree.” *Id.*

<sup>171</sup> See *NFL v. Rondor, Inc.*, 840 F. Supp. 1160, 1164 (N.D. Ohio 1993) (stating that, “The test for determining whether an antenna system is ‘common’ within the meaning of [the home-style act] is highly localized.”) In properly applying the home-style act, the court notes:

In April and May of 1993, Mr. Hurray conducted a survey of the private homes nearest defendants' establishments to determine the types of antenna systems being used in those homes. Mr. Hurray conducted the survey first by inspecting the defendants' antenna systems and then comparing those systems to those of homes in the areas immediately surrounding each defendant's establishment. Mr. Hurray conducted this survey on foot in seven (7) different municipalities,

the size of the screen;<sup>173</sup> how the set is configured;<sup>174</sup> how long cable wires extend;<sup>175</sup> and whether the television is on a table, mounted on a wall,<sup>176</sup> or recessed into a wall.<sup>177</sup> The number of such surveys would increase as the number of businesses in a given area increase.<sup>178</sup> In addition, future reassessments will have to be conducted due to fluctuations in the economy and technological advances that will alter the definition of “home-style.”<sup>179</sup>

The burden of making such determinations runs directly counter to the government’s affirmative interest in protecting the tranquility of the home.<sup>180</sup> Not

including Cleveland, Avon, Westlake, North Olmsted, Strongsville, Lakewood and Fairview Park.

*Id.* at 1164.

<sup>172</sup> See 17 U.S.C. § 110(5)(A) (2000). The receiver must be “common.” *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> See *BMI v. Claire's Boutiques, Inc.*, 754 F. Supp. 1324, 1329 (N.D. Ill. 1990). “A number of courts have examined various models and configurations of receivers and speakers in order to determine whether the sound systems are of a kind commonly used in private homes.” *Id.* The practice has become increasingly common in courts, to find a system not within the definition of home-style because of its configuration, when indeed the court acknowledges each individual component is otherwise home-style.

<sup>175</sup> See *Merrill v. Bill Miller's Bar-B-Q Enter.*, 688 F. Supp. 1172, 1176 (W.D. Tex. 1988). A speaker cable that was forty feet long invalidated the system as home-style. *Id.*

<sup>176</sup> See *BMI*, 949 F.2d at 1485 (finding speakers that were hung from the ceiling were home-style). *Sailor Music v. Gap Stores, Inc.*, 668 F.2d 84, 86 (2d Cir. 1981) (holding that four speakers mounted within the ceiling were not home-style). *Springsteen v. Plaza Roller Dome, Inc.*, 602 F. Supp. 1113, 1114 (M.D.N.C. 1985) (holding that six speakers mounted on separate light poles were home-style).

<sup>177</sup> See *Sailor Music v. Gap Stores, Inc.*, 668 F.2d 84, 86 (2d Cir. 1981). Four speakers that were mounted within the ceiling were not home-style. *Id.*

<sup>178</sup> See generally *Hickory Grove Music v. Andrews*, 749 F. Supp. 1031, 1037-38 (D. Mont. 1990). Defendant has the burden of showing that his radio system is home-style. *Id.* Any proprietor wishing to avoid liability would have to conduct their own survey, at the very least, to show a good-faith effort in abiding by the law. *Id.* In *Hickory Grove Music*, defendant provided a sworn affidavit stating that their system was “commonly used in homes *in the area*.” *Id.* (emphasis added, implying the localized nature of the survey).

<sup>179</sup> Rapidly evolving technology ensures that the definition of home-style will never remain static.

<sup>180</sup> See *Mainstream Mktg. Servs. v. FTC*, 358 F.3d 1228, 1237-38 (10th Cir. 2004).

The United States Supreme Court has emphasized the importance of individual privacy, particularly in the context of the home, stating that “the ancient concept that ‘a man’s home is his castle’ into which ‘not even the king may enter’ has lost none of its vitality.” [T]he Court again stressed the unique nature of the home and recognized that “the State’s interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society.” One important aspect of residential privacy is protection of the unwilling listener. A special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions. Thus, [the Court] has repeatedly held that individuals are not required to welcome unwanted speech into their own homes and that the government may protect this freedom. . . . The Court called the unwilling listener’s interest in avoiding unwanted communication part of the broader right to be let alone that has been described as “the right most valued by civilized men.” The Court added that the right to avoid unwanted speech has special force in the context of the home.

*Id.*

only should citizens be able to avoid intrusive surveys, but they should not be asked to participate in a form of quasi-legislation based on their personal possessions.<sup>181</sup> Understandably, many people might refuse to answer such questions, making an accurate<sup>182</sup> determination of the law nearly impossible.

Opponents might contend that since 1976 intrusive surveys have not been an issue, citing the numerous cases involving the use of radios in commercial establishments. Yet, the regularity with which defendants have been found liable evidences that business proprietors forego such intrusive questions. Simple logic supports this proposition. Imagine the shock of a homeowner being called or visited by a stranger stating in so many words, "the law requires me to know what kind of television you own. Is it an expensive plasma screen? Is it hooked up to a stereo? And where is it located?"<sup>183</sup> A business proprietor is more likely to be arrested for suspiciously canvassing a neighborhood than asking the embarrassing questions required to determine the limits of the Home-Style Act.

### 3. The Discriminatory "Zip-Code" Effect

An ancillary effect of the Home-Style Act is that it allows copyright law to hinge on the economic strength of citizens within a given community.<sup>184</sup> Because the home-style test is "highly localized,"<sup>185</sup> business proprietors located in affluent

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

<sup>182</sup> In this sense, accurate must mean that it stands impervious to legal attacks. *See Music Licensing Hearings, supra* note 84. If a plaintiff's own statistical analysis of home-style is more impressive than the defendant's good-faith attempt, then the party with greater resources, time, and area coverage may prevail. *See Int'l Korwin Corp. v. Kowalczyk*, 665 F. Supp. 652 (N.D. Ill. 1987). This is particularly true when plaintiffs, ASCAP, provided their own expert witness to testify that a defendant's radio is not home-style. *Id.*

<sup>183</sup> *See BMI v. Claire's Boutiques, Inc.*, 754 F. Supp. 1324, 1329 (N.D. Ill. 1990).

[F]actors which courts generally examine include (1) whether the receiver and other equipment itself is generally sold for commercial or private use; (2) the number of speakers which the receiver can accommodate; (3) the number of speakers actually used; (4) the manner in which the speakers are installed; (5) whether the speaker wires are concealed; (6) the distance of the speakers from the receiver; and (7) whether the receiver is integrated with a public announcement system or telephone lines.

*Id.*

<sup>184</sup> *See NFL v. Rondor Inc.*, 840 F. Supp. 1160, 1167 (N.D. Ohio 1993). Both plaintiff's and defendant's surveys consisted of telephone interviews and visual inspections of immediately surrounding neighborhoods. *Id.* The court held that, "the information sought for this litigation can best be determined from the actual viewing of residences and the type of external antenna attached thereto." *Id.* at 1170. The defendant's survey was localized 420 homes in the 216 telephone area-code, and included the question of whether the residence owned a satellite dish. *Id.* at 1169. In the plaintiff's survey, over four thousand homes were visually inspected. *Id.* *See also NFL v. Ellicottville Gin Mill*, 1995 U.S. Dist. LEXIS 18583 (W.D.N.Y. 1995) (noting that the "plaintiffs' survey[ed] . . . Rochester television antennas, showing various boom and mast lengths."). Both cases deal specifically with blacked-out football games and the antenna used to receive the broadcasts. Both instances deal with equipment located outside the home. This implies that when the equipment can be easily surveyed by visual inspection, the data will prove conclusive. Thus, survey data involving radio or televisions, while more difficult to obtain, would prove just as conclusive.

<sup>185</sup> *Id.*

neighborhoods are afforded fewer restrictions than those in average or low-income territories. In places like the “Hollywood Hills,” the average home television might be sixty inches measured diagonally, whereas in “Small Town,” Nebraska, the same may not be true. In this “zip-code effect,” fair-use exemptions are directly correlated to average disposable income in the neighborhood. The Home-Style Act thus provides a luxury for some while discriminatorily denying others a similar benefit. This effect egregiously offends the original intent of copyright law and fails to serve a legitimate governmental purpose.<sup>186</sup> The practical effect ignores the fundamental reason for shifting copyright protection from common law to federal law.<sup>187</sup> When Congress preempted state copyright laws, they sought uniformity of application across the nation.<sup>188</sup> The legislative history of the 1976 Copyright Act could not be clearer:

One of the fundamental purposes behind the copyright clause of the Constitution, as shown in Madison's comments in *The Federalist*, was to promote national uniformity and to avoid the practical difficulties of determining and enforcing an author's rights under the differing laws and in the separate courts of the various States. Today, when the methods for dissemination of an author's work are incomparably broader and faster than they were in 1789, national uniformity in copyright protection is even more essential than it was then to carry out the constitutional intent.<sup>189</sup>

Despite cases indicating the existence of the “zip-code effect,” arguments that the term “home-style” should be defined at a national level suffer from logical inconsistencies as well. Who would determine the size of a national “home-style” television? Projections made on external data, such as national retail sales of certain televisions, would not adhere to the Home-Style Act.<sup>190</sup> As stated by one court, the test is not what is “commonly available for use in private homes,” but what is “commonly used in private homes.”<sup>191</sup> Sales data cannot account for this.

Furthermore, if “home-style” was determined to be a twenty-six inch television, the FMLA fifty-five inch standard would become obsolete. Licensing of audiovisual media is effectively split into its separate audio and visual components, which are governed by drastically different laws. This problem is compounded when licensors, such as songwriters and the NFL, do not share the same economic incentive to grant licenses.

It becomes quite apparent that a business proprietor cannot realistically determine the most commonly used television on a national scale. The plaintiff need merely assert a claim of infringement, placing the affirmative defense of fair-use upon the defendant. This becomes an insurmountable burden of proving that his

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<sup>186</sup> See H.R. REP. NO. 94-1476 (1976).

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

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

<sup>190</sup> Sales data accounts for what people buy, but not what is actually in peoples homes, as required by the Home-Style Act. The new televisions might be accompanying an older smaller set, may break or be returned, and may not have been purchased for home use.

<sup>191</sup> See *NFL v. Rondor, Inc.*, 840 F. Supp. 1160, 1170 (N.D. Ohio 1993).

television is the most commonly used device within private homes in the entire United States.

Yet, at a local level, the Home-Style Act would become directly linked into the local economy, fragmenting the fundamental purpose of shifting to a federal law and discriminating against entire townships based on wealth. The Home-Style Act is clearly void of any meaningful law. It vests legislative power in the consumer electronics market and forces individual citizens to constantly be aware of those trends in order to avoid liability.

#### 4. *Judicial Inconsistency*

Deficiencies in the Home-Style Act necessitate that federal courts interpret the statute as a means of mitigating any uncertainties left by Congress.<sup>192</sup> Despite the judiciary's best efforts to give meaning to the Home-Style Act, courts have increasingly taken on a super-legislative role<sup>193</sup> that has destroyed the uniformity sought in the 1976 Copyright Act.<sup>194</sup> In the statute's thirty-year existence, independent courts have devised elaborate systems of analysis, yet never adopted a "bright-line" rule. While some courts have noted that an otherwise "home-style" radio system failed their respective tests because a speaker was mounted in a wall or a speaker wire was longer than forty feet,<sup>195</sup> another court held that a system involving speakers mounted on light poles dispersed throughout a 7,000 square foot miniature golf course was, in fact, "home-style."<sup>196</sup> Such holdings have made an already vague statute indeterminable. As courts apply what they believe was Congress's intent, the judiciary has lost sight of their proper role:

Congress passes laws, not purposes. What matters is not some general purpose that may have motivated the lawmakers but the means they chose to achieve that end. The fact that [the courts] can conceive of a better way of accomplishing what we think may have been the congressional purpose does not give us license to ignore the means Congress actually adopted.<sup>197</sup>

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<sup>192</sup> See *Columbia Natural Resources v. Tatum*, 58 F.3d 1101, 1108 (6th Cir. 1995).

<sup>193</sup> See *BMI v. Claire's Boutiques, Inc.*, 754 F. Supp. 1324, 1333 (N.D. Ill. 1990). The court wrestled with ambiguities in the Home-Style Act, yet rebuffed opinions of other courts inventing elements of the statutory test, such as business revenue. *Id.* The court stated, "to elevate [extemporaneous elements] to an importance equal or even greater than the factors enumerated in the text of § 110(5) itself is to violate [the] principle [of] drawing on legislative history to formulate 'rules competing with those found in the U.S. Code.'" *Id.* The court held that a legislative history "may not . . . be used to supply additional elements beyond those specified in the statute." *Id.*

<sup>194</sup> The inconsistency of the home-style act has been well critiqued and widely accepted. For in-depth analysis of contradictory cases see Litman, *supra* note 109; John Wilk, *Seeing the Words and Hearing the Music: Contradictions in the Construction of 17 U.S.C. Section 110(5)*, 45 RUTGERS L. REV. 783 (1993).

<sup>195</sup> See *Music Licensing Hearings*, *supra* note 84. See also 2-8 NIMMER ON COPYRIGHT § 8.18 (2003).

<sup>196</sup> *Springsteen v. Plaza Roller Dome, Inc.*, 602 F. Supp. 1113, 1114 (M.D.N.C. 1985).

<sup>197</sup> See *Kenaitze Indian Tribe v. Alaska*, 860 F.2d 312, 317 (9th Cir. 1988).

The judiciary's thirty-year search for the elusive purpose of the Home-Style Act has led to fragmentation along district lines.<sup>198</sup> The judiciary continues to procrastinate in addressing the vagueness of the statute while they wait for further legislation, such as the FMLA, to circumvent the teeth of the Home-Style Act. Although much of the public performance litigation pertaining to music may be quelled by the FMLA, television broadcasters, such as the NFL, may decide to capitalize on the ambiguity of the Home-Style Act, and reinvigorate its effect.

#### IV. IN SUMMARY

For the vast majority of business proprietors, these arguments hold true; however, Las Vegas generally falls outside the statutory scope of fair-use. Most of the targeted cease-and-desist letters involved projector screens generally measuring twenty-feet diagonally.<sup>199</sup> It becomes easy to dismiss this use as patently violating copyright law, and every year it becomes far easier to lose sight of a more basic question: Is this fundamentally fair? For the past thirty years, courts have delved into the minutia offered by expert witnesses<sup>200</sup> trying to quantify the "commonness" of entertainment equipment. Perhaps no one remembers the some sixty years prior to 1976, when public reception was not a public performance.<sup>201</sup> Indeed, the original drafting of the 1998 FMLA tried to reinstate this concept.<sup>202</sup>

Yet, we must remind ourselves that "[t]he immediate effect of our copyright law is to secure a *fair* return for an 'author's' creative labor."<sup>203</sup> For the NFL, the return for their creative labors averages \$2.2 billion per year in licensing of television broadcasting rights.<sup>204</sup> This is undoubtedly fair, considering the general public absorbs much of this cost.<sup>205</sup> Even if the NFL's theory of television ratings is true, why should copyright law be the instrument that deprives the public in order to

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<sup>198</sup> See generally *BMI*, 754 F. Supp. 1324 (discussing differing court holdings regarding similar elements of the home-style "test").

<sup>199</sup> See *Super Bowl Parties*, at <http://www.reviewjournal.com/sports/superbowl/parties.html> (Feb. 1, 2004) (providing a listing of all Las Vegas Super Bowl parties and the available amenities).

<sup>200</sup> See *Int'l Korwin Corp. v. Kowalczyk*, 665 F. Supp. 652, 655 (N.D. Ill. 1987) (noting that plaintiff provided an expert witness to testify on the features and power rating of defendant's stereo system).

<sup>201</sup> See Federal Communications Act of 1934, 47 U.S.C. §§ 151-609 (1964), "no person may lawfully impose [a] charge upon the reception of commercial television broadcasts and every person is free to receive such broadcasts by the equipment of his choice." *Id.*

<sup>202</sup> See H.R. 4936, 103d Cong. (1994).

Section 110(5) of the title 17, United States Code, is amended to read as follows:  
[The following is not an infringing act. The] communication of a transmission embodying a performance or display of a work by the public reception of the transmission by television or radio sets located in a business establishment, unless a direct or indirect charge is made to see or hear the transmission.

*Id.*

<sup>203</sup> See *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975). (emphasis added).

<sup>204</sup> See *Lee and Chun*, *supra* note 138.

<sup>205</sup> See *Teleprompter Corp. v. CBS*, 415 U.S. 394, 411-12 (1974).



compensate for a company's process of collecting data?<sup>206</sup> As stated, a copyright grants a general right of exclusion, not a selective one.<sup>207</sup> An author cannot selectively discriminate when half of America simultaneously views his work on their television sets.<sup>208</sup> The inadequacies of § 110(5) must be addressed in order to re-secure the lost fundamental rights of the public.

## V. PROPOSAL

### A. Summary of the Issues

The copyright monopoly on television broadcasts contradicts current public interest and must be changed. Viewer rating systems have created an economic incentive for television copyright owners to refuse licensing to public establishments.<sup>209</sup> Unfortunately, the only law available to prevent the over-expansion<sup>210</sup> of this copyright monopoly is inadequate. The FMLA was created specifically to deal with music, and is thus inapplicable to a sporting event.<sup>211</sup> While the Home-Style Act does apply to television broadcasts, it is unconstitutionally vague and open to a myriad of opposing interpretations.<sup>212</sup> The business proprietor's perception of "home-style" is constantly vulnerable to a plaintiff's countervailing analyses and surveys.<sup>213</sup> Ultimately, however, a copyright should not be a license to infringe on individual liberties by enabling its holder to dictate the size, place or manner in which people enjoy free broadcasting.

The current definition of performance is overly-broad and thus should be redrafted to strike a fair balance between the author and the public.

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<sup>206</sup> See *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (stating that "[t]he sole interest of the United States and the primary object in conferring the monopoly," this Court has said, "lie in the general benefits derived by the public from the labors of authors.").

<sup>207</sup> See NIMMER ON COPYRIGHT § 13.09 (2003). Selective exclusion enters a complex area of law, in which a copyright owner's limited monopoly can be exercised in such a way as to commit an antitrust violation. *Id.* The issue arises "[o]n whether the copyright owner's enforcement of exclusivity against some infringers but not against others without a valid business reason for the distinction may constitute a violation of the antitrust laws." *Id.* at n2. (citing *Metromedia Broad. Corp. v. MGM/UA Entm't Co.*, 611 F. Supp. 415 (C.D. Cal. 1985)). This is significant in light of the economic losses of only a few select business that were specifically targeted with a cease-and-desist letter, compared to the myriad of other high profile parties that did not receive any warning.

<sup>208</sup> *Id.*

<sup>209</sup> See generally discussion *supra* Part III.A.

<sup>210</sup> See Litman, *supra* note 109, at 903. The 1976 Copyright Act, heavily influenced by special interest groups, "yielded a statute far more favorable to copyright proprietors than its predecessor, containing structural barriers to impede future generations' exploitation of copyrighted works. The legislative process may have struck an unwise balance . . ." *Id.*

<sup>211</sup> See discussion *supra* Part IV.A.

<sup>212</sup> See discussion *supra* Part IV.B.

<sup>213</sup> See *Int'l Korwin Corp. v. Kowalczyk*, 665 F. Supp. 652 (stating that plaintiff employed expert witness to testify as to what he believed was the most common technology).

### *B. A Return to the Fair and Functional Rules of the Supreme Court*

Free broadcasting in public should not be considered a performance. Store owners should not have to check if their equipment is “home-style” by calculating the length of their speaker cable, measuring a speaker’s ohm rating or measuring the square footage of a building’s useable space.<sup>214</sup> Providers of free over-the-air broadcasts already are compensated adequately because of a well-balanced relationship between television networks, advertisers, copyright holders, and the public.<sup>215</sup> Use of a radio or television in a public setting does not upset this balance, nor does it unduly take from the copyright holders.<sup>216</sup>

When a party licenses its work for public broadcast, a public license must be implied. Thus, when a radio or television show airs, it is implied that the public has the freedom to receive the program on whatever equipment they choose, wherever they want.<sup>217</sup>

Successful implementation of free broadcasting requires the line drawn by the Supreme Court between the broadcaster and viewer to be reinstated.<sup>218</sup> We have been living in the world predicted by *Aiken*: a regime of inequitable copyright law.<sup>219</sup> Equity demands that the performance definition must be redrafted.

### *C. The Proposed Performance Laws*

#### *1. Proposed Definition of “Perform”*

Under 17 U.S.C. § 101, the definition of a performance must be changed. The new definition should be in accordance with prior judicial holdings that broadcasters perform while viewers do not.<sup>220</sup>

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<sup>214</sup> See generally *Cass County Music Co. v. Muedini*, 55 F.3d 263 (7th Cir. 1994).

<sup>215</sup> See *Teleprompter Corp. v. CBS*, 415 U.S. 394, 411-12 (1974) (explaining the economic relationship between copyright authors, television networks, advertisers, and viewers). See Lee and Chun, *supra* note 138. The NFL is compensated \$2.5 billion per year for television broadcasting rights. *Id.*

<sup>216</sup> See *Teleprompter Corp.*, 415 U.S. at 411-12.

<sup>217</sup> See Federal Communications Act of 1934, 47 U.S.C. §§ 151-609 (1964). “[N]o person may lawfully impose [a] charge upon the reception of commercial television broadcasts and every person is free to receive such broadcasts by the equipment of his choice.” *Id.*

<sup>218</sup> See *id.* at 162 (holding that viewers of television programs do not perform). *Teleprompter Corp.*, 415 U.S. at 409 (holding that the importation of distant cable signals by local CATV (cable stations) is not a performance and thus subsequent viewing by individuals is not a public performance). See also *Fortnightly Corp.*, 392 U.S. at 398 (“Broadcasters perform. Viewers do not perform.”). *Buck v. Jewell-LaSalle Realty, Co.*, 283 U.S. 191, 199 n.5. (1931) (noting that if the radio station had licensed the music broadcast, receivers of broadcast would not be performers).

<sup>219</sup> See *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 162 (1975).

<sup>220</sup> See *id.* See also *Teleprompter Corp.*, 415 U.S. at 409. See also *Fortnightly Corp.*, 392 U.S. at 398. “Broadcasters perform. Viewers do not perform.” *Id.* *Buck v. Jewell-LaSalle Realty Co.*, 283 U.S. 191, 199 n. 5 (1931). (noting that if the radio station had licensed the music broadcast, receivers of broadcast would not be performers).

To "perform" a work means to recite, play, dance, or act it, or in the case of radio or motion picture or other audiovisual work, to be the original propagation point of a broadcast to the public.<sup>221</sup>

Thus, examples of a performance would be: a person reading aloud at home, an actor singing on stage, a band covering songs at a bar, a radio station broadcasting music, or a cable network's national broadcast of a football game. While these are examples of a performance, they are not all examples requiring a royalty payment. Only a "public performance" would require such payments.

## 2. *A Proposed Definition of "Public Performance"*

The new definition of a "public performance" should read as follows:

To perform or display a work "publicly" means:

- (1) to perform 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; and
- (2) to intentionally make the performance available to a substantial portion of the surrounding audience.

Under this definition, a person at a restaurant who is reading a book aloud to a friend at the same table is performing, but not publicly. Even if the person reading is overheard by surrounding tables, it would not be a public performance. If this same person were to stand up and read with enough volume so that a substantial number of people in the room could hear the performance, it would be public and constitute an infringing act.<sup>222</sup>

Likewise, a television network would be performing publicly when it transmitted a performance via radio wave. The transmission would be a "public performance" because: (1) it was performed in public airspace and (2) was intended to be received by a significant portion of the surrounding viewers. Liability would arise when the transmitted public performance happened to be a copyright work.<sup>223</sup>

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<sup>221</sup> Altering the definition of "perform" to include only the original point of propagation is the key to balancing the interests of the public and authors. The intent is limit receivers of a transmission from infringement.

<sup>222</sup> Naturally, to avoid the vagary that plagues the current home-style exemption, it would be necessary to define how many people constitute a "significant" number, and the bounds of the surrounding area. Certainly a performance of a play in a closed room would be simple to define as the majority. However, for broadcasts, the majority could be on the scale of half the American population. So, in the case of broadcasting a transmission, the number would be extremely low, on the order of fifty to one hundred. The significance of setting the number above one single person, is to account for the rise of personal wireless technology, which under the existing performance act, might constitute a transmission further to the public.

<sup>223</sup> See 17 U.S.C. § 501 (2000). Under the basic tenants of copyright law, this means that the transmitted work must have a modicum of originality and be fixed in a tangible medium. 17 U.S.C. § 102 (2000).

### 3. *The Return of the Audience*

Finally, there should be a statutory definition of an audience member.

To be an “audience” member means:

- (1) To be the intended recipient of a performance; or
- (2) In the case of signal broadcasts, to receive the performance and render it in audible or visual form via radio, television, or any other device.

A person falls outside the definition of an audience member when:

- (1) A person places a direct charge on another audience member to see or hear the performance; or
- (2) A person who receives the performance further transmits it to the public in direct or delayed fashion.

Under this definition, people attending the Las Vegas Super Bowl parties would be audience members to the broadcast. The broadcast was intended for the public, there was not a direct charge to see the game, and the broadcast was not retransmitted.<sup>224</sup>

The proposed statutes would render much of 17 U.S.C. § 110 unnecessary.<sup>225</sup> In particular, these laws would require the revocation of both the FMLA and the home-style exemption.

## VI. CONCLUSION

Copyright law has evolved greatly from its conceptual premise in the Constitution.<sup>226</sup> Since copyright laws were first incepted, courts have been at the forefront of the battle to interpret broad statutory language in light of new and unanticipated technologies. In the last century, few other inventions have tested the wisdom of our courts like the radio and the television; each capable of rendering a singer’s voice to listeners hundreds of miles away, those devices inevitably created difficult challenges in defining the performance doctrine.

The definition of a public performance has followed a strange road. Influenced and written by business interests before Congress,<sup>227</sup> 17 U.S.C. § 110(5) has become a puzzling statute that has isolated the public from the fair balance demanded by the Constitution.

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<sup>224</sup> Since the new definition of public performance allows for large screen viewings in commercial establishments, copyright holders would not have standing to dictate how or where their broadcast is rendered. This may have another positive ancillary effect; forcing large broadcasters to pressure media rating services to alter their systems to conform with public demand.

<sup>225</sup> Although the proposed revision of the performance definitions may appear anarchistic in light of the current regime of strict copyright law, they are not entirely wishful thinking. Consider the proposed Fairness in Music Licensing Act, as drafted in 1994. *See* H.R. 4936, 103d Cong. (1994).

<sup>226</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>227</sup> *See generally* Litman, *supra* note 109, at 903.

The solution does not lie in another exemption or reevaluation of the diagonal screen size of a television. Congress must take clear steps to return to the equitable rules forged by the Supreme Court. This means returning to the doctrinal dichotomy of performer and audience and eliminating statutory language that defines infringement based on consumer trends. Only then will copyright law truly be consistent with the language of our Constitution.

“With these tips and a lot of creativity, you are on your way to giving a “Super” Super Bowl Party. Relax, have fun, and enjoy the game!”<sup>228</sup>

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<sup>228</sup> See Coward, *supra* note 1.