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The Erosion of American Copyright Protection: The Fairness in Music Licensing Act, 18 J. Marshall J. Computer & Info. L. 791 (2000)

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COMMENTS

THE EROSION OF AMERICAN COPYRIGHT PROTECTION: THE FAIRNESS IN MUSIC LICENSING ACT

I. OVERTURE: INTRODUCTION

Music is so embedded in our culture and every day lives that many may not realize that every song belongs to a composer, publisher or other copyright owner. Radio and television are so readily available, we do not give thought to the underlying copyrights attached to the images and sounds or the fact that someone deserves to be paid for sharing their creativity and genius with the world. The framers of our Constitution, realizing the importance of protecting this creativity, included a constitutional provision authorizing Congress "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."[1]

Since the inception of federal copyright protection,[2] Congress has progressively and systematically broadened the scope and number of rights granted to authors[3] and expressly limited exceptions to their ex-

1. U.S. CONST. art. I, § 8, cl. 8.

2. *See* The First Copyright Law of the United States, §§ 1-7 (1790), *reprinted in* 8 MELVILLE B. NIMMER, ET AL., NIMMER ON COPYRIGHT app. 7-41. RICHARD ROGERS BOWKER, COPYRIGHT ITS HISTORY AND ITS LAW 3 (1912). The first Federal Copyright Act followed a period where states passed their own individual copyright provisions. *Id.* Twelve of the original thirteen states had their own legislation in 1790 when federal protection rendered the states' acts obsolete. *Id.* The protection of copyright in America actually dates back to seven years before the Act of 1790. *Id.*

3. *See* This is true prior to the Fairness in Music Licensing Act. *See* The First Copyright Law of the United States, §§ 1-7 (1790), *reprinted in* 8 MELVILLE B. NIMMER, ET AL., NIMMER ON COPYRIGHT app. 7-41. The first Act, protecting books, maps, and charts, was extremely limited in scope. *Id. See, e.g.*, An Act to Amend the Several Acts Respecting Copyrights, §§ 1-3 (1831), *reprinted in* 8 MELVILLE B. NIMMER, ET AL., NIMMER ON COPYRIGHT app. 7-49. After numerous amendments, its scope expanded. *See also* Copyright Act of 1909, §§ 1-62 (1909), *reprinted in* 8 MELVILLE B. NIMMER, ET AL., NIMMER ON COPYRIGHT app. 6. With the passing of the Copyright Act of 1909, the rights and scope were broadened

clusive rights.[4] Today, American copyright law grants five exclusive rights to composers of music, including the right to reproduce the copyrighted work into phonorecords,[5] prepare derivative works based on the original work,[6] distribute copies of the work,[7] perform the work publicly,[8] and display the work publicly.[9] For over one hundred years, Congress and the courts vehemently protected composers' and songwriters' rights to perform publicly and control public performance of their works,[10] carving out narrow exemptions for allowable infringement.[11] Unfortunately, the Fairness in Music Licensing Act,[12] signed into law by President Clinton on October 27, 1998, has and will continue to erode this protection.[13] It creates unprecedented broad exemptions for for-

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further. *Id.; see also* 17 U.S.C. §§ 101-810 (1976). Finally, in 1976, the 5 exclusive rights took shape and the result prior to 1999 was comprehensive protection. *Id.*

4. *See id.*

5. *See* 17 U.S.C. § 106(1). "[T]he owner of copyright under this title has the exclusive right[ ]. . . to reproduce the copyrighted work in copies or phonorecords. " *Id.*

6. *See* 17 U.S.C. § 106(2) (1976). "[T]he owner of copyright under this title has the exclusive right[ ]. . . to prepare derivative works based upon the copyrighted work." *Id.*

7. *See* 17 U.S.C. § 106(3) (1976). "[T]he owner of copyright under this title has the exclusive right[ ]. . . to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending." *Id.*

8. *See* 17 U.S.C. § 106(4) (1976). "[T]he owner of copyright under this title has the exclusive right[ ]. . . in the case of. . . musical. . . works. . .to perform the copyrighted work publicly." *Id.*

9. *See* 17 U.S.C. § 106 (5) (1976). [T]he owner of copyright under this title has the exclusive right[ ]. . . in the case of. . . musical. . .works. . . to display the copyrighted work publicly. *Id.*

10. *See* An Act to Amend Title Sixty, Chapter Three of the Revised Statutes Relating to Copyrights (1897), *reprinted in* 8 MELVILLE B. NIMMER, ET AL., NIMMER ON COPYRIGHT app. 7-92. 1897 marked the first time the exclusive right of performance for musical works was codified. *See also* 17 U.S.C. § 1 (1909). The right of performance was revised in 1909. *See, e.g.*, Buck v. Jewell-LaSalle Realty Co., 283 U.S. 191, 202 (1931) (holding that, though the statute was passed before the radio boom of the early 1900's, it nonetheless included in its definition of "perform," the retransmission of a radio broadcast by a business establishment, for profit, to its customers; *see also* Hickory Grove Music v. Andrews, 749 F. Supp. 1031,1036 (D. Mont. 1990) (noting Congress' expansive new definition of "perform" under the Copyright Revision Act of 1976). The courts have broadly interpreted the statutory definition of "perform." *Id.*

11. *See* 17 U.S.C. §§ 107-120 (1976); *see, e.g.*, Twentieth Century Music Corporation v. Aiken, 422 U.S. 151, 159-60 (1975) (holding that a small commercial establishment playing the radio on a small, primitive radio was not infringing on the exclusive right of performance).

12. *See* 17 U.S.C. § 110(5) (1999).

13. *See id.; see also* ASCAP, *ASCAP Legislative Matters* (visited Oct. 3, 1999) <http://www.ascap.com/legislative/legis_qa.html>. The unprecedented commercial exemptions severely limit the exclusive right of performance. *Id.* Songwriters will lose millions of dollars in annual revenue. *Id.* This erosion continues as more businesses and restaurants try to push the limits of the new Act. *Id.* The courts may interpret the Fairness in Music Licens-

merly infringing public performances[14] of copyrighted "non-dramatic musical works."[15] Specifically, over seventy percent of restaurant and bar owners previously required to obtain blanket licenses from performing rights organizations[16] to perform a copyrighted song via retransmission of radio broadcasts in their establishments are no longer under such obligation.[17] These newly exempted establishments enjoy unlimited freedom to utilize protected songs to provide atmosphere for their patrons.[18] Such unlicensed commercial uses were prohibited for nearly seventy years under the Copyright Acts of 1909 and 1976 as interpreted by the courts.[19]

This attrition in protection will cost composers and publishers tens of millions of dollars in lost revenue each year[20] and unduly burden the courts with those who will push the envelope of the new "restaurant friendly" laws.[21] Further, the Fairness in Music Licensing Act may vio-

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ing Act broadly, given its apparent intent to vastly expand the "home system" exemption. *Id.*

14. *Compare* 17 U.S.C. § 110(5)(B)(ii) (1999) (expanding exemptions to include restaurants less than 3,750 square feet) *with* 17 U.S.C. § 110(5) (1976) (amended 1998) (limiting exemptions); *see also* 17 U.S.C.A. app. ch.1 § 110 (West Supp. 1976). Under the Copyright Act of 1976, Congress created the first for-profit exemption to the exclusive rights. *Id.* Congress intended for this exemption to protect extremely small businesses with primitive sound systems. *Id.* The Fairness in Music Licensing Act extended this exemption to include extremely large restaurants and abandoned the ideal of protecting small businesses. *Id.*

15. 17 U.S.C. § 102 (1999). "Non-dramatic musical works" is one of the categories protected under current copyright law. *Id.*

16. *See* For discussion of performing rights organizations, see *infra* notes 61-69 and accompanying text.

17. *See* 17 U.S.C. § 110(5) (1999); BMI, *BMI Government Relations: Legislation Q and A* (visited Nov. 19, 1999) <http://www.bmi.com/legislation/info/qanda.asp>; *see also* ASCAP, *Special Legislative Report: Evolution of Music Licensing* (visited Nov. 19, 1999) <http://www.ascap. com/legislative/ legis_points.html>.

18. *See id.*

19. *See* The Copyright Act of 1909, §§ 1-62 (1909), *reprinted in* 8 MELVILLE B. NIMMER, ET AL., NIMMER ON COPYRIGHT app. 6; *see also* 17 U.S.C. § 101-810 (1976); Buck v. Jewell-LaSalle Realty Co., 283 U.S. 191, 195 (1931) (holding that a hotel was required to obtain a license to retransmit a radio broadcast of copyrighted works to its patrons); Hickory Grove Music v. Andrews 749 F. Supp. 1031, 1037 (D. Minn. 1990) (ruling that owner of restaurant who played the radio over loudspeakers in his establishment was infringing on the rights granted copyright owners by the Copyright Act of 1976); Crabshaw Music v. K-Bob's of El Paso, Inc., 744 F. Supp. 763, 767-68 (W.D. Tex. 1990) (rebroadcasting of radio transmissions by restaurant owner throughout establishment was an infringing performance).

20. *See* 144 CONG. REC. E2096 (Oct. 1998) (statement of Rep. Clement) (quoting Congressional Research Service); ASCAP, *ASCAP Legislative Matters* (visited Oct. 3, 1999) <http://www.ascap.com/ legislative/legis_qa.html>.

21. *See, e.g., Andrews*, 749 F. Supp. at 1037. The feud between performing rights organizations and restaurant and bar owners and other businessmen has been bitterly contested in the courts. *Id.; see infra* notes 173-185 and accompanying text. The owners believe that the performing rights organizations are "double dipping," in that they license

late two international treaties dealing with copyright and intellectual property protection.[22] The Act, a direct result of a massive lobbying act on behalf of thirty restaurant and business associations,[23] represents a reversion to nineteenth century protection for twenty-first century songwriters.[24] In yielding under the lobbying pressure, Congress allowed a private business sector to shape foreign policy[25] and has exposed the United States to potential international sanctions under the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention) and the Agreement on Trade Related Aspects of Intellectual

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the radio station and then desire to license a business who plays the radio on its premises where the public can hear it. *Id.* Performing rights organizations assert that, though the businesses it seeks to license are not selling the music being re-transmitted via loudspeaker to customers, the music nevertheless aids in the selling of goods and services of the businesses by providing a more pleasant atmosphere for customers. *Id. See, e.g.*, Crabshaw Music v. K-Bob's of El Paso, Inc., 744 F. Supp. 763, 767-68 (W.D. Tex. 1990). Large amounts of litigation have resulted from the 1976 Copyright Act's express requirement of blanket licenses for such businesses. *See* Rodney Ho, *Compromise Sought for Legislation on Music Copyrights*, WALL ST. J., March 24, 1998, at B2. Songwriters fear the Fairness in Music Licensing Act could lead to more exemptions. *Id.*

22. *See* The Berne Convention for the Protection of Literary and Artistic Works (Paris Text), July 24, 1971, art.11 *bis*, 95 Stat. 1756, 1759, 102 U.N.T.S. 456, 458 [hereinafter Berne Convention]; *see also* Agreement on Trade-Related Aspect of Intellectual Property Rights, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS, 33 I.L.M. 1197 (1994) [hereinafter TRIPS]; 144 CONG. REC. E2096 (October 1998) (statement of Rep. Clement); 144 CONG. REC. S12434 (October 1998) (statement of Sen. Thompson).

23. *See* Matthew Clark, *Fairness in Music Licensing Act of 1997: Will It End The Confusion Surrounding the Homestyle Exemption of the Copyright Act?*, 8 DEPAUL-LCA J. ART & ENT. L. 141,150 (1997); *see* 144 CONG. REC. S12434 (October 1998) (statement of Sen. Thompson) "It became clear in the final days of this Congressional session that in order to obtain copyright term extension and the WIPO implementing legislation, unfair music licensing legislation would have to be included." *Id.*

24. *See generally* The First Copyright Act of the United States § 1-7 (1790), *reprinted in* 8 MELVILLE B. NIMMER, ET AL., NIMMER ON COPYRIGHT app. 7-41; *see also* An Amendatory Act Relating to the Remedies for Unauthorized Public Performance of Dramatic and Musical Compositions § 4966 (1897), *reprinted in* 8 MELVILLE B. NIMMER, ET AL., NIMMER ON COPYRIGHT app. 7-92. The Fairness in Music Licensing Act represents a monumental leap backward in protection of the exclusive right of performance. *Id.* 17 U.S.C. § 110(5) (1999). This is the smallest level of protection since the codification of performance as part of a songwriter's exclusive rights. *Id.*

25. *See* Berne Convention art.11 *bis* (outlining international protection guidelines for member nations; the Fairness in Music Licensing Act violates article 11 *bis)*; *see* Clark, *supra* note 23; *see also* 144 CONG. REC. S12434 (October 1998) (statement of Sen. Thompson) (indicating that other important legislation was being held hostage in an attempt to force through the Fairness in Music Licensing Act, and that the attachment of the Act to important legislation was accomplished by lobbying pressure from business organizations).

Property (TRIPS).[26] Congress must amend the Copyright Act, specifically Section 110, to reflect its original purpose of protecting small business owners.[27]

This comment will explore the history of American copyright protection, including the evolution of statutes, case history, and industry development. After establishing this historical framework, this comment will address the illogical progression evinced by the Fairness in Music Licensing Act, refute arguments advanced by proponents of the legislation, analyze the international ramifications of the Act, examine the motivation behind the restaurant lobby's diligence, and illustrate how songwriters are the innocent victims of the Act's exemptions. Finally, this comment advocates a return to the substance and principles established by Congress in the "home use exemption" as codified in the Copyright Act of 1976.

II. BACKGROUND

DOWNBEAT: THE INCEPTION AND CULTIVATION OF AMERICAN COPYRIGHT PROTECTION

On May 31, 1790, the First Congress passed the initial Copyright Act of the United States of America.[28] Primarily concerned with authors of maps, charts, and books, the act was based on England's Statute of

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26. Berne Convention art.11 *bis*; TRIPS arts. 9, 13; BMI, *BMI Government Relations: Legislative Newsflash, 8-15-99* (visited Nov. 15, 1999) <http://www.bmi.com/legislation/news99/aug1999.asp>.

27. *See* 17 U.S.C.A. app. ch.1 § 110 (West Supp. 1976).

28. The First Copyright Law of the United States of America § 1 (1790), *reprinted in* 8 MELVILLE B. NIMMER, ET AL., NIMMER ON COPYRIGHT app. 7-41.

> SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.* That from and after the passing of this act, the author and authors of any map chart, book or books already printed within these United States, being a citizen or citizens thereof, or resident within the same, his or their executors, administrators or assigns who hath or have not transferred to any other person the copyright of such map, chart, book or books, share or shares thereof; and any other person or persons being a citizen or citizens of these United States, or residents therein, his or their executors, administrators or assigns, who hath or have purchased or legally acquired the copyright of any such map, chart, book or books, in order to print, reprint, publish or vend the same, shall have the sole right and liberty of printing, reprinting, publishing and vending such map, chart, book or books, for the term of fourteen years from the recording of the title in the clerk's office as is herein directed: And that the author and authors of any map, chart, book or books already made and composed, and not printed or published, or that shall hereafter be made and composed, being a citizen or citizens of the se United States, or resident therein, and his or their executors, administrators or assigns, shall have the sole right and liberty of printing, reprinting, publishing and vending such map, chart, book or books for the like term of fourteen years from the time of recording the title thereof in the clerk's office as aforesaid. . . .

Id.

Anne.[29] Congress amended the original Act, adding music to its list of protected works in 1831.[30] On January 6, 1897, the Fifty-fourth Congress amended the Act to include a composer's exclusive right of performance,[31] giving writers civil remedy against infringers[32] and making willful, for profit violations of this right a misdemeanor, punishable by up to one year in prison.[33] Passed during a period of economic and technological explosion in America, all twenty-nine amendments to the original Act exhibit a Congressional intent to expand greatly the protection and scope of the copyright law.[34] This expansion, however, created a

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29. *See generally* 8 Anne ch. 19 (1710) *reprinted in* 8 MELVILLE B. NIMMER, ET AL., NIMMER ON COPYRIGHT app. 7-41; *see* RICHARD ROGERS BOWKER, COPYRIGHT ITS HISTORY AND ITS LAW 3 (1912).

30. *See generally* An Act to Amend the Several Acts Respecting Copyrights (1831), *reprinted in* 8 MELVILLE B. NIMMER, ET AL., NIMMER ON COPYRIGHT app. 7-49.

> *Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled,* [t]hat from and after the passing of this act, any person or persons, being a citizen or citizens of the United States, or resident therein, who shall be the author or authors of any book or books, map, chart, or musical composition, which may be now made or composed, and not printed and published, or shall hereafter be made or composed. . . and the executors, administrators, or legal assigns of such person or persons, shall have the sole right and liberty of printing, reprinting, publishing, and vending such book or books, map, chart, [or] musical composition. . ..

Id.

31. *See* An Amendatory Act Relating to the Remedies for Unauthorized Public Performance of Dramatic and Musical Compositions § 4966 (1897), *reprinted in* 8 MELVILLE B. NIMMER, ET AL., NIMMER ON COPYRIGHT app. 7-92.

32. *See id.*

> Sec. 4966. Any person publicly performing or representing any dramatic or musical composition for which a copyright has been obtained, without the consent of the proprietor of said dramatic or musical composition, or his heirs or assigns, shall be liable for damages therefor, such damages in all cases to be assessed at such sum, not less than one hundred dollars for the first and fifty dollars for every subsequent performance, as to the court shall appear to be just. . . . Any injunction that may be granted upon hearing after notice to the defendant by any circuit court of the United States, or by a judge thereof, restraining and enjoining the performance or representation of any such dramatic or musical composition may be served on the parties against whom such injunction may be granted anywhere in the United States; but the defendants in said action, or any or either of them, may make a motion in any other circuit in which he or they may be engaged in performing or representing said dramatic or musical composition to dissolve or set aside the said injunction upon such reasonable notice to the plaintiff as the circuit court or the judge before whom said motion shall be made. . . on the plaintiff in person or on his attorneys in the action.

Id.

33. *See id.* "If the unlawful performance and representation be willful and for profit, such person or persons shall be guilty of a misdemeanor, and upon conviction be imprisoned for a period not exceeding one year." *Id.*

34. *See* For the text of the original Act and its amendments, see 8 MELVILLE B. NIMMER, ET AL., NIMMER ON COPYRIGHT app. 7. The amendments show Congress' attempts at keeping up with the new technology and providing increased protection for intellectual property. *Id.*

statutory monster.[35] The language of the early Act and its amendments was difficult to understand[36] and created implementation problems for the Copyright Office.[37]

On directive from President Theodore Roosevelt in 1905,[38] Congress began holding conferences, enlisting input from authors, composers, publishers, and photographers,[39] with the ultimate goal of completely overhauling the copyright law.[40] The Copyright Act of 1909, effective March 4, 1909, represented a monumental achievement in copyright protection.[41] Among many other things, the exclusive rights, including the right to perform publicly were codified together, each receiving extensive definition.[42] The 1911 Amendment to the 1909 Act was the last Congres-

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35. *See* STAFF OF SENATE SUBCOMMITTEE ON PATENTS, TRADEMARKS, AND COPYRIGHTS, 86TH CONG., COPYRIGHT LAW REVISION 1 (Comm. Print 1960). President Theodore Roosevelt alludes to the difficulties in interpreting the original Act and its amendments in a letter to Congress calling for a complete revision of the Copyright Act. *Id.*

36. *See* 8 MELVILLE B. NIMMER, ET AL, NIMMER ON COPYRIGHT app. 7 (containing the text of the original Copyright Act and all 29 amendments). *Id.*

37. *See* STAFF OF SENATE SUBCOMMITTEE ON PATENTS, TRADEMARKS, AND COPYRIGHTS, 86TH CONG., COPYRIGHT LAW REVISION 1 (Comm. Print 1960).

> In December 1905, the President transmitted a message to the Congress reading in part as follows:
> 'Our Copyright laws urgently need revision. They are imperfect in definition, confused and inconsistent in expression; they omit provision for many articles which, under modern reproductive processes, are entitled to protection; they impose hardships upon the copyright proprietor which are not essential to the fair protection of the public; they are difficult for the courts to interpret and impossible for the Copyright Office to administer with satisfaction to the public. Attempts to improve them by amendment have been frequent, no less than twelve acts for the purpose having been passed since the Revised Statutes. To perfect them by further amendment seems impractical. A complete revision of them is essential. Such a revision, to meet modern conditions, has been found necessary in Germany, Austria, Sweden, and other foreign countries, and bills embodying it are pending in England and the Australian Colonies. . . . It deserves prompt consideration.

Id.

38. *See id.*

39. *See id.* at 2.

40. *See id.*

41. *See Compare* The Copyright Act of 1909 §§ 1-7 (1909), *reprinted in* 8 MELVILLE B. NIMMER, ET AL., NIMMER ON COPYRIGHT app. 6 (simplifying the language of the Copyright act); *with* the original Act and Amendments, *reprinted in* 8 MELVILLE B. NIMMER, ET AL., NIMMER ON COPYRIGHT app. 6 (evincing the overly verbose and obtuse nature of the old law); *see also* RICHARD ROGERS BOWKER, COPYRIGHT ITS HISTORY AND ITS LAW 3 (1912).

42. *See* The Copyright Act of 1909 § 1, *reprinted in* 8 MELVILLE B. NIMMER, ET AL., NIMMER ON COPYRIGHT app. 6 at 3, 6-5 (footnotes omitted).

> [A]ny person entitled thereto, upon complying with the provisions of this Act, shall have the exclusive right:
> (a) To print, reprint, publish, copy, and vend the copyrighted work;
> (b) To translate the copyrighted work into other languages or dialects, or make any other version thereof. . . to arrange or adapt it if it be a musical work. . .
> (c) To deliver, authorize the delivery of, read, or present the copyrighted work in public for profit if it be a lecture, sermon, address, or similar production. . .

sional action regarding copyright before the advent of radio and television.[43] The technological explosion that followed stretched the 1909 Act to its limits.

B. MUSIC TO COMPOSERS' EARS: THE *JEWELL-LASALLE* HOLDING AND THE MULTIPLE PERFORMANCE DOCTRINE

The Copyright Act of 1909,[44] enacted before the radio and television boom, did not contemplate the changes resulting from the phenomenal growth of the industry.[45] In the benchmark case of *Buck v. Jewell-LaSalle Realty Co.*,[46] the Supreme Court ruled that a hotel's retransmission of received radio broadcasts to its patrons' individual rooms was a "performance"[47] under the 1909 Act.[48] This was a monumental victory for songwriters. The Supreme Court, in viewing the 1909 Act as inclusive of the new technology,[49] prevented the need for amending the Act. Further, because of the wisdom of the Supreme Court, the theory that a commercial retransmission of a broadcast to customers was a perform-

(d) To perform or represent the copyrighted work publicly if it be a drama. . .
(e) To perform the copyrighted work publicly for profit if it be a musical composition; and for the purpose of public performance for profit, and for the purposes set forth in subsection (a) hereof, to make any arrangement or setting of it or of the melody of it in any system of notation or any form of record in which the thought of an author may be recorded and from which it may be read or reproduced: *Provided*, That the provisions of this title, so far as they secure copyright controlling the parts of instruments serving to reproduce mechanically the musical work, shall include only compositions published and copyrighted after July 1, 1909 and shall not include the works of a foreign author or composer unless the foreign state or nation of which such author or composer is a citizen or subject grants, either by treaty, convention, agreement, or law, to citizens of the United States similar rights.
(f) To reproduce and distribute to the public by sale or other transfer of ownership, or by rental, lease, or lending, reproductions of the copyrighted work if it be a sound recording. . . .

Id.

43. *See* Buck v. Jewell-LaSalle Realty Co., 283 U.S. 191, 196 n.2 (1931) (quoting THE RADIO INDUSTRY, HARVARD GRADUATE SCHOOL OF BUSINESS ADMINISTRATION LECTURES, 1927-28, pp. 195-209). "Station KDKA, erected in Pittsburg in 1920, as the pioneer commercial broadcasting station in the world. The latest Amendment of the Copyright Act, which added new classes of copyrights, was that of August 24, 1912." *Id.*

44. *See* The Copyright Act of 1909 §§ 1-62 (1909), *reprinted in* 8 MELVILLE B. NIMMER, NIMMER ON COPYRIGHT app. 6.

45. *See* Twentieth Century Music Corporation v. Aiken, 422 U.S. 151, 157-8 (1975) (questioning whether radio comes within the purview of the 1909 Copyright Act since radio was not developed at the time of its passage); *Jewell-LaSalle*, 283 U.S. at 196.

46. *Jewell-LaSalle*, 283 U.S. at 191.

47. *Id.* at 196. The hotel owned a master receiver that was wired to every public or private room in the hotel. *Id.* Guests of the hotel could listen to a retransmission of a radio broadcast via headphones or loudspeaker in their rooms. *Id.*

48. *See* 17 U.S.C. § 1(e) (1909), *reprinted in* 8 MELVILLE B. NIMMER, NIMMER ON COPYRIGHT app 6-3.

49. *See Jewell-LaSalle*, 283 U.S. at 196-7.

ance[50] became the accepted norm.[51] Had the ruling instead dispelled the notion that such retransmission was a performance, the right of performance might have a completely different interpretation today.[52]

Perhaps the most important facet of the *Jewell-LaSalle* holding is the Court's establishment of what is now known as the "multiple performance doctrine."[53] Before the advent of radio, a single live performance of a song could not generate another licensable performance.[54] Suddenly, through the magic of radio waves, a single broadcast performance could be retransmitted in many locations, creating thousands (today, millions) of potentially infringing performances. The *Jewell-LaSalle* Court firmly established that each of these multiple performances deserves the courts' protection[55] under the copyright laws of the United States.[56] The Court compared the reception and retransmission of a radio broadcast to the playing of a phonograph record, theorizing that, "[t]he modulation of the radio waves in the transmitting apparatus, by the audible sound waves, is comparable to the manner in which the wax phonograph record is impressed by these same waves through the medium of a recording stylus."[57]

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50. *See id.* at 202.

51. *See id.* This was a defining moment for how copyright would be regarded in the modern era. This decision was rendered just after the advent of radio and was the initial authority on the subject of whether the retransmission of radio broadcasts was a performance. The holding shaped the perception of judges, legislators, businessmen, songwriters, and the public regarding the level of participation necessary to constitute a performance.

52. *See id.* Because *Jewell-LaSalle* was the first major case dealing with performance by reception and retransmission of radio signals, the Court's holding instantly legitimized the theory that playing the radio was a performance under the Copyright Act. Similarly, if the Court concluded that the retransmission was not a performance, in subsequent cases, the analysis of "performance" would differ from the current norm.

53. *Jewell-LaSalle*, 283 U.S. at 199-200. Simply stated, this doctrine recognizes that via broadcast signal, the same initial performance generates an infinite number of possible simultaneous performances. *Id.* It is the basis for the majority of the case and statutory law addressing performance of a copyrighted musical work in the twentieth century. *Id.*

54. *See* Twentieth Century Music Corporation v. Aiken, 422 U.S. 151, 157 (1975). Before the existence of technology allowing transmission and retransmission of a performance by some means, live individual performance was the only medium from which to hear a song. *Id.* The single live performance was the only "transmission," and could be heard only in close proximity to the actual performers. *Id.*

55. *See Jewell-LaSalle*, 283 U.S. at 202.

56. *See* 17 U.S.C. §§ 1-62 (1909), *reprinted in* 8 MELVILLE B. NIMMER, NIMMER ON COPYRIGHT app.6.

57. *Jewell-LaSalle*, 283 U.S. at 200.

C. A Really "Big Band": Performing Rights Organizations

This songwriter's exclusive[58] right to perform[59] her works publicly may be transferred[60] and is generally administered by one of the performing rights organizations: the American Society for Composers Authors and Publishers (ASCAP), Broadcast Music Incorporated (BMI) or SESAC.[61] Founded in the early to mid 1900's,[62] performing rights organizations were at first controversial,[63] but have evolved into an accepted and necessary cog in the copyright and entertainment machine.[64] Today, the organizations monitor how many times the songs of their affiliates are broadcast over radio and television[65] and also issue blanket licenses to

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58. *See* 17 U.S.C. § 106 (1999); *see* 17 U.S.C. §§ 107-120 (1999). The "five exclusive rights" is the term used to refer to the rights codified in Section 106; however, they are not completely exclusive. *Id.* They are subject to a few statutory exemptions. *Id.*

59. *See* 17 U.S.C. § 106(4) (1999).

60. *See* 17 U.S.C. § 201(d) (1999).

61. SESAC was formerly known as "The Society of European Stage Authors and Composers," but is now simply known by the word "SESAC." ASCAP and BMI account for the vast majority (over 90%) of all songwriters and publishers in the United States; however, SESAC is becoming more of a player in performing rights administration. *See* SESAC, *Questions and Answers on SESAC and Performance Licensing For Businesses* (visited Nov. 15, 1999) <http://www.sesac.com/sesacq&a.htm>.

62. ASCAP, *ASCAP Essentials* (visited Nov. 15, 1999) <http://www.ascap.com/about/essentials.html>. ASCAP was founded in 1914. *Id.; see also* SESAC, *Questions and Answers on SESAC and Performance Licensing For Businesses* (visited Nov. 15, 1999) <http://www.sesac.com/sesacq&a.htm>. SESAC was established in 1930. *Id.;* BMI, *BMI Background* (visited Nov. 15, 1999) <http://www.bmi.com/about/bmido/backgrounder.asp>. BMI came into existence in 1940. *Id.*

63. *See, e.g.*, Columbia Broadcasting Sys. v. ASCAP, 400 F. Supp. 737 (S.D.N.Y. 1975); Alden-Rochelle v. ASCAP, 80 F. Supp. 888 (S.D.N.Y 1948); Noel L. Hillman, *Intractable Consent: A Legislative Solution to the Problem of the Aging Consent Decrees in United States v. ASCAP and United States v. BMI*, 8 Fordham Intell. Prop. Media & Ent. L.J. 733, 743-745 (1998).

64. *See* ASCAP, *ASCAP Licensing: Frequently Asked Questions About Licensing* (visited Nov. 15, 1999) <http://www.ascap.com/licensing/licensingfaq.html>; *see also* BMI, *General Licensing FAQ* (visited Nov. 15, 1999) <http://www.bmi.com.iama/business/faq/general.asp>; *see also* SESAC, *Questions and Answers on SESAC and Performance Licensing for Businesses* (visited Nov. 15, 1999) <http://www.sesac.com/sesacq&a.htm>. Today, as a general rule, songwriters and publishers in the United States affiliate with a performing rights organization. *Id.* Their clearinghouse function provides songwriters a cost-effective way of licensing the right of performance and allows easier access for broadcasters, businesses, and other entities who would need to secure a performance license. *Id.*

65. *See id.* Every time a song is played on the radio, the performing rights organizations know about it. *Id.* Techniques employed by the performing rights organizations in their effort to monitor performances include "sampling," where actual workers travel to different markets and tape radio broadcasts, and the use of "cue sheets," where every affiliated radio and television station must keep a journal of which songs are played at which times. *Id.; see* SESAC, *MusiCode: The Marriage of Music and Technology* (visited Nov. 15, 1999) <http://www.sesac.com.musi.htm>. SESAC uses sophisticated computer software to aid in tracking performances. *Id.*

concert venues, bars, restaurants, retail stores, and other businesses, granting the non-exclusive right to play via loudspeaker any song contained in the catalog of the organization.[66] The annual rate a business pays for a blanket license can vary dramatically and is dependent upon several factors including the square footage of the establishment, type of business, type of music provided (live, recorded, video), whether a customer is charged for admittance, whether dancing is allowed, and number of times a week music is offered.[67] ASCAP, a non-profit entity, and BMI, a not-for profit entity, direct all monies collected from performance fees, less an 18% operating costs, back to their members.[68] SESAC is structured as a private, for-profit business, but maintains similar cost and payment numbers.[69]

Restaurant and bar owners have feuded bitterly with ASCAP and BMI since their inception,[70] citing the organizations' tactics in issuing blanket licenses as strong-armed and borderline abusive.[71] Further, their opponents argue that ASCAP and BMI violate anti-trust laws.[72] This disdain for performing rights organizations is a major part of the impetus behind the Fairness in Music Licensing Act.[73] The organizations maintain that they are merely administering songwriters' statutory rights[74] and these rights could not be protected by any other

66. *See* ASCAP, *ASCAP Licensing: Frequently Asked Questions About Licensing* (visited Nov. 15, 1999) <http://www.ascap.com/licensing/licensingfaq.html>; *see also* BMI, *General Licensing FAQ* (visited Nov. 15, 1999) <http://www.bmi.com.iama/business/faq/general.asp>. ASCAP and BMI collect monies generated from licensed performances on behalf of their writer and publisher affiliates and issue quarterly payments. *Id.*

67. *See id.*; *see also* Edward R. Silverman, *Paying the Piper eateries and bars are loath to pay licensing fees just for playing music – so they're lobbying congress for relief*, NEWSDAY, Jan 9, 1995, at C01.

68. *See* ASCAP, *ASCAP Licensing: Frequently Asked Questions About Licensing* (visited Nov. 15, 1999) < http://www.ascap.com/licensing/licensingfaq.html>; BMI, *Where Does the Money Go?* (visited Nov. 15, 1999) <http://www.bmi.com/iama/business/faq/money.asp>.

69. *See* SESAC, *Questions and Answers on SESAC and Performance Licensing For Businesses* (visited Nov. 15, 1999) <http://www.sesac.com/sesacq&a.htm>.

70. *See* Hillman, *supra* note 63, at 758-9 (describing a feud between ASCAP and New Jersey Restaurant Association); *see also* Silverman, *supra* note 67.

71. *See id.* One restaurant owner describes ASCAP and BMI as "like a Gestapo." *Id.*

72. *See* Hillman, *supra* note 63, at 758-9.

73. *See, e.g., Music Licensing Practices: Hearings on H.R. 3288 Before the Subcommittee on Intellectual Property of the House Judiciary Committee*, 105th Cong. (Feb. 23, 1994) (statement of Pete Madland on behalf of the Tavern League of Wisconsin). "[Performing rights organizations] squeeze money out of the pockets of small businesses. If the consequences were not so great, this whole thing would be laughable. But unfortunately. . . [b]ig business preys on small business to collect every dime they can because it is legal." *Id.*

74. *See* ASCAP, *ASCAP Licensing: Frequently Asked Questions About Licensing* (visited Oct. 3, 1999) < http://www.ascap.com/licensing/licensingfaq.html>; *see also* BMI, *General Licensing FAQ* (visited Nov. 15, 1999) <http://www.bmi.com/iama/business/faq/

means.[75] In the course of trying to issue blanket licenses and collect fees, performing rights organizations often encounter rude restaurant, bar, and retail managers and owners who try to stall or avoid attempts at collection.[76] These avoidance tactics force the organizations to use ardent methods to secure payment.[77] As a last resort, performing rights organizations will sue a reluctant unlicensed user for infringement.[78] Performing rights organizations, acting on behalf of their songwriter and publisher constituency, have long advocated for strict enforcement of copyright laws,[79] and fiercely opposed the Fairness in Music Licensing Amendment.[80]

D. A SOUR NOTE OR "*AIKEN'S* DEPARTURE"

The *Jewell-LaSalle* holding[81] and the doctrine of multiple performances[82] survived unchallenged for nearly 40 years, until the holding in *Twentieth Century Music Corporation v. Aiken*.[83] There, the Supreme Court effectively overruled *Jewell-LaSalle*,[84] holding that the 1909 Copyright Act[85] did not contemplate nor extend to radio or television retransmission within a business establishment.[86] The business in question, George Aiken's Chicken, was a small fast-food restaurant.[87] Aiken re-

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general.asp>; *see also* SESAC, *Questions and Answers on SESAC and Performance Licensing for Business* (visited Nov. 15, 1999) <http://www.sesac.com/sesacq&a.htm>.

75. *See id.; see* Columbia Broadcasting Sys. v. ASCAP, 400 F. Supp. 737, 741 (S.D.N.Y. 1975) (asserting that performing rights organizations "clearinghouse" function brings copyright users and owners together, an impossibility without the organizations). *Id.*

76. *See* Edward R. Silverman, *SIDEBAR: A Music Cop Hears the Blues*, NEWSDAY, Jan. 9, 1995 at C01. A BMI Licensing agent, discussing her encounters with restaurant owners, said "I get a whole range of responses. Some people pretend they aren't the owners. Some simply tell me to drop dead." *Id.*

77. *See* Silverman, *supra* note 67.

78. *See Questions and Answers on SESAC and Performing Licensing For Businesses* (visited Nov. 15, 1999) <http://www.sesac.com/sesacq&a.htm>.

79. *See* ASCAP, *Special Legislative Report: 1993-Present* (visited Nov. 15, 1999) <http://www.ascap.com/legislative/legis_timeline.html> (providing a timeline detailing ASCAP's opposition to the Fairness in Music Licensing Act).

80. *See* ASCAP, *Legislative Matters Special Legislative Report* (visited Oct. 3, 1999) <http://www.ascap.com/legislative/legislative.html>; *see* Ben Van Houten, *Dinner Music*, RESTAURANT BUSINESS, Nov. 1, 1998, at 21.

81. Buck v. Jewell-LaSalle Realty Co., 283 U.S. 191 (1931).

82. *See id.* at 199.

83. Twentieth Century Music Corp. v. Aiken, 422 U.S. 151 (1975) (challenging the *Jewell-LaSalle* Court's notion that 1909 Copyright Act included the retransmission of radio broadcasts in its definition of "perform.").

84. *Jewell-LaSalle*, 283 U.S. at 191 (1931).

85. 17 U.S.C. §§ 1-62 (1909), *reprinted in* 8 MELVILLE B. NIMMER, NIMMER ON COPYRIGHT app 6.

86. *Aiken*, 442 U.S. at 162.

87. *See id.* at 152.

transmitted radio broadcasts to his customers via loudspeaker.[88] Included in the retransmissions were copyrighted songs for which Aiken had not secured a performance license.[89] The majority in rendering its decision,[90] cited the absence of radio when the Copyright Act of 1909 was contemplated, and narrowly interpreted the definition of "perform" in the 1909 Act.[91]

In his concurring opinion, Justice Blackmun disagreed with the majority's classification of Aiken as merely an "innocent listener,"[92] and cites the installation of four loudspeakers as clearly providing "entertainment and edification [to] his customers."[93] Justice Blackmun further argued that because, in Mr. Aiken's opinion, the unlicensed music added an attractive atmosphere to his restaurant, he was something more than an innocent listener.[94] The majority declined to specifically overrule *Jewell-LaSalle*, but the scope of *Aiken* effectively rendered it obsolete.[95] Fortunately for songwriters, the victory for copyright infringers was short-lived.

E. Congress Waltzes to the Rescue: The Copyright Act of 1976

In response to *Aiken*,[96] Congress began debate on the second major revision to American copyright law.[97] In addition to extending the dura-

88. *See id.* at 152-3.

89. *See id.*

90. *See id.* at 162 (holding that, because the purpose of the 1909 Act was "to prohibit unauthorized performances of copyrighted musical compositions in such places as concert halls, theaters, restaurants, and cabarets," it did not contemplate the radio and television boom that subsequently occurred). *Id.*

91. 17 U.S.C. § 1 (1909) *reprinted in* 8 Melville B. Nimmer, Nimmer on Copyright app. 6-3.

92. *Aiken*, 442 U.S. at 164 (Blackmun, J. concurring).

93. *Aiken*, 442 U.S. at 164-5 (Blackmun, J. concurring).

> In one sense, of course, he was a listener . . . Perhaps his work was made more enjoyable by the soothing and entertaining effects of the music. With this aspect I would have no difficulty. But respondent Aiken installed four loudspeakers in his small shop. This, obviously, was not done for his personal use and contentment. . . .

Id.

94. *See id.*

95. *See id. At 166.*

> For more than 35 years the rule in Jewell-LaSalle was a benchmark in copyright law and was the foundation of a significant portion of the rather elaborate licensing agreements that evolved with the developing media technology. . . . I cannot understand why the Court is so reluctant to do directly what it obviously is doing indirectly, namely, to overrule Jewell-LaSalle.

Id.

96. *Aiken*, 442 U.S. 151.

97. *See* 17 U.S.C. §§ 101-810 (1976); *see* Hickory Grove Music v. Andrews, 749 F. Supp. 1031, 1037 (D. Mont. 1990). "Congress enacted [the Copyright Act of 1976] in direct response to *Aiken*." *Id.*

tion of copyright[98] and eliminating the penalty for improper notice,[99] the Copyright Revision Act of 1976 included an expanded definition of "perform."[100] Because this definition included both direct performances and those accomplished "by means of any device or process,"[101] the 1976 Act legitimized the multiple performance doctrine.[102] Further, in an effort to clarify the circumstances under which a for-profit performance was exempt from the exclusive rights,[103] Congress formulated the "home system" exemption.[104] Originally designed to protect individuals who per-

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98. *See* 17 U.S.C. § 302 (1976) (amended 1998).

> (a) IN GENERAL.—Copyright in a work created on or after January 1, 1978, subsists from its creation and, except as provided by the following subsections, endures for a term consisting of the life of the author and fifty years after the author's death.
>
> (b) JOINT WORKS.—In the case of a joint work prepared by two or more authors who did not work for hire, the copyright endures for a term consisting of life of the last surviving author and fifty years after such last surviving author's death.
>
> (c) ANONYMOUS WORKS, PSEUDONYMOUS WORKS, AND WORKS MADE FOR HIRE.—In the case of an anonymous work, a pseudonymous work, or a work made for hire, the copyright endures for a term of seventy-five years from the year of its first publication, or a term of one hundred years from the year of its creation, which ever expires first. If before the end of such term, the identity of one or more of the authors of an anonymous or pseudonymous work is revealed in the records of a registration made for that work under subsection (a) or (d) of section 408, or in the records provided by this subsection, the copyright in the work endures for the term specified by subsection (a) or (b), based o the life of the author or authors whose identity has been revealed. . . .

Id.

99. *See* The Copyright Act of 1909 § 19 (1909), *reprinted in*, 8 MELVILLE B. NIMMER, NIMMER ON COPYRIGHT app 6. Prior to the Copyright Act of 1976, if the notice of copyright was improper, the work contained therein could become public domain and the author would lose his copyright forever. *Id.* 17 U.S.C. § 401 (1976) (amended 1988). The Copyright Act of 1976 relaxed the stringent notice requirements under the Copyright Act of 1909. *Id.*

100. 17 U.S.C. § 101 (1976). "To 'perform' a work means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible." *Id.*

101. *Id.*

102. Buck v. Jewell-LaSalle Realty Co., 283 U.S. 191, 193-194,198 (1931).

103. *See* 17 U.S.C. § 106 (1976).

104. 17 U.S.C. § 110 (1976) (amended 1998); *see* 17 U.S.C.A. app. ch. 1 § 110 (West Supp. 1976).

> The majority of the 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 [section 101 of this title]. The Committee had adopted the language of section 110(5) [cl. (5) of this section] with an amendment expressly denying the exemption in situations where 'the performance or display is further transmitted beyond the place where the receiving apparatus is located'; in doing so, it accepts the traditional, pre-*Aiken*, interpretation of the Jewell-LaSalle decision, under which public communication by means other than a home receiving

form protected works by merely turning on, "in a public place, an ordinary radio or television,"[105] Congress extended its protection to small businesses,[106] granting them relief from paying blanket license fees under certain limited circumstances.[107] The "outer limit" of this exemption was the fact situation in *Aiken*: a small restaurant with a primitive sound system.[108]

The Copyright Revision Act of 1976[109] also enumerated other performances receiving exemption from the exclusive rights[110] conferred upon songwriters.[111] These exemptions include "fair use,"[112] and uses by libraries,[113] non-profit educational entities,[114] government,[115] and

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set, or further transmission of a broadcast to the public is considered an infringing act.

Under the particular fact situation in the *Aiken* case, assuming a small commercial establishment and the use of a home receiver with four ordinary loudspeakers grouped within a relatively narrow circumference from the set, it is intended that the performances would be exempt under clause (5). However, the Committee considers this fact situation to be the outer limit of the exemption and believes that the line should be drawn at that point. Thus, the clause would exempt small commercial establishments whose proprietors merely bring onto their premises standard radio or television equipment and turn it on for their customers' enjoyment, but it would impose a liability where the proprietor has a commercial 'sound system' installed or converts a standard home receiving apparatus (by augmenting it with sophisticated or extensive amplification equipment) into the equivalent of a commercial sound system.

Id.

105. *See* 17 U.S.C.A. app. ch. 1 § 110 (West Supp. 1976).

106. *See id.*; 17 U.S.C. § 110(5) (1976) (amended 1998).

107. *See id.*

108. Twentieth Century Music Corporation v. Aiken, 422 U.S. 151 (1975).

109. *See* 17 U.S.C. §§ 101-810.

110. *See* 17 U.S.C. § 106.

111. *See* 17 U.S.C. §§ 107-120.

112. 17 U.S.C. § 107.

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

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

Id.

113. *See* 17 U.S.C. § 108 (1976).

churches.[116] A recurring theme throughout these exemptions is the requirement that the use be non-profit or non-commercial in nature.[117] These exemptions have public utility as their common denominator.[118] The historical allowance for such uses and their contrast to purely com-

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(a) Notwithstanding the provisions of section 106, it is not an infringement of copyright for a library or archives, or any of its employees acting within the scope of their employment, to reproduce no more than one copy or phonorecord of a work, or to distribute such copy or phonorecord, under the conditions specified by this section. . . .

Id.

114. *See* 17 U.S.C. § 110(1) (1976).

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

(1) performance or display of a work by instructors or pupils in the course of face-to-face teaching activities of a nonprofit educational institution, in a classroom or similar place devoted to instruction, unless, in the case of a motion picture or other audiovisual work, the performance, or display of individual images, is given by means of a copy that was not lawfully made under this title, and that the person responsible for the performance knew or had reason to believe was not lawfully made. . . .

Id.

115. *See* 17 U.S.C. § 110(2) (1976).

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

(1) performance of a nondramatic literary or musical work or display of a work by or in the course of a transmission, if—

(A) the performance, or display is a regular part of the systematic instructional activities of a governmental body or a nonprofit educational institution; and

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

(C) the transmission is made primarily for—

(i) reception in classrooms or similar places normally devoted to instruction, or

(ii) reception by persons to whom the transmission is directed because their disabilities or other special circumstances prevent their attendance in class rooms or similar places normally devoted to instruction, or

(iii) reception by officers or employees of governmental bodies as a part of their official duties or employment.

Id.

116. *See* 17 U.S.C. § 110(3) (1976). "Performance of a nondramatic literary or musical work or of a dramatico-musical work of a religious nature, or display of a work, in the course of services at a place of worship or other religious assembly." *Id.*

117. *See* 17 U.S.C. §§ 107, 110 (1976); U.S. Songs, Inc. v. Downside Lenox, Inc., 771 F.Supp 1220, 1228 (N.D. Ga. 1991) (discussing the relevant factor in determining whether "fair use" exemption applies).

118. *Cf.* 17 U.S.C. §§ 107, 110 (1976). The nonprofit and noncommercial nature of all exemptions from copyright infringement (prior to the Fairness in Music Licensing Act) suggest that Congress intended for those uses which are in the best interest of the public (i.e. religious, educational, and non-profit uses) to be exempted from paying performance royalties. *Id.*

mercial uses[119] is an important background on which to analyze the illogical progression evidenced by the Fairness in Music Licensing Act.[120]

F. The Courts March to Congressional Beat: Recent Decisions Interpreting the Home Use Exemption

After the Congressional restriction of *Aiken*,[121] and the codification of the new expanded definition of "perform,"[122] the courts' straight-forward application of the text and spirit of the new law created a concrete test for the only for-profit exemption to the exclusive rights.[123] Congress spoke clearly on its intent regarding the home system exemption,[124] and the courts, after an early transition period[125] applied this intent uniformly.[126] In *Hickory Grove Music v. Andrews,* the court outlined the three-part test used to determine if the alleged infringer qualifies as exempt from paying blanket license fees under the home system exemption.[127] There, the establishment was a small restaurant[128] with a low quality sound system.[129] The defendants, for the enjoyment of their patrons, regularly performed copyrighted songs via retransmission of radio broadcasts, but refused to enter into any type of licensing agreement with ASCAP for the performances.[130] The defense maintained that the retransmission was not a "public performance" under the Copyright Revision Act of 1976[131] and cited the "home system defense."[132] The court

119. *Compare* 17 U.S.C. §§ 107, 110 (1976) (exempting non-profit and non-commercial uses of copyrights from the exclusive rights) *with* 17 U.S.C. § 110(5) (1998) (allowing exemptions for commercial, for-profit uses).

120. *See id.* The Fairness in Music Licensing Act abandons the spirit of the law as evidenced by the public utility nature of previous exemptions. *Id.*

121. Twentieth Century Music Corp. v. Aiken, 422 U.S. 151 (1975).

122. 17 U.S.C. § 101 (1976).

123. *See* Hickory Grove Music v. Andrews, 749 F. Supp. 1031, 1036 (D. Mont. 1990).

124. 17 U.S.C.A. app. ch. 1 §110 (West Supp. 1999).

125. *See* Springsteen v. Plaza Roller Dome, Inc., 602 F.Supp. 1113 (M.D.N.C. 1985). Earlier decisions did not reflect the current conservative judicial climate. (holding that a 7,500 square-foot miniature golf course, producing only $4,000 in revenue each year was exempt from paying performance royalties); *see also Andrews*, 749 F. Supp. at 1039 n. 2 (discussing the irrelevance of the *Springsteen* holding).

126. *See* Crabshaw Music v. K-Bob's of El Paso, Inc., 744 F. Supp 763 (W.D. Tex. 1990); *see, e.g., Andrews*, 749 F. Supp. at 1033

127. *See Andrews*, 749 F. Supp. at 1037.

128. *See id.* at 1034. The restaurant, George Henry's, had a gross seating area of 1,192 feet and the seating capacity is 120 people. *Id.*

129. *See id.* Consisting of a receiver, amplifier, cassette deck, and five speakers installed in the ceiling, the sound system was originally installed for a public address system and was later converted to play music. *Id.* Ironically, the fact that the sound was not of a decent quality and barely audible was of no consequence to the court. *Id.* at 1038.

130. *See id.* at 1034.

131. 17 U.S.C. § 101 (1976).

132. *Andrews*, 749 F. Supp. at 1034-5.

rejected the defendants' notion that the retransmission of a radio broadcast was not a "public performance" as defined in the statute[133] and applied a three-part test in determining if the establishment qualified under the home system exemption.[134] The court weighed the size and level of sophistication of the audio system, whether the performances were "further transmitted" to the public, and the size of the establishment. The "outer limits" of the home system exemption, evident from congressional comment[135] about the then new Section 110[136] and its relationship to *Aiken*,[137] did not include the defendants' situation, and the plaintiffs ultimately prevailed.[138]

In *Crabshaw Music v. K-Bob's of El Paso, Inc.*,[139] a factually similar case to *Andrews*,[140] the court ruled that a sound system consisting of eleven speakers and a commercial receiver installed in a large restaurant[141] did not fall under the home system exemption.[142] The defense relied on *Aiken*[143] and its pre-1976 definition of "perform,"[144] but the court's ruling, citing the clear congressional intent in passing the Copyright Revision Act of 1976,[145] further entrenched the validity of the extremely narrow exemption carved out for commercial uses of protected songs.[146]

The *Andrews* and *Crabshaw Music* decisions evinced a movement by the courts toward the increased protection for songwriters against infringement. The uncertainty created by earlier isolated decisions[147] interpreting the home system exemption was replaced by a concrete test affording greater deference to congressional intent.[148] Congress' affirm-

133. 17 U.S.C. § 101 (1976).

134. *See Andrews*, 749 F. Supp. at 1037-38.

135. H. Conf. Rep. No. 94-1733, 94th Cong., 2d Sess. at 75, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 5659, 5810, 5816.

136. 17 U.S.C. § 110(5) (1976) (amended 1998).

137. 17 U.S.C.A. app. ch. 1 § 110 (West Supp. 1999).

138. *See Andrews*, 749 F. Supp. at 1040.

139. Crabshaw Music v. K-Bob's of El Paso, Inc., 744 F. Supp 763 (W.D. Tex. 1990).

140. *Andrews*, 749 F. Supp. at 1040.

141. *See Crabshaw Music*, 744 F. Supp at 767. K-Bob's had 7000 square feet of dining area and grossed between $800,000 and $900,000 annually. *Id.*

142. *See* 17 U.S.C. § 110(5) (1976) (amended 1998).

143. *Aiken*, 442 U.S. at 162.

144. Copyright Act of 1909 § 1(e) (1909), *reprinted in* 8 MELVILLE B. NIMMER, ET AL., NIMMER ON COPYRIGHT app. 6-4.

145. *See Crabshaw Music*, 744 F. Supp. at 766.

146. *See* 17 U.S.C. §§ 107, 110 (1976).

147. *See* Springsteen v. Plaza Roller Dome, Inc., 602 F.Supp. 1113 (M.D.N.C. 1985); *see also* Hickory Grove Music v. Andrews, 749 F. Supp. 1031, 1039 n. 2 (D. Mont. 1990). "[D]ecisions since 1985 tend to be much more conservative than the court's decision in *Springsteen*. *Id.* *Springsteen* now stands as an exceptional case, not as the norm." *Id.*

148. *Andrews*, 749 F. Supp. at 1037.

ative attempt to limit for-profit exemptions required the courts to apply strictly the test for application of the home system exemption. Since the discrepancies of earlier holdings regarding the exemption,[149] the courts, with one exception,[150] have applied uniform standards[151] in judging whether a commercial retransmission of a radio broadcast falls under the home use exemption of Section 110.[152] This diminutive exemption under the 1976 Act[153] was the first and only for-profit allowance in the history of American copyright law.[154] Intended to prevent innocent infringement and protect extremely small businesses with primitive sound equipment,[155] it fits logically within the spirit of the statutory and case law.[156]

III. ANALYSIS

A. More Depressing Than Country Music: The Fairness in Music Licensing Act

On January 25, 1999, the Fairness in Music Licensing Act,[157] effectively ended over one hundred years of protection from the commercial exploitation of a copyrighted song without remuneration to the songwriter.[158] The Act amends Section 110(5) of the Copyright Act,[159] known as the "home system exemption," to include restaurants nearly four times the size of the largest restaurant previously exempted.[160]

149. *See, e.g., Springsteen*, 602 F. Supp. 1113.

150. *See* Broadcast Music, Inc. v. Claire's Boutiques, Inc. 949 F.2d 1482, 1489-90 (7th Cir. 1991) (holding that sound system size must be judged on a per-store basis and [that the aggregate total of sound equipment for an entire corporation was not pertinent].

151. *See Andrews*, 749 F. Supp. at 1037.

152. *See* 17 U.S.C. § 110(5) (1976) (amended 1998).

153. *See id.*

154. *See* Leon E. Seltzer, Exemptions and Fair Use in Copyright The Exclusive Rights Tensions in the 1976 Copyright Act 12 (1978). "The Copyright of 1909 [exempted non-profit performances] of a musical or non-dramatic literary work. . . . All other exceptions to copyright controls were governed by the judicial doctrine of fair use. . . ."

155. *See Andrews*, 749 F. Supp. at 1037.

156. *See, e.g., Andrews*, 749 F. Supp. at 1037.

157. *See* 17 U.S.C. § 110(5) (1999).

158. *See* An Amendatory Act Relating to the Remedies for Unauthorized Public Performance of Dramatic and Musical Compositions §4966 (1897), *reprinted in* 8 Melville B. Nimmer, Nimmer on Copyright app. 7-92. The right of public performance was first recognized in 1891. *Id.*

159. 17 U.S.C. § 110(5) (1976).

160. 17 U.S.C. § 110(5) (1999).

> 5(A) except as provided in subparagraph (B), communication of a transmission embodying a performance or display of a work by the public reception of the transmission on a single receiving apparatus of a kind commonly used in homes, unless—
> (A)[1] a direct charge is made to see or hear the transmission; or
> (B)[1] the transmission thus received is further transmitted to the public;

Seventy percent of bars and restaurants formerly required to pay blanket licensing fees are allowed, free of charge and for the enjoyment of their customers, to perform copyrighted songs via retransmission of ra-

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

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

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

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

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

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

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

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

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

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

Id.

dio and television broadcasts.[161] Viewed in the context of Section 110 of the Copyright Revision Act of 1976[162] and the tendency toward expansion of copyright protection,[163] the Fairness in Music Licensing Act exhibits a complete departure from the principles established throughout over two hundred years of American copyright protection.[164]

Notwithstanding the case and statutory history, the Fairness in Music Licensing Act expanded commercial exemption to unprecedented dimensions. All restaurants and bars smaller than 3,750 gross square feet[165] are automatically exempted from paying performance royalties associated with the retransmission of radio and television broadcasts containing copyrighted songs. Further, any restaurant or bar, regardless of size, could be exempt if their sound or audiovisual system conforms to a few criteria. With the current rate of audio and video technology, conforming to these criteria is not difficult. Undoubtedly, establishments who do not fall under this exemption today will modify their equipment to comply with the exemption. This presents a scenario where nearly all restaurants and bars could enjoy unlimited freedom to exploit copyrighted works for commercial gain without remuneration to the songwriter.

All of the exemptions to the exclusive rights prior to the Fairness in Music Licensing Act shared a common theme of public utility.[166] Even the for-profit nature of the home system exemption under the 1976 Act,[167] retained the honorable intention of protecting small businesses.[168] Ironically, today, most songwriters are smaller business people than many of the restaurant owners who are exempted from paying licensing fees by the Fairness in Music Licensing Act.[169] Under the new

161. *See* 144 CONG. REC. E2096 (October 1998) (statement of Rep. Clement) (quoting Congressional Research Service).

162. 17 U.S.C. § 110 (1976) (amended 1998).

163. *See* The First Copyright Law of the United States, § 1-7 (1790), *reprinted in* 8 MELVILLE B. NIMMER, ET AL., NIMMER ON COPYRIGHT app. 7-41. The first Act, protecting books, maps, and charts, was extremely limited in scope. *Id. See, e.g.*, An Act to Amend the Several Acts Respecting Copyrights, § 1-3 (1831), *reprinted in* 8 MELVILLE B. NIMMER, ET AL., NIMMER ON COPYRIGHT app. 7-49. After numerous amendments, its scope expanded. *See also* Copyright Act of 1909, § 1-32 (1909), *reprinted in* 8 MELVILLE B. NIMMER, ET AL., NIMMER ON COPYRIGHT app. 6. With the passing of the Copyright Act of 1909, the rights and scope were broadened further. *Id. See also* 17 U.S.C. § 101-810 (1976). Finally, in 1976, the 5 exclusive rights took shape and the result prior to 1999 was comprehensive protection. *Id.*

164. *See id.*

165. *See* 17 U.S.C. § 110(5)(B)(ii) (1999).

166. *See* 17 U.S.C. §§ 107, 110 (1976).

167. 17 U.S.C. § 110(5) (1976) (amended 1998).

168. *See* 17 U.S.C.A. app. ch. 1 § 110 (West Supp. 1976).

169. 144 CONG. REC. S12434 (October 1998) (statement of Sen. Thompson). "The exemptions are too generous, as they go well beyond the interest of small establishments. In

Section 110,[170] with a few minor alterations to its sound system, K-Bob's, the mammoth restaurant in *Crabshaw Music*[171] would be exempt from paying blanket license fees for the performance of copyrighted songs.[172] Is this Congress' idea of protecting small businesses?

B. "PLAY IT AGAIN": THE MULTIPLE PERFORMANCE DOCTRINE AND THE "DOUBLE-DIPPING" MISCONCEPTION

One argument advanced by proponents of the new legislation centers around so-called "double dipping," or the multiple licensing of the same performance.[173] For example, when a commercial radio station broadcasts the performances of copyrighted songs, it has paid one of the performing rights organizations for the right to play each particular song. A business establishment receives the broadcast of a song and retransmits it to its patrons; for this performance, the establishment must pay a licensing fee.[174] While the proponents of the new legislation consider the second license superfluous and a multiple payment for the same performance,[175] their analysis is misguided and contrary to eighty years of statutory and case precedent.[176]

The focus should not be on the single performance itself, rather the emphasis must be placed on the commercial gain received for the transmission and retransmission of the performance. If a business performs a copyrighted musical work via retransmission of a radio or television broadcast, it does so to provide a certain atmosphere for its patrons.[177]

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fact, the vast majority of songwriters are smaller business people than many of the establishments that will be exempted from paying royalties by this bill." *Id.*

170. 17 U.S.C. § 110(5) (A) (1999).

171. Crabshaw Music v. K-Bob's of El Paso, Inc., 744 F. Supp 763, 766 (W.D. Tex. 1990).

172. *See* 17 U.S.C. § 110 (1999); *see also Crabshaw Music*, 744 F. Supp. at 766.

173. *See* Matthew Clark, *Fairness in Music Licensing Act of 1997: Will It End The Confusion Surrounding the Homestyle Exemption of the Copyright Act?*, 8 Depaul-LCA J. Art & Ent. L. 141,150 (1997); *see also Music to Their Ears*, RESTAURANTS AND INSTITUTIONS, Dec. 1, 1998, at 20; *see also* Silverman, *supra* note 67.

174. *See* ASCAP, *ASCAP Licensing: Frequently Asked Questions About Licensing* (visited Nov. 15, 1999) < http://www.ascap.com/licensing/licensingfaq.html>; *see also* BMI, *General Licensing FAQ* (visited Nov. 15, 1999) <http://www.bmi.com/iama/business/faq/general.asp>.

175. *See* Clark, *supra* note 173.

176. *See generally* 17 U.S.C.A. app. ch. 1 § 110 (West Supp. 1999); *see, e.g.*, Buck v. Jewell-LaSalle Realty Co., 283 U.S. 191 (1931); *see also* Hickory Grove Music v. Andrews 749 F.Supp. 1031, 1037 (D. Mont. 1990). Since Jewell-LaSalle, the case history (with one exception) overwhelmingly supports the doctrine of multiple performances. *Id.* The one exception, *Aiken*, was struck down when Congress enacted the Copyright Act of 1976. *Id.*

177. *See* Susan Reda, *Targeted Store Music Programs Strengthen Ties between Sounds and Sales*, STORES, Oct. 1998, at 54-56; *see also* Andrea Petersen, *Restaurants Bring In da Noise to Keep Out da Nerds*, WALL ST. J., Dec. 30, 1997, at B1; Julie Miller, *Industry Fights to Modify Music Monopoly*, HOTEL AND MOTEL MANAGEMENT, May 19, 1997, at 29. Restaurant owners deny the fact that music is directly linked to increased sales; however, the

The atmosphere is designed to keep them in the establishment and spending money.[178] This performance is as much a part of the "feel"[179] and décor of a restaurant as the paint on the walls, architecture, artwork, food, chairs, and table linens are, yet the owners don't wish to pay for it.[180] Just as the maker of every material used to construct the interior of a restaurant should be paid for their labor, so should the songwriter, whose craft can provide an ambiance ranging from raucous to romantic.

C. INTERNATIONAL "HARMONY" THREATENED: VIOLATION OF TRIPS AND THE BERNE CONVENTION

On March 1, 1989, the United States became a member nation of the Berne Convention for the Protection of Artistic and Literary Works (Berne Convention).[181] More recently, the United States entered into the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS),[182] which established the World Trade Organization (WTO)[183] as the governing body for international copyright disputes, and set guidelines for all member countries regarding copyright,[184] trademark,[185] and patent protection.[186] The Fairness in Music Licensing Act may violate both of these agreements,[187] creating a potentially embarrassing situation and calling our status as a world leader in copyright

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trend in marketing is toward including music in the planning of environment and the total sensory package presented by retailers, restaurants, and hotels. *Id.* This undermines the claims that businesses should not pay for music because it is not a factor in the success and profitability of an establishment. *Id.*

178. *See* 144 CONG. REC. S12434 (October 1998) (statement of Sen. Thompson); Peterson, *supra* note 177. Research shows that the pace of music played in an eating establishment is directly proportional to the rate of consumption by the patrons. *Id.*

179. *See* Jack Hayes, *Can the 'Feel' of a Restaurant be as Important as Its Food?*, NATION'S RESTAURANT NEWS, Feb. 24, 1997, at 82.

180. *See* Rodney Ho, *Compromise Sought for Legislation on Music Copyrights*, WALL ST. J., March 24, 1998, at B2. "Stephen Palmer, owner of Palmer Place, a casual dining restaurant in LaGrange, Ill., maintains that, 'I don't attract customers into my restaurant because of music.'" *Id.*

181. The Berne Convention art.11 *bis*.

182. TRIPS arts. 9, 13; For background information on the TRIPS Agreement, *see generally* THOMAS PLETSCHER, INTERNATIONAL CHAMBER OF COMMERCE, INTELLECTUAL PROPERTY AND INTERNATIONAL TRADE A GUIDE TO THE URUGUAY ROUNDTABLE TRIPS AGREEMENT (1996).

183. *Id.* at 74. The World Trade Organization is the governing body that will preside over any disagreement under the Berne Convention and TRIPS agreements. *Id.*

184. *See* TRIPS art. 9-1.

185. *See* TRIPS arts. 15, 16.

186. *See* TRIPS arts. 27, 28.

187. *See* Berne Convention art.11 *bis*; *see also* TRIPS arts. 9, 13.

protection into serious question.[188]

When the United States joined the Berne Convention, it represented "a major step toward harmonization [of international copyright protection]."[189] The potential conflict with the Berne Convention arises from Articles 11 and 11 bis which confer upon composers of musical works the exclusive right to control public performances of their songs and the broadcasting and retransmitting of broadcast performances.[190] On its face, the Act is in direct conflict with these articles.[191] The new Section 110 permits the vast majority of restaurants and bars in the United

188. *See* 144 CONG. REC. E2096 (October 1998) (statement of Rep. Clement). "One or more of our trading partners will file a complaint in the World Trade Organization. . . . 'The United States will lose, and we will be presented with a series of unfortunate options: ignore the WTO, incur sanctions, or modify our law. All will be contentious and difficult.'" *Id.*

189. *See* PLETSCHER, *supra* note 182, at 22.

190. Berne Convention arts. 11, 11 *bis*.

Article 11

(1) Authors of dramatic, dramatico-musical and musical works shall enjoy the exclusive right of authorizing:
   (i) the public performance of their works, including such public performance by any means or process;
   (ii) any communication to the public of the performance of their works.
(2) Authors of dramatic, dramatico-musical works shall enjoy, during the full term of their rights in the original works, the same rights with respect to translations thereof.

Article 11 *bis*

(1) Authors of literary and artistic works shall enjoy the exclusive right of authorizing:
   (i) the broadcasting of their works or the communication thereof to the public by any other means of wireless diffusion of signs, sounds, or images;
   (ii) any communication to the public by wire or by rebroadcasting of the broadcast of the work, when this communication is made by an organization other than the original one;
   (iii) the public communication by loudspeaker or any other analagous instrument transmitting, by signs, sounds or images, the broadcast of the work.
(2) It shall be a matter for legislation in the countries of the Union to determine the conditions under which the rights mentioned in the preceding paragraph may be exercised, but these conditions shall apply only in the countries where they have been prescribed. They shall not in any circumstances be prejudicial to the moral rights of the author, nor to his right to obtain equitable remuneration which, in the absence of this agreement, shall be fixed by competent authority.
(3) In the absence of any contrary stipulation, permission granted in accordance with paragraph (1) of this article shall not imply permission to record, by means of instruments recording sounds or images, the work broadcast. It shall, however, be a matter for legislation in the countries of the Union to determine the regulations for ephemeral recordings made by a broadcasting organization by means of its own facilities and used for its own broadcasts. The preservation of these recordings in official archives may, on the ground, of their exceptional documentary character, be authorized by such legislation.

Id.

191. *Compare* 17 U.S.C. § 110(5) (1999) (allowing commercial exemptions to the exclusive rights, thus affecting the authors exclusive right to perform and license broadcast per-

States unlimited freedom to retransmit radio and television broadcasts of copyrighted songs without compensating the songwriter.[192] This broadened exemption prevents composers from exercising exclusive control over the performance, broadcast, and retransmission of their musical works and clearly encroaches on the rights guaranteed by the Berne Convention.[193] The Berne Convention does allow member countries[194] to make exemptions to the exclusive rights,[195] provided that the exemptions do not unreasonably damage the rights of the author.[196] The Fairness in Music Licensing Act will cost American songwriters tens of millions of dollars in revenue annually[197] and foreign songwriters can expect a similar annual income reduction. This loss evinces unreasonable damage to the exclusive rights conferred upon foreign songwriters by the Berne Convention,[198] and offers further evidence that, because of the Fairness in Music Licensing Act, the United States is no longer complying with its international obligations.[199]

The TRIPS agreement was a significant accomplishment for the international protection of intellectual property.[200] The Berne Convention is still regarded as the benchmark international agreement; however, it is insufficient in providing for dispute resolution and actual enforcement of the rights it grants.[201] The TRIPS Agreement, by invoking the jurisdiction of the WTO,[202] provides a concrete dispute settlement process that yields enforceable decisions.[203]

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formances); *with* Berne Convention arts. 11, 11 *bis* (requiring that member nations not interfere with the author's right of performance).

192. *See* 17 U.S.C. § 110(5) (1999); *see also* 144 CONG. REC. E2096 (October 1998) (statement of Rep. Clement); *see also* ASCAP, *Legislative Matters Special Legislative Report* (visited Nov. 15, 1999) <http://www.ascap.com/legislative/legislative.html>.

193. *See* 17 U.S.C. § 110(5) (1999); *see also* Berne Convention art. 11 *bis*.

194. See WORLD INTELLECTUAL PROPERTY ORGANIZATION [hereinafter WIPO], *Contracting Parties of Treaties Administered by the WIPO: Berne Convention for the Protection of Literary and Artistic Works* (visited Nov. 7, 1999) <http://www.wipo.org/eng/ratific/e-berne.htm>. For a list of current signatories to the Berne Convention.

195. *See* Berne Convention arts. 1-20.

196. *See* Berne Convention art. 11.

197. *See* 144 CONG. REC. E2096 (October 1998) (statement of Rep. Clement); ASCAP, *Legislative Matters Special Legislative Report* (visited Nov. 15, 1999) <http://www.ascap.com/legislative/legislative.html>.

198. *See* Berne Convention arts. 1-20.

199. *See* 17 U.S.C. § 110(5) (1998); 144 CONG. REC. E2096 (October 1998) (statement of Rep. Clement); ASCAP, *Legislative Matters Special Legislative Report* (visited Nov. 15, 1999) <http://www.ascap.com/legislative/legislative.html>.

200. *See generally* PLETSCHER, *supra* note 182.

201. *See id.*

202. TRIPS art. 23. Under the TRIPS agreement, member countries commit to the use of the WTO rules and procedures. *Id.*

203. *See* PLETSCHER, *supra* note 182 at 75. For background information on TRIPS and the WTO, *see generally*, WTO, *Intellectual Property Page Index* (visited Nov. 15, 1999)

Regarding copyright law, TRIPS requires member countries[204] to allow exemptions to the exclusive rights[205] only in certain special situations.[206] Article 13 of the TRIPS Agreement provides that where exemptions to the exclusive rights are made available in member countries, the general principles of the Berne Convention shall be applied.[207] Specifically, exemptions must not interfere with a creator's right to exploit her work for commercial gain nor conflict with her legitimate interests.[208] Further, the TRIPS agreement requires member nations to comply with Articles 1 through 20 of the Berne Convention.[209] Thus, if a country violates the Berne Convention, it also violates the TRIPS Agreement. The Fairness in Music Licensing Act, by exempting seventy percent of eating and drinking establishments from paying to perform copyrighted music via retransmission of radio or television broadcasts,[210] violates both the spirit and text of the TRIPS agreement.[211] A composer's "legitimate interests"[212] are not served through such a broad exemption. Further, the exemption circumvents the composer's exclusive right of exploitation guaranteed by the Berne Convention and recognized by the TRIPS Agreement.[213]

Under TRIPS, a member country may file a complaint in the WTO against another member for violations of the agreement.[214] The complaint is directed to the Dispute Settlement Body (DSB), an entity within the WTO who then establishes a panel consisting of three to five repre-

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<http://www.wto.org/wto/intellec/intell2.htm>. Located in Geneva, Switzerland, the WTO utilizes dispute settlement procedures established by the General Agreement on Tariffs and Trade. *Id.*

204. For a list of signatories to the TRIPS Agreement, *see* WTO, *Organization Members* (visited Nov. 15, 1999) <http://www.wto.org/wto/about/organsn6.htm>.

205. *See* TRIPS art. 9.1; *see also* Berne Convention arts. 1-20.

206. TRIPS art. 13. "Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder." *Id.*

207. *See id.*

208. *See id.*

209. TRIPS art. 9.1.

210. *See* 17 U.S.C. § 110(5) (1998); 144 CONG. REC. E2096 (October 1998) (statement of Rep. Clement); ASCAP, *Legislative Matters Special Legislative Report* (visited Nov. 15, 1999) <http://www.ascap.com/legislative/legislative.html>.

211. TRIPS art. 9.1

212. TRIPS art. 13.

213. Berne Convention arts. 11, 11 *bis*; TRIPS art. 9.1; *see* 144 CONG. REC. E2096 (October 1998) (statement of Rep. Clement). "As the Secretary of Commerce, the Honorable William Daley so aptly observed, '[W]e know that our trading partners will claim that [the Fairness in Music Licensing Act] is an overly broad exception that violates or obligations under the Berne Convention for the Protection of Artistic and Literary Works and the Agreement on the Trade-Related Aspects of Intellectual Property."

214. TRIPS art. 9.1; PLETSCHER, *supra* note 182, at 75; *see* WTO, *Intellectual Property Page Index* (visited Nov. 15, 1999) <http://www.wto.org/wto/intellec/intell2.htm>.

sentatives of member nations not party to the dispute.[215] After a fact-finding process,[216] the panel issues its report to the DSB.[217] The alleged violating country is allowed one appeal from the findings of the panel.[218] The DSB will adopt the final report and can instruct the violating country to comply with the agreement and impose sanctions in the event of continued non-compliance.[219]

Unfortunately, the United States will be among the first to experience the WTO dispute resolution process. On May 25, 1999, European TRIPS member nations[220] brought an action in the WTO against the United States, claiming that the Fairness in Music Licensing Act is in direct violation of the TRIPS agreement and its adoption of the Berne Convention's protection of copyrighted songs.[221] The United States will likely lose this action, and be forced to choose between ignoring the WTO, accepting sanctions, and removing the broadened exemption.[222] In passing the Fairness in Music Licensing Act,[223] Congress allowed special interest groups to influence and jeopardize not only the protection afforded American copyright owners, but the protection of foreign copyright owners as well.[224] Their influence, based solely on greed and revenge,[225] may result in sanctions from member nations of the Berne Convention and TRIPS Agreement and cause substantial embarrassment to the United States, a former world leader in copyright protec-

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215. *Id.*

216. *See id.*

217. *See id.*

218. *See id.*

219. *See id.*; *see also* 144 CONG. REC. E2096 (October 1998) (statement of Rep. Clement).

220. *Europe Upset U.S. Bars Can Play Songs For Free*, REUTERS, May 26, 1999. The European Union initiated the action; however, Australia, Switzerland, and Japan reserve the right to join later. *Id.*

221. *Id.*; BMI, *BMI Government Relations: Legislative Newsflash, 8-15-99* (visited Nov. 15, 1999) <http://www.bmi.com/legislation/news99/aug1999.asp>.

222. 144 CONG. REC. E2096 (October 1998) (statement of Rep. Clement).

223. *See* 17 U.S.C. § 110(5) (1999).

224. *See* 17 U.S.C. § 110(5) (1999); *see Music Licensing: Hearings on H.R. 789 Before the Subcommittee on Courts and Intellectual Property of the House Judiciary Committee*, 105th Cong. (July 17, 1997) (statement of Peter Kilgore, on behalf of the National Restaurant Association). The National Restaurant Association represents nearly 33,000 companies with 175,000 stores. *Id.; see* REUTERS, *supra* note 220. The European Community is angry over the Fairness in Music Licensing Act. *Id.*

225. *See Music Licensing Practices: Hearings on H.R. 789 Before the House Small Business Committee*, 105th Cong. (May. 8, 1996) (statement of Pat Alger, songwriter, on behalf of the American Society of Composers, Authors, and Publishers). "The average cost to a restaurant for the right to use my music and the music of all my fellow members of ASCAP is $1.58 a day. Indeed, 80% of ASCAP's licensees pay less than $1.10 a day. Some burden!" *Id.*; *see, e.g., supra* note 73. Restaurant owners repeatedly express disdain for the performing rights organizations. *Id.*

tion.[226] According to Secretary of Commerce William Daley, the Fairness in Music Licensing Act's changes to Section 110 make losing an action under our international copyright treaties a virtual certainty and will result in a "contentious and difficult" situation for the United States.[227] The TRIPS agreement has the potential to enrich international business; however, "its benefits will only be reaped if its provisions are implemented both in substance and in spirit by the member countries."[228] Clearly, Congress has ignored the substance and abandoned the spirit of the TRIPS Agreement, creating an unfortunate multinational dispute.[229]

D. Lobbying on a "Major Scale"

The Fairness in Music Licensing Act's unfair exemptions are the result of a "compromise" between songwriter and hospitality industry advocates.[230] The original proposed amendment, introduced by Senators Strom Thurmond and Jesse Helms in February of 1997, sought to eliminate entirely the multiple performance doctrine established in the *Jewell-LaSalle* holding.[231] Throughout the debate surrounding the Act, the Restaurant lobby expressed sympathy toward the plight of the songwriter, and restaurant owners claimed to "support musicians making money off their music";[232] however, their actions contradicted this apparently sympathetic attitude.[233] The restaurant industry overwhelmingly favored the original version of the Act, which sought to eliminate entirely the multiple performance doctrine.[234] Examination of the record yields insight into the true motivation behind the restaurant lobby's push for music licensing legislation.[235]

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226. *See* 144 Cong. Rec. E2096 (October 1998) (statement of Rep. Clement).

227. *Id.*

228. Pletscher, *supra* note 182, at 79.

229. *See supra* note 225.

230. Ho, *supra* note 180; *see also* ASCAP, *Special Legislative Report: Evolution of Music Licensing* (visited Nov. 15, 1999) <http://www.ascap.com/legislative/legis_points.html>.

231. Buck v. Jewell-LaSalle Realty Co. 283 U.S. 191, 201 (1931).

232. Ho, *supra* note 180.

233. *See, e.g.,* Silverman, *supra* note 76. "Undeterred by excuses, lies, or hostility, [Carol Alessi, a BMI licensing agent] regularly returns to establishments that ignore her repeated entreaties. . . ." *Id.*

234. *See* Silverman, *supra* note 67. According to Scott Wexler of the United Hotel and Tavern Association, "[Music licensing legislation] is the most important issue to our members." *Id.* The Association represents 5,000 establishments in New York State alone. *Id.*

235. *See supra* note 73; *Music Licensing Practices: Hearings on H.R. 3288 Before the Subcommittee on Intellectual Property of the House Judiciary Committee*, 105th Cong. (Feb. 23, 1994) (statement of John Deion, owner of the Last Call Saloon in Providence, RI). "As it stands, the law from my perspective appears extremely one-sided in favor of the music licensing organizations. . . . The music licensing organizations know this and treat us small business owners with a great degree of impunity." *Id.*

The hospitality industry claims that music is not a factor in the success of its businesses.[236] Because of the difficulty in defining, with any degree of certainty, the exact link between sales and music, their assertions are difficult to refute.[237] Nevertheless, the fact that the industry is paying ever-increasing attention to the role of music in marketing strategies suggests that a correlation does exist.[238] Today, theme restaurants are quite common.[239] Their musical selection is as important to the "feel" of the restaurant as the architecture, decorations, and food.[240] Furthermore, scientific research indicates that the speed of the music played in an eating establishment is directly proportional to how fast patrons eat and drink.[241] Business owners "are giving music an expanding role in their total marketing strategy. . .to more closely target their customers' music moods and preferences."[242] Today, in a restaurant setting, music is an integral part of a total sensory package that helps generate profits for the owner.[243] Notwithstanding this evidence of a relationship between music and profits, restaurant and bar owners remain adamant in their stance against paying to play copyrighted songs in their establishments[244] and applied severe pressure in lobbying for music licensing reform.[245]

E. CRESCENDO: THE FEUD, REVENGE, AND THE REAL VICTIMS OF THE FAIRNESS IN MUSIC LICENSING ACT

Prior to the Fairness in Music Licensing Act, the average daily fee paid by restaurants and bars to a performing rights organization for the unlimited use of their copyrighted material was less than two dollars.[246] However, the hospitality industry was not as concerned with the cost as they were with revenge on the performing rights organizations.[247] The long-standing, festering feud between the organizations and restaurant

236. *See id.*

237. *See* Reda, *supra* note 177, at 56.

238. *See id.* at 54, 56.

239. *See, e.g.*, Peterson, *supra* note 177.

240. *Cf.* Jack Hayes, *Can the Feel of a Restaurant Be as Important as Its Food?*, NATION'S RESTAURANT NEWS, Feb. 24, 1997, at 82.

241. *See* Peterson, *supra* note 177.

242. Reda, *supra* note 177, at 54.

243. *See id.* at 56.

244. *See* Silverman, *supra* note 67; Silverman, *supra* note 76; *supra* note 177.

245. *See* Kilgore, *supra* note 224. The 175,000 restaurants represented by the National Restaurant Association (NRA) is a fraction of the restaurants and businesses that participated in the lobby for fairness in music licensing legislation. *Id.* The NRA was one of approximately 30 such restaurant and retail organizations. *Id.*

246. Alger, *supra* note 225.

247. Madland, *supra* note 73; Deion, *supra* note 235.

and bar owners is a result of mistakes by both sides.[248] Restaurant and bar owners and managers historically were reluctant to pay for blanket licenses associated with the performance of music in their establishments.[249] Whether due to ignorance of the law or a knowing attempt at circumventing the Copyright Act, this reluctance occasionally was met with extreme measures from performing rights organizations.[250]

An illustration of the organizations' sometimes abrasive collection procedures is evident from a recent dispute with the Girl Scouts of America.[251] In 1995, ASCAP contacted the American Camping Association, claiming that singing and playing music at summer camps violated songwriters' right of public performance.[252] The Association warned its member campsites that non-compliance with ASCAP's requests could result in an infringement suit with potentially devastating results.[253] Several camps, including at least sixteen Girl Scout camps, paid the fee.[254] The following year, ASCAP sought to license 6,000 other camps across the United States, demanding as much as $1,439 from some camps.[255] Several Girl Scout camps rejected ASCAP's licensing attempts and instructed counselors to refrain from singing songs not owned by the Girl Scouts.[256] The Wall Street Journal learned of the situation and published a front-page article, detailing ASCAP's role in the licensing disagreement.[257] ASCAP, in an attempt at damage control, refunded the Girl Scouts' licensing fees.[258] The damage, however, to ASCAP's reputation was already done.[259]

The hospitality industry shares fault in the licensing war. Owners and managers of eating and drinking establishments consistently avoid and act in a rude and threatening manner toward the performing rights organizations' licensing agents.[260] This behavior can lead to the so-

248. *See generally* Hillman, *supra* note 63 for a history of the feud.

249. Silverman, *supra* note 76.

250. *Cf.* Alden-Rochelle v. ASCAP, 80 F. Supp. 888 (S.D.N.Y. 1948) ASCAP attempted to prohibit the display of a motion picture in theaters not licensed by ASCAP. *Id.*

251. *See* Noel L. Hillman, *Intractable Consent: A Legislative Solution to the Problem of the Aging Consent Decrees in United States v. ASCAP and United States v. BMI*, 8 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 733, 760-3 (1998).

252. *See id.*

253. *See id.*

254. *See id.*

255. *Id.*

256. *See id.*

257. Lisa Bannon, *The Birds May Sing, But Campers Can't Unless They Pay Up – ASCAP Warns the Girl Scouts That "God Bless America" Can Hit Legal Sour Notes*, WALL ST. J., Aug. 21, 1996, at A1.

258. *See* Hillman, *supra* note 251, at 761.

259. *See id.*

260. Silverman, *supra* note 76.

called "gestapo-like" tactics by the organizations.[261] Their willingness to threaten and initiate legal action against individual restaurants is a response reserved only for an owner or manager's repeated and willful avoidance of the licensing requirement under Copyright Law.[262]

The songwriters, whose average annual income is under $5,000,[263] are caught in the middle of this licensing war. The restaurant lobby, Congress, and the public have distorted views of songwriters.[264] Many perceive them as leading wealthy and glamorous lives.[265] This misperception is linked to celebrity performing artists who often do not write the music they perform. In actuality, many songwriters work full-time jobs to support their songwriting careers.[266] In their lobbying attempts and in trade magazines, hospitality industry advocates repeatedly cite the need to control the outrageous demands by performing rights organizations as the major reason for music licensing reform.[267] They continually fail to differentiate the struggling songwriter from the organization.[268] In their zeal to clip the organizations' wings, the restaurant lobby and some members of Congress ignored the injustice worked on the songwriters by the Fairness in Music Licensing Act.[269] If Congress and the restaurant industry desire to limit the power of performing rights organizations, they should accomplish the task in a manner that does not hurt songwriters.[270] Because of their non-profit and not-for-profit status, ASCAP and BMI cannot generate a profit.[271] For this reason, reducing the money restaurants and bars must pay for the use of copyrighted songs only hurts the songwriters.[272]

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261. Silverman, *supra* note 67.

262. *See* Hickory Grove v. Andrews, 749 F. Supp. 1031 (D. Mont. 1990); *see also* Crabshaw Music v. K-Bob's of El Paso, Inc., 744 F. Supp. 763 (W.D. Tex. 1990).

263. Beth Van Houten, *Dinner Music*, RESTAURANT BUSINESS, Nov. 1, 1998, at 21.

264. *See* Deion, *supra* note 235.

265. *See* Madland, *supra* note 73 (responding to testimony by Mac Davis, a successful songwriter and performing artist) "There are thousands of 'Pete Madlands' in your congressional districts and very few if any 'Mac Davises.' We are your constituents, please listen to us." *Id.*

266. *See Music Licenses: Hearings on H.R. 789 Before the House Committee on Small Business*, 105th Cong. (Feb. 23, 1994) (statement of George David Weiss, President of the Songwriter's Guild of America).

267. *See* Madland, *supra* note 73; Van Houten, *supra* note 263.

268. *See* Madland, *supra* note 73; Van Houten, *supra* note 263.

269. *See* 17 U.S.C. § 110(5) (1999).

270. *See* 144 CONG. REC. E2096 (October 1998) (statement of Rep. Clement) (quoting Congressional Research Service). "The earnings of songwriters, composers, and publishers stand to be reduced by tens of millions of dollars annually."

271. ASCAP, *ASCAP Licensing: Frequently Asked Questions About Licensing* (visited Nov. 15, 1999) < http://www.ascap.com/licensing/licensingfaq.html>; BMI, *Where Does the Money Go?* (visited Nov. 15, 1999) <http://www.bmi.com/iama/business/faq/money.asp>.

272. *See id.*

F. NICHES, FAIR USE, AND THE EQUILIBRIUM OF COPYRIGHT

The history of American copyright protection shows a constant juggling act by Congress and the courts in a struggle to maintain a balance of copyright purposes.[273] Copyright must balance: (1) the rights of the author of a work and the rights of other potential authors; (2) the market value of a work and the potential chilling of new creations; and (3) the author's right to be paid and various public policies in favor of commercial and non-profit exemptions.[274] To retain harmony among all these interests, Congress and the courts through amendment and precedent carve out minute niches in the law.[275] If the rights too greatly benefit one side or another, much like a sculptor chisels away imperfections in his work, first the courts and then Congress act to repair the situation with a minimal intrusion into the right addressed.[276] The rationale for this creation of niches or "chiseling away" lies in the balancing of purposes. Should Congress or the courts act too decisively in reigning in rights granted, the scale tips the other way. For example, if Congress required written permission from the copyright owner for all commercial and non-profit uses, the result would be a chilling effect on the dissemination of new works. Requiring permission for all uses of a copyrighted work may prevent potential authors from improving on the work of another. As this example shows, maintaining the equilibrium of copyright is a delicate and tedious process, requiring incremental modification to avoid harming other rights.

By exempting seventy percent of restaurants and bars from paying performance royalties, The Fairness in Music Licensing Act dramatically swings the balance of purposes away from the authors and toward the public.[277] This new exemption will result in a loss of income so extreme, that the songwriter's incentive to create new works is reduced.[278] Fur-

273. *See* Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 479 (1984).

274. *See id.* In exploring the infringement defense of "fair use," the court examines, among other factors, the harm to the market value of the work infringed upon and the nature of the allegedly infringing use. *Id.*

275. *See, e.g.*, 17 U.S.C.A. app. ch. 1 § 110 (West Supp. 1976). The "home use" exemption was codified in 1976 in response to the Supreme Court's holding in *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151 (1975). *Id.* The Court saw the need for a commercial exemption in the case of extremely small businesses using primitive sound equipment. *Id.*

276. *See, e.g.*, 17 U.S.C. § 101 (1976). The definition of "perform" in § 101 was changed in the 1976 revision to encompass what is known as the multiple performance doctrine. *Id. See, e.g.*, Buck v. Jewell-LaSalle Realty Co., 283 U.S. 191 (1931). The Supreme Court established the multiple performance doctrine before Congress codified the new definition of "perform" in 1976. *Id.*

277. *See* 17 U.S.C. § 110(5) (1999); *see* 144 CONG. REC. E2096 (October 1998) (statement of Rep. Clement) (quoting Congressional Research Service).

278. *See id. See also* ASCAP, *ASCAP Legislative Matters* (visited Oct. 3, 1999) <http://www.ascap.com/legislative/legis_qa.html>.

ther, the loss of income may force struggling songwriters to abandon practicing their craft altogether. The average songwriter makes less than $5,000 annually.[279] As Justice Oliver Wendell Holmes observed, "If music did not pay, it would be given up."[280] The untoward effects of the Fairness in Music Licensing Act may never be fully realized because the decrease in incentive and income associated with its unprecedented exemption could prevent the next Cole Porter, George Gershwin, or John Lennon from sharing his creativity with the world. Such a chilling effect would far outweigh any other domestic or international consequences. Unfortunately society may never hear what it is missing.

IV. FINALE: CONCLUSION

Music belongs to everyone; however, individual songs and their underlying copyrights have rightful owners who deserve compensation for the commercial exploitation of their creativity. In passing the ironically-titled Fairness in Music Licensing Act,[281] Congress vacated the protection and principles forged throughout two centuries of American legal history.[282] The expansiveness of the new "home use" exemption[283] rewards large restaurants and deprives songwriters of a substantial portion of their income.[284] Further, the Fairness in Music Licensing Act upsets the delicate balance of copyright purposes, by removing the incentive and encouragement for an author to create new works. The new exemption will have devastating domestic and foreign repercussions. As the Supreme Court noted, the "golden rule of copyright" states, "[T]ake not from others to such an extent and in such a manner that you would be resentful if they so took from you."[285] In yielding to intense lobbying pressure, Congress has so taken from songwriters. To preserve the integrity of American copyright law, Congress must repeal the Fairness in Music Licensing Act, and restore the home use exemption to its original form.[286]

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279. *See* Beth Van Houten, *Dinner Music*, RESTAURANT BUSINESS, Nov. 1, 1998, at 21.

280. Herbert v. Shanley, 242 U.S. 591, 595 (1917).

281. *See* 17 U.S.C. § 110(5) (1999).

282. *See generally* The First Copyright Law of the United States §§ 1-7 (1790), *reprinted in* 8 MELVILLE B. NIMMER, NIMMER ON COPYRIGHT app. 7; RICHARD ROGERS BOWKER, COPYRIGHT ITS HISTORY AND ITS LAW, p.3 (1912). Federal copyright protection dates back to 1790. *Id.*

283. 17 U.S.C. § 110(5) (1999).

284. *See* 144 CONG. REC. E2096 (October 1998) (statement of Rep. Clement) (quoting Congressional Research Service); *see also* ASCAP, *ASCAP Legislative Matters* (visited Oct. 3, 1999) <http://www.ascap.com/legislative/legis_qa.html>.

285. Harper and Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 552 (1985).

286. *See* 17 U.S.C. § 110(5) (1976) (amended 1998).