

concern of the school district for its control over what is perhaps the most critical component of its statutory duty: personnel administration. The new Iowa continuing contract law has arguably struck the balance on the side of the teacher's interest, at least in relation to the prior law. In whatever fashion the judiciary resolves the extent of a teacher's right to procedural due process under Iowa law, unless it is determined that complete modification of the "just cause" basis for terminations is possible, public school teachers in Iowa will now have greater job security than ever. Whether the manner in which the legislature has struck the balance will result in an uneven scale thus remains to be seen.

The comprehensiveness and detail of this law, if fully applied, may have the desirable effect of shifting the focus from procedural issues to the true issue in termination proceedings: the substantive basis for a school board's decision. By placing the contract termination process in a demanding procedural context the legislature placed a heavy burden on school boards to proceed to termination only with "just cause." Teachers will in turn be more assured that the substantive basis for terminations are adequately protected. Perhaps the ultimate effect, and even the test of the law's usefulness, will be a reduction in the volume of litigation arising from the termination of teachers' contracts.

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# COPYRIGHTED MUSICAL COMPOSITIONS: "PUBLIC PERFORMANCE FOR PROFIT" AS AFFECTED BY THE 1976 ACT

## I. INTRODUCTION

Article I, section 8 of the United States Constitution expressly gives Congress the following power: "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."<sup>1</sup> Pursuant to this express constitutional power, the 1790 Congress passed its first copyright law "for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned."<sup>2</sup> The coverage of the 1790 Act was extended in 1802 to include "arts of designing, engraving, and etching historical and other prints."<sup>3</sup> In 1831, a revision of the copyright law was passed which repealed the 1790 and 1802 Acts and extended copyright protection to musical compositions.<sup>4</sup> The next major revision of the copyright law was made in 1870.<sup>5</sup> Yet another major revision of the copyright law was made in 1909.<sup>6</sup> In 1947, the 1909 Act and its amendments were codified as Title 17 of the United States Code.<sup>7</sup>

Until January 1, 1978, copyright law in the United States was governed by the Copyright Act of 1909. Due to the great technological advancements of this century, a new, updated copyright law was found to be necessary.<sup>8</sup> After many years of study and proposed revisions, Congress passed the Copy-

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1. U.S. CONST. art. I, § 8, cl. 8.

2. Act of May 31, 1790, ch. 15, 1 Stat. 124.

3. Act of April 29, 1802, ch. 36, 2 Stat. 171.

4. Act of February 3, 1831, ch. 16, 4 Stat. 436.

5. Act of July 8, 1870, ch. 230, 16 Stat. 198. Between the 1831 revision and the passage of the 1870 Act, the following acts were passed which related to the Copyright Law: Act of June 30, 1834, ch. 157, 4 Stat. 728 (recordation of deeds or instruments or writing for the transfer or assignment of copyrights); Act of August 18, 1856, ch. 169, 11 Stat. 138 (extending coverage to prevent unauthorized performance of any dramatic composition); Act of February 5, 1859, ch. 22, 11 Stat. 380 (shifting copyright recordation duties from the Department of State to the Department of the Interior); Act of February 18, 1861, ch. 37, 12 Stat. 130 (providing a right for writ of error or appeal to the United States Supreme Court); Act of March 3, 1865, ch. 126, 13 Stat. 540 (extending coverage to photographs and negatives); Act of February 18, 1867, ch. 43, 14 Stat. 395 (providing penalty for failure to timely deposit a copy of copyrighted article with the Library of Congress).

6. Act of March 4, 1909, ch. 320, 35 Stat. 1075. The Act of 1870 was carried into Title IX, Chapter 3 of the Revised Statutes of 1874, §§ 4948-71. There were several amendments to the Revised Statutes prior to the major enactment of the 1909 law. The 1909 Act repealed and superseded all prior copyright laws, increased the copyright renewal period from 14 to 18 years and established the Office of Register of Copyrights under the Librarian of Congress.

7. Copyright Act of July 30, 1947, ch. 391, 61 Stat. 652. Title 17 was entitled "Copyrights."

8. The Register of Copyrights sponsored a series of thirty studies on the law and proposed revisions. A summary of the studies appears in STAFF OF HOUSE COMM. ON THE JUDICIARY, 87TH CONG., 1ST SESS., REPORT ON COPYRIGHT LAW REVISION (Comm. Print 1961).

right Act of 1976.<sup>9</sup> This new Act took effect on January 1, 1978.<sup>10</sup> There are many significant changes in the 1976 law with the result that copyright lawyers will be encountering new requirements and altered procedures under this law. Among the more significant changes brought about by the new Act are that the rights previously granted to an owner of a copyright have been extended,<sup>11</sup> as have the acts which constitute infringement of a copyright.<sup>12</sup>

A detailed examination of the changes which have resulted from this new Act would not only be lengthy but extremely speculative at this time. This Note will focus generally on the significant differences brought about by this legislative action and its impact on the owners of copyrighted non-dramatic musical compositions. One area in which Congress' recent action will be immediately felt is in defining what constitutes "public performance." Therefore, this subject will receive extensive treatment in this Note.

## II. EXCLUSIVE RIGHTS TO PERFORM UNDER 1909 ACT

Under the Copyright Act of 1909, one who composed an "original musical composition"<sup>13</sup> was entitled to registration of the composition for federal protection from infringement.<sup>14</sup> This right has not been significantly changed by the new 1976 law since it affords copyright protection for the author of musical works; such protection also includes any accompanying words.<sup>15</sup> Section (1) of the 1909 Act gave the copyright owner the exclusive right of performing his musical composition publicly for profit.<sup>16</sup> The wording of section 1(e) has been the source of much litigation throughout this century.<sup>17</sup> Courts have been required to determine just what was meant by the phrase "public per-

9. 17 U.S.C. §§ 101-810 (1976).

10. *Id.* § 301 provides for the preemption of other copyright laws as of January 1, 1978.

11. See 17 U.S.C. § 302 (1976). The new Act now allows copyright protection for the life of the author plus fifty years after death. Under the Copyright Act of 1909, the period for which copyright protection was afforded was a maximum of fifty-six years.

12. Compare the provisions of 17 U.S.C. §§ 501-509 (1976) with those of its predecessor, 17 U.S.C. §§ 101-116 (1952).

13. The term "original musical composition" as used in copyright law means a musical composition which is a product of the author's independent creative effort or individuality of expression. *Trebonik v. Grossman Music Corp.*, 305 F. Supp. 339 (N.D. Ohio 1969). See also *Smith v. George E. Muehlebach Brewing Co.*, 140 F. Supp. 729 (W.D. Mo. 1956) (musical composition held to include both melody and lyrics); *Northern Music Corp. v. King Record Distributing Co.*, 105 F. Supp. 393 (S.D.N.Y. 1952) (copyright infringement established only where originality is found to exist in the song's rhythm, harmony or melody).

14. 17 U.S.C. § 5(e) (1976).

15. 17 U.S.C. § 102(a)(2) (1976).

16. 17 U.S.C. § 1 (1976) which provides, in part, that "[a]ny person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right: . . . (e) to perform the copyrighted work publicly for profit if it be a musical composition; . . ."

17. *Twentieth Century Music Corp. v. Aiken*, 500 F.2d 127 (3rd Cir. 1974), *aff'd*, 422 U.S. 151 (1975) (music not "performed" by playing radio over four speakers in small restaurant); *Lerner v. Schectman*, 228 F. Supp. 354 (D. Minn. 1964), (performance held to be "public" in private nightclub with liberal membership qualifications).

formance"<sup>18</sup> and also what types of performances were "for profit."<sup>19</sup> The majority of the cases which have presented this type of problem are copyright infringement suits brought by copyright owners or their representatives. An explanation of who these litigating "representatives" are and why they exist will be of some aid.

### A. Performing Rights Societies

The music industry has been on a steady increase ever since the inception of the radio and the phonograph. Across the nation and throughout the world, countless numbers of people are playing and enjoying music in various forms. Music is performed in living rooms, parks, restaurants, hotels, night-clubs, concert halls and on radio and television. Since musical works may be performed on such an extensive basis, it is impossible for individual composers and publishers to effectively enforce their performing rights on an individual basis.<sup>20</sup> The need for an organization to collectively enforce these performance rights became evident early after the passage of the 1909 Act. Since then, there have been three such major organizations established in the United States.

In 1914, The American Society of Composers, Authors and Publishers (ASCAP) was founded.<sup>21</sup> ASCAP was the first performing rights society organized to enforce the rights of publishers and songwriters who were both members and owners of the society.<sup>22</sup> In 1939, members of the radio broadcasting industry organized Broadcast Music, Incorporated (BMI) for the purpose of serving as a clearinghouse for the licensing of music performance rights just as ASCAP had been doing for the previous twenty-five years.<sup>23</sup> The third major organization which was organized to enforce these types of rights is the privately-owned Society of European Stage Authors and Composers, Incorporated (SESAC).<sup>24</sup>

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18. *Buck v. Jewell-La Salle Realty Co.*, 283 U.S. 191 (1931) (acts of hotel proprietor in making available to guests, through radio receiving set and loudspeaker, copyrighted musical compositions, held to constitute "performance"). See also *Associated Music Publishers, Inc. v. Debs Memorial Radio Fund*, 141 F.2d 852 (2d Cir. 1944); *Jerome H. Remick & Co. v. General Electric Co.*, 16 F.2d 829 (S.D.N.Y. 1926); *M. Witmark & Sons v. L. Bamberger & Co.*, 291 F.776 (D.N.J. 1923).

19. *Buck v. Russo*, 25 F. Supp. 317 (D. Mass. 1938) (playing music in dining and dancing establishment which was paid for indirectly by the public in purchases of food and drink constituted "performance for profit").

20. 2 M. NIMMER, *NIMMER ON COPYRIGHT* § 8.19 at 8-238 (1978).

21. *Id.* § 8.19.

22. An analysis of the role of ASCAP may be found in *K-91, Inc. v. Gershwin Publishing Corp.*, 372 F.2d 1 (9th Cir. 1967), cert. denied, 389 U.S. 1045 (1968) (actions of ASCAP held not to violate antitrust laws).

23. *Bard & Kurlantzick, A Public Performance Right in Recordings: How to Alter the Copyright System Without Improving It*, 43 GEO. WASH. L. REV. 152, 165 (1974). For a short history of ASCAP and BMI, see B. KAPLAN & R. BROWN, *CASES ON COPYRIGHT* 424-41 (1960); Finklestein, *Public Performance Rights in Music and Performance Rights Societies*, 7 COPYRIGHT PROB. ANALYZED 69 (1951).

24. See 2 NIMMER, *supra* note 20, at § 8.19.

The duties of these three societies are essentially the same. A composer or publisher of a non-dramatic musical composition<sup>25</sup> which has been copyrighted will assign only his or her "small rights" in the composition to the society.<sup>26</sup> "Small rights" are the rights to performance of the music and accompanying words alone. "Small rights" should be compared to the "grand rights" of performance which permit the staging of a musical composition in an entire dramatic production. The "grand rights" are enforced by the proprietor of the dramatic rights only.<sup>27</sup> Upon assigning the small rights to the performing rights society, the assignor becomes a member of the society. It is then the society's duty to sell licenses to users of the composition, monitor uses of the composition in order to detect violations, institute actions for infringement for such violations and to distribute its revenue to the members.<sup>28</sup>

In response to allegations of anti-trust violations, the United States brought suit under the Sherman Act against ASCAP in 1934.<sup>29</sup> Some seven years later a consent decree issued. Aside from effectively terminating the action, the decree also outlined certain rules for the society to follow in the issuance of licenses and the distribution of revenue.<sup>30</sup> Today, ASCAP operates

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25. Dramatic works are given copyright protection under section 102(a)(3) of the new Act. A rendition of a musical composition is characterized as dramatic if it is accompanied by dialogue, scenery or costumes. Finklestein, *The Composer and the Public Interest - Regulation of Performing Right Societies*, 19 LAW & CONTEMP. PROB. 275, 283 n.32 (1954). ASCAP appears to take the position that the performance of a musical composition is dramatic if it aids in telling a story. *The Robert Stigwood Group, Ltd. v. Sperber*, 457 F.2d 50 (2d Cir. 1972) (performance of musical compositions from the rock opera *Jesus Christ Superstar* without scenery, costumes or dialogue held to be a dramatic performance. "Small rights" are equivalent to non-dramatic rights).

26. See 3 NIMMER, *supra* note 20, at § 10.10(E).

27. See Bard, *supra* note 23, at 165.

28. Finklestein, *ASCAP as an Example of the Clearing House System in Operation*, 14 BULL. COPYRIGHT SOC'Y 2 (1966).

29. *United States v. ASCAP*, No. E 78-388 (S.D.N.Y. 1934). See N.Y. Times, Aug. 31, 1934, at 15, Col. 3; see also Shull, *Collecting Collectively: ASCAP's Perennial Dilemma*, 7 COPYRIGHT L. SYMP. 35, 39 (1956). ASCAP was alleged among other things to have conspired to restrain interstate commerce and trade by asserting exclusive performance rights, discriminating in prices for similarly situated licensees, refusing to issue per program license and electing directors by other than membership vote.

30. *United States v. American Soc'y of Composers, Authors and Publishers*, [1940-1943 Trade Cases] TRADE REG. REP. (CCH) ¶ 56,104 (S.D.N.Y. 1941), *modified*, [1950 Trade Cases] TRADE REG. REP. (CCH) ¶ 62,595 (S.D.N.Y. 1950). The Consent Decree provided, *inter alia*: Para. II, sec. 1 - that ASCAP shall not acquire exclusive licenses of performance rights; Para. II, sec. 2 - that ASCAP shall not discriminate in price or terms between similarly situated licensees, except that differentials may be based on 'applicable business factors'; Para. II, sec. 3 - that ASCAP shall not acquire blanket licensing, but shall offer per program licenses, unless blanket licenses are requested by the broadcaster; Para. II, sec. 8 - that ASCAP shall not refuse licenses of performance rights in order to exact additional consideration therefor; but it may restrict performance licenses in order to reasonably protect the value of performance rights. Schull, *supra* Note 29, at 41 (citing consent decree from *United States v. American Soc'y of Composers, Authors and Publishers*, [1940-1943 Trade Cases] TRADE REG. REP. (CCH) ¶ 56,104 (S.D.N.Y. 1941), *modified*, [1950 Trade Cases] TRADE REG. REP. (CCH) ¶ 62,595 (S.D.N.Y. 1950)).



under an amended consent judgement which was rendered on March 14, 1950.<sup>31</sup> In 1966, BMI was subjected to a similar action which resulted in a consent decree that served to curb the economic power of BMI just as the earlier decree had done to ASCAP.<sup>32</sup> These consent decrees make provisions for judicial supervision over ASCAP and BMI licensing practices, prices and distribution.<sup>33</sup> Today, ASCAP has a membership of over 8,000 authors, composers and publishers.<sup>34</sup> BMI is owned by approximately 500 American broadcasting companies.<sup>35</sup> The repertory of these two societies, which numbers over four million compositions, covers almost every domestic copyrighted musical composition in the United States.<sup>36</sup>

A prospective user of any of the exclusive rights attached to a copyrighted musical composition must obtain a license to perform the composition from the composer or publisher who owns the copyright. For one who plans numerous musical compositions every day, such as a radio station or nightclub owner, the difficulty and inconvenience of obtaining a license from each copyright owner, is readily apparent. In order to make this licensing process more efficient for both the user and the copyright owner, the performing rights societies issue a license for the use of compositions that are included in their repertory.

There are two types of licenses granted by ASCAP—a "blanket license" which entitles the user to the use of the entire ASCAP repertory for a flat annual fee, and a "per program license" in which the user is charged a specified fee for each program according to the compositions played and the advertising revenue from such programs.<sup>37</sup> Most broadcasters secure rights by a blanket license since it is much easier than specifically listing each musical composition which may be performed and the broadcaster is not limited in his available repertoire. The cost of such a license is determined by a percentage of the annual net advertising revenues received by the broadcaster or, in the case of a nightclub, a percentage of the establishment's income.<sup>38</sup>

The previously mentioned consent decrees prevent the societies from unfairly discriminating in the rates they charge.<sup>39</sup> The performing rights so-

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31. *United States v. American Soc'y of Composers, Authors and Publishers*, [1950 Trade Cases] TRADE REG. REP. (CCH) ¶ 62,595 (S.D.N.Y. 1950). The amendments strictly regulated dealings between ASCAP and foreign performing rights societies and also made it possible for authors to make licensing deals directly with the users without ASCAP interference.

32. See *United States v. Broadcast Music, Inc.*, 35 Copyright Office Bull. 559 (1966).

33. Finklestein, *Copyright Revision—Music: CATV, Educational Broadcasting, and Juke Boxes*, 53 IOWA L. REV. 870 (1968).

34. Z. LINDEY, *ENTERTAINMENT PUBLISHING AND THE ARTS - AGREEMENTS AND THE LAW*, 461 (Cum. Supp. 1977).

35. *Id.* at 454.

36. *Columbia Broadcasting System, Inc., v. ASCAP*, 400 F. Supp. 737, 742 (S.D.N.Y. 1975).

37. See 2 NIMMER, *supra* note 20, at 8-239.

38. See Schull, *supra* note 29, at 39.

39. [1940-1943 Trade Cases] TRADE REG. REP. (CCH) ¶ 56,104, Para. II, Sec. 2. See also [1950-1951 Trade Cases] TRADE REG. REP. (CCH) ¶ 62,595 for amendments to 1941 Consent Decree; Consent Decree further modified in [1960 Trade Cases] TRADE REG. REP. (CCH) ¶ 69,612

cieties police establishments and notify prospective users of the licensing requirement for performance of copyrighted material and charge them a fee. Upon a user's refusal to purchase a license, the society may gather evidence of infringing activities and then institute an infringement action against the user. Such evidence is usually obtained by monitoring the broadcasts of the user or by investigators who attend the user's concert, dance, nightclub or place of business.

Upon proof that the user wrongfully performed the society's songs publicly for profit, the society was entitled, under the 1909 Act, to either actual damages plus the profits of the user or statutory damages of at least \$250.00 and a maximum of \$5,000 for each individual infringement.<sup>40</sup> Other statutory remedies available for infringement included injunctive relief, costs and, at the discretion of the court, reasonable attorney fees.<sup>41</sup> Under the new Act, the remedies allowed have remained the same with the exception that the statutory maximum for damages under section 501(c)(1) is now \$10,000 for each infringement rather than the previous \$5,000.<sup>42</sup>

### III. THE "PUBLIC PERFORMANCE" ELEMENT OF THE COPYRIGHT ACTS

Under the 1909 Act, recovery for copyright infringement by a performance of a musical composition required that the court find that the composition was "performed publicly for profit."<sup>43</sup> Many of these infringement actions were filed by the performing rights societies on behalf of their members. The defendants in these cases were frequently the proprietors of taverns, nightclubs or restaurants. The musicians or singers who actually performed the work were rarely made defendants.<sup>44</sup>

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(regarding distribution of ASCAP revenues to members, voting rights, payments to resigning members, surveys of performances, appeals of membership classifications and grants of membership).

40. See 17 U.S.C. § 101 (1970), which in pertinent part provides:

If any person shall infringe the copyright in any work protected under the copyright laws of the United States such person shall be liable:

(a) Injunction.

To an injunction restraining such infringement;

(b) Damages and profits; amount; other remedies.

41. *Id.* § 116. In part this section provides as follows:

In all actions, suits, or proceedings under this title, except when brought by or against the United States or any officer thereof, full costs shall be allowed, and the court may award to the prevailing party a reasonable attorney's fee as part of the costs.

For an application of this section, see *Metro Associated Services, Inc. v. Webster City Graphic, Inc.*, 117 F. Supp. 224, 236 (N.D. Iowa 1953).

42. See 17 U.S.C. § 502 (1976), which provides for injunctive relief against the infringing party; 17 U.S.C. § 504 (1976) providing for damages and profits to be awarded, and 17 U.S.C. § 505 (1976) which provides for an award of costs and attorney fees.

43. 17 U.S.C. § 1(e) (1970). "To perform the copyrighted work publicly for profit if it be a musical composition; and for the purpose of public performance for profit . . . ."

44. See note 99 *infra* and accompanying text.

### A. Performance

In these actions the first issue which had to be faced was whether the act alleged to infringe was a "performance." Clearly, the live playing of a musical composition before an audience was a performance. In *Remick Co. v. American Accessories Co.*,<sup>45</sup> it was held that a radio station's broadcasting of copyrighted musical works was also a performance. Broadcasting a musical composition played live by an orchestra over a public address system for the entertainment of the patrons of a concert hall, restaurant, nightclub or race-track was also found to constitute a public "performance" for profit which infringed on the rights of the copyright holder.<sup>46</sup> Earlier, it had been held that the playing of record albums over loudspeakers throughout a department store was a public "performance" for profit.<sup>47</sup>

While the broadcasting activities of television networks and local television stations were understood to be a performance that required licensing,<sup>48</sup> the operation of a community antenna television (CATV) system that received, amplified and modulated signals from television stations was held *not* to be a "performance" infringing the rights of the copyright owner.<sup>49</sup> Similarly, no statutory "performance" was found to exist where a restaurant owner played music from a radio station over four speakers for the enjoyment of his customers.<sup>50</sup> The court reasoned that "mere extension of the range of audibility of a broadcast program cannot be said to constitute performance."<sup>51</sup>

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45. 5 F.2d 411 (6th Cir.), *cert. denied*, 269 U.S. 556 (1925). In *Remick*, the Sixth Circuit noted that "[r]adio broadcasting is intended to and in fact does, reach a very much larger number of the public at the moment of the rendition than any other medium of performance." *Id.* at 412.

46. *Famous Music Corp. v. Bay State Harness Horse and Breeding Ass'n, Inc.*, 423 F. Supp. 341 (D. Mass. 1976), *aff'd*, 554 F.2d 1213 (1st Cir. 1977). In *Famous Music*, the proprietor of a raceway hired an orchestra of independent musicians to play music, such music being broadcast over loudspeakers around the raceway. The music was not the main attraction and the proprietor had no part in the selection of works. In spite of his inactive role in the music performed, the court held him liable for infringement.

47. *Chappell & Co., Inc. v. Middleton Farmers Market & Auction Co.*, 334 F.2d 303, 304 (3d Cir. 1964). In *Chappell*, the playing of recorded copyrighted musical compositions in defendant's place of business was held to constitute a "public performance." The court found that the purpose for such playing was to entertain and amuse his patrons, as well as for the promotion of the record albums. *Id.*

48. *CBS v. ASCAP*, 400 F. Supp. 737, 747 (S.D.N.Y. 1975), *rev'd*, 562 F.2d 130 (2d Cir. 1977). CBS has held ASCAP and BMI blanket licenses for its television network on a continuous basis since the late 1940's.

49. *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968), *reh. denied*, 393 U.S. 902 (1968). The court noted that "CATV operators, like viewers and unlike broadcasters, do not perform the programs they receive and carry." *Id.* at 400-01.

50. *Twentieth Century Music Corp. v. Aiken*, 500 F.2d 127 (3d Cir. 1974), *aff'd*, 422 U.S. 151 (1975) (no "performance" resulted where the defendant merely activates his restaurant radio; the "performance" takes place at the studio of the broadcasting station). *See also* *Buck v. Debaum*, 40 F.2d 734 (S.D. Cal. 1929).

51. *Twentieth Century Music Corp. v. Aiken*, 500 F.2d 127, 137 (3d Cir.), *aff'd*, 422 U.S. 151 (1975).



The key to these latter cases seems to be whether there was a previously licensed performance of a copyright musical composition being transmitted or whether there was a copyrighted musical composition *primarily* originating from the defendants' establishment. The original broadcasts by radio and television stations in the CATV and restaurant cases were licensed while the racetrack and department store cases involved live renditions and the playing of phonograph records originating from the defendants' establishments.

In section 101 of the new Act, "performance" of a work is defined as, "to recite, render, play, dance, or act it, either directly or by means of any device or process . . ."<sup>52</sup> This provision would seem broad enough to include the following as performances: renditions from recordings; retransmission by loudspeakers; broadcasting; live renditions; and retransmission by cable or any other device. However, any changes caused by this definition of "performance" must be considered in light of the many limitations and exemptions which are placed on the rights of the copyright owner by the new Act.<sup>53</sup>

#### B. Determining when a Performance is "Public"

Another issue which was frequently the subject of litigation under the 1909 Act, was whether a performance was a "public" one or a private one. Obviously, a performance in a private home, with only family members and invited guests in attendance, would not be deemed a "public" performance.<sup>54</sup> Similarly, a performance in a private club where only members and invited guests were allowed to attend was a private performance.

However, where the performance took place in a non-profit private club which posted signs at the door indicating, "Members and Guests," it was held to be a "public" performance where the club allowed strangers to enter with no qualifications except good appearance and behavior.<sup>55</sup> Also, if the evidence showed that membership qualifications for a private club were meaningless except for requiring a good credit rating, good appearance, good behavior and payment of an application fee, the court would deem the performance within such a club to be a "public" one.<sup>56</sup>

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52. 17 U.S.C. § 101 (1976).

53. 17 U.S.C. §§ 107, 110, 111 (1976).

54. See *Buck v. Jewell-LaSalle Realty Co.*, 283 U.S. 191 (1931). In answer to the allegation of infringement, the Court stated that "[t]he owner of a private radio receiving set who in his own home invites friends to hear a musical composition which is being broadcast, would not be liable for infringement. For even if this [were] deemed a performance, it is neither public nor for profit." *Id.* at 196.

55. *Lerner v. Club Wander In, Inc.*, 174 F. Supp. 731 (D. Mass. 1959). In *Lerner*, the club charged no admission fee and testimony revealed that non-members were allowed to patronize the club as freely as members. The court concluded that retention of the right to exclude members of the public on appearance standards, did not render the performance private. See also *M. Witmark & Sons v. Tremont Social and Athletic Club*, 188 F. Supp. 787 (D. Mass. 1960). Testimony in this case revealed that membership of customers was not checked, and therefore the general public was permitted to enter and enjoy the performance.

56. *Lerner v. Schectman*, 228 F. Supp. 354 (D. Minn. 1964). The "private club" in *Lerner*

It has been determined that if an unrestricted number of persons from the general public were permitted to enjoy a performance, it was not necessary that such persons be physically assembled in order to find that the performance is a "public" one. In *Remick Co. v. American Accessories Co.*,<sup>57</sup> it was held that a radio broadcaster was liable for copyright infringement of musical compositions which he was not licensed to publicly perform. The court stated as follows:

A performance, in our judgment, is no less public because the listeners are unable to communicate with one another, or are not assembled within an inclosure, or gathered together in some open stadium or park or other public place. Nor can a performance, in our judgment, be deemed private because each listener may enjoy it alone in the privacy of his home. Radio broadcasting is intended to, and in fact does, reach a very much larger number of the public at the moment of the rendition than any other medium of performance. The artist is consciously addressing a great, though unseen and widely scattered, audience, and is therefore participating in a public performance.<sup>58</sup>

Also, under the old Act, it made no difference that the public performance was heard or attended by a limited number of people.<sup>59</sup>

Under the Copyright Act of 1976 the owner of a copyrighted musical composition is given the exclusive right to perform and display the copyright work publicly.<sup>60</sup> Although there is no "for profit" limitation on this right to perform publicly, there are several exemptions which involve the "for profit" limitation. These exemptions are positioned directly after the statutory grant of the public performance right and thus act to limit it. Section 101 of the new Act defines the meaning of "publicly" as follows:

To perform or display a work 'publicly' means -

(1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or

(2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.<sup>61</sup>

Obviously, by phrasing the definition of "publicly" in terms of "any place where a substantial number of persons outside of a normal circle of a family

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was a nightclub which sold memberships for \$10.00. The membership served no function in relation to the organization or operation of the club. The only function it served was to expend money for food and liquor on the premises. The court found that the organization of this club was primarily for the purpose of engaging in business for the personal profit of the owner of the club.

57. 5 F.2d 411 (6th Cir.), cert. denied, 269 U.S. 556 (1925).

58. *Id.* at 412.

59. See 2 NIMMER, *supra* note 20, at 8-139.

60. 17 U.S.C. § 106 (4), (5) (1976).

61. *Id.* § 101.

and its social acquaintances is gathered . . .," Congress implies that *all* private clubs are public under the new Act and may now be subject to performance fees.

Also defined in section 101 is the meaning of "transmit." As used in the new Act, "[t]o transmit a performance or display is to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent."<sup>62</sup> As previously mentioned, section 101 also defines the intended meaning of "to perform." Therefore, it appears that the new copyright law has made statutory provisions pertaining to "public" performance to replace the previous judicial interpretations under the old law.

### C. *The "For Profit" Element of the 1909 Copyright Act*

The most difficult issue presented by section 1(e) of the old Act was the question of whether the public performance was "for profit" or not. Under section 104 of the 1976 Copyright Act, public performances of musical works by charitable, educational or religious organizations have been classified as not being "for profit" where the performance is given for charitable or educational purposes.<sup>63</sup> Clearly, any establishment which charged an admission fee to see a performance of a copyrighted musical composition met the "for profit" requirement of the old law. However, a much more difficult question was posed by the situation where patrons were charged prior to entry, or where the charge was attributable to some other benefit received by the patrons.

The leading case addressing these issues was *Herbert v. Shanley Co.*,<sup>64</sup> where it was held that the performance of a copyrighted musical composition in a hotel restaurant, without charge for admission to hear the music, but incidental to the dinner for which the patrons paid, infringed upon the copyright owner's exclusive right to perform the work publicly for profit. Mr. Justice Holmes stated:

[The performances] are part of a total for which the public pays, and the fact that the price of the whole is attributed to a particular item which those present are expected to order, is not important. It is true that the music is not the sole object, but neither is the food, which probably could be got cheaper elsewhere.<sup>65</sup>

If the purpose in employing the musical performance was directly or indirectly for profit, it did not matter whether the performance actually created a profit or not. Further, it made no difference whether an admission fee was charged or not, as long as the performance was for the purpose of creating

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62. *Id.*

63. *Id.* § 104.

64. 242 U.S. 591 (1917). This is a landmark copyright case in which Nathan Burkan, the founder of ASCAP, represented the owner of the copyrighted composition, Victor Herbert.

65. *Id.* at 594-95. This philosophy may be applicable today to the recent refusals by many "disco" clubs to pay ASCAP fees, on the grounds that their admission charge is not for the music but for the drink which the customer is given after entering the establishment.

commercial advantage or profit.<sup>66</sup>

The operation of television and radio stations are certainly done "for profit." Therefore, any copyrighted musical compositions performed in their broadcasting would require a license under section 1(e). But, prior to 1949, ASCAP granted royalty-free licenses to all television stations for the use of the ASCAP repertory. Today, local television stations and major networks are charged for blanket licenses.<sup>67</sup> Also, the broadcasts of a non-profit radio station have been held as performances "for profit" where the station sold advertising spots in order to pay operating expenses. It was unimportant whether the profit went to the radio station, its employees or to the advertisers; it was still performed publicly for profit.<sup>68</sup>

D. "For Profit" As Defined by the 1976 Copyright Act

Today, the new Copyright Act has dropped the "for profit" limitation from the grant to copyright owners of exclusive rights to the public performance of their musical works.<sup>69</sup> Although there is no mention of a profit limitation in section 106, the limitations and exemptions set forth in the other sections of the new Act must be considered. The old "for profit" limitation is now embraced by the combined provisions of section 110 of the new Act. These provisions exempt certain public performances and displays from liability for copyright infringement.

The first such exemption applies to performances by pupils or instructors in the course of face-to-face teaching activities in a non-profit educational institution and in a place or room devoted to instruction.<sup>70</sup> Broadcasts which are "a regular part of the systematic instructional activities of a governmental body or a non-profit educational institution," are exempt if the performance 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

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66. *Id.*

67. *United States v. ASCAP*, 208 F. Supp. 896, 897 (S.D.N.Y. 1962), *aff'd*, 331 F.2d 117 (2d Cir. 1964). The purpose of granting free licenses was to assist the television stations and to enable the television industry to gain stability.

68. *Associated Music Publishers, Inc. v. Debs Memorial Radio Fund, Inc.*, 141 F.2d 852 (2d Cir. 1944). The defendant owned and operated a part-time, non-profit radio station. The particular program broadcast was not sponsored directly by an advertiser. However, the station did sell advertising in order to pay its operating costs. Although the program brought in no direct revenue, the broadcast was held to be "for profit." The court based its "for profit" finding upon evidence that the broadcast helped to build up listener appeal and thereby provide an inducement to advertisers who profited from such an increased audience.

69. 17 U.S.C.A. § 106(4) (1977).

70. *Id.* § 110(1).

attendance in classrooms 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. . . .<sup>71</sup>

The new Act also exempts performances rendered in the course of religious services.<sup>72</sup> The House Reports on this legislation seem to indicate that secular operas, musical plays, and motion pictures are not exempt by this provision.<sup>73</sup> Furthermore, this exemption is not intended to cover religious broadcasts made to the public at large.<sup>74</sup>

Another exemption which takes the place of the old "for profit" limitation is section 110(4), which exempts any live performance of a musical work if it is performed:

without any purpose of direct or indirect commercial advantage and without payment of any fee or other compensation for the performance to any of its performers, promoters, or organizers, if—

- (A) there is no direct or indirect admission charge; or
- (B) the proceeds, after deducting the reasonable costs of producing the performance, are used exclusively for educational, religious, or charitable purposes and not for private financial gain. . . .<sup>75</sup>

The copyright owner may bar use of his work by serving proper notice of his objection to the non-profit performance.<sup>76</sup>

This fourth provision, when combined with the others, effectively re-establishes the prior section 1(e) limitation which only granted the copyright owner the exclusive right to public performance of his work "for profit." Undoubtedly there will be litigation over the correct interpretation of what is an "indirect admission charge" or what constitutes "direct or indirect commercial advantage." Perhaps the courts will rely on the early copyright decisions and the Holmes philosophy on such issues.<sup>77</sup> One thing would seem

71. *Id.* § 110(2).

72. *Id.* § 110(3).

73. See S. REP. NO. 473, 94th Cong., 1st Sess. 73-76 (1975); H.R. REP. NO. 1476, 94th Cong., 2d Sess. 84 (1976), which provides in part: "[T]he exemption would not extend to religious broadcasts or other transmission to the public at large, even where the transmissions were sent from the place of worship."

74. U.S. COPYRIGHT OFFICE, GENERAL GUIDE TO THE COPYRIGHT ACT OF 1976 8:12 (1977).

75. 17 U.S.C.A. § 110(4) (1977).

76. *Id.* at § 110(4)(B)(i)-(iii).

77. See *Herbert v. Shanley Co.*, 242 U.S. 591, 594-95 (1917), wherein Mr. Justice Holmes commented:

If the rights under the copyright are infringed only by a performance where money is taken at the door they are very imperfectly protected. Performances not different in kind from those of the defendants could be given that might compete with and even destroy the success of the monopoly that the law intends the plaintiffs to have. It is enough to say that there is no need to construe the statute so narrowly. The defendants' performances are not eleemosynary. They are part of a total for which the public pays, and the fact that the price of the whole is attributed to a particular item which those present are expected to order, is not important. It is true that the music is not the sole



certain; the limitations of no commercial advantage, no fee and no compensation to any of the performers, promoters or organizers will severely restrict the number of accused infringers who will be able to avail themselves of this fourth exemption. It would thus seem apparent that almost any business establishment which has live music performed would be subject to performance licensing.

The fifth exemption listed in section 110 is for the public reception of a broadcast on a radio or television of the type used in private homes, unless a direct charge is made to hear the transmission or the transmission received is *further transmitted* to the public.<sup>78</sup> This provision seems similar to the result reached in *Twentieth Century Music Corp. v. Aiken*.<sup>79</sup> The proprietor of a business may play a radio within his establishment, without infringing musical copyrights, as long as the receiver is no different than that normally utilized in the home. However, if the system is altered or improved in some way for the benefit of the public, license liability will be imposed.<sup>80</sup>

Another exemption under section 110 is for performances "by a governmental body or a non-profit agricultural or horticultural organization, in the course of an annual agricultural or horticultural fair or exhibition conducted by such body or organization . . . ."<sup>81</sup>

The seventh section 110 exemption allows for the performance of musical works by vending establishments which are "open to the public at large without any . . . admission charge, where the sole purpose of the performance is to promote the retail sale of copies . . . of the work, and the performance is not transmitted beyond . . . the immediate area" of the actual sale.<sup>82</sup> This seems to indicate that any record or tape store may have live bands, tape

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object, but neither is the food, which probably could be got cheaper elsewhere. The object is a repast in surroundings that to people having limited powers of conversation or disliking the rival noise give a luxurious pleasure not to be had from eating a silent meal. If music did not pay it would be given up. If it pays it pays out of the public's pocket. Whether it pays or not the purpose of employing it is profit and that is enough.  
*Id.* at 594-95.

78. 17 U.S.C.A. § 110(5) (1977).

79. 500 F.2d 127 (3d Cir. 1974), *aff'd*, 422 U.S. 151 (1975) (owner of a small restaurant held not to have infringed copyright when he played music over his radio with four speakers for the enjoyment of his customers).

80. See H.R. REP. NO. 1476, 94th Cong., 2d Sess. 81 (1976), wherein it is reported: 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 customer's enjoyment, but it would impose 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.

81. 17 U.S.C.A. § 110(6) (1977). It would seem from the legislative history that Congress intended to create an extremely narrow exemption in this area. See H.R. REP. NO. 1476, 94th Cong., 2d Sess. 81, 87 (1976) which provides that: "[t]he exemption extends only to the governmental body or nonprofit organization sponsoring the fair; the amendment makes clear that, while such a body or organization cannot itself be held vicariously liable for infringements by concessionaires at the fair, the concessionaires enjoy no exemption under the clause."

82. 17 U.S.C.A. § 110(7) (1977).

players or phonographs perform copyrighted musical works publicly as long as its purpose is to promote the sale of the musical recordings which are played. In such a situation, the issue may arise as to whether the proprietor's "sole purpose" is to promote the sale of the works played or if there is another purpose to be served.

The last two exemptions in section 110 deal with performances transmitted for blind and handicapped persons. The exemption in section 110(8) is for broadcasts of works specifically designed for, and directed to blind, deaf or similarly handicapped people. The broadcast must be made without any purpose of direct or indirect commercial advantage and it must be broadcast through the facilities of a governmental body, a non-commercial educational broadcast system, a radio subcarrier authorization or a cable system.<sup>83</sup> The section 110(9) exemption is very limited and applies only to one single performance of a work which was published at least ten years prior to the performance. The broadcast must be specifically designed and primarily directed to blind or sight-impaired people. Further, the broadcast must be transmitted by a radio subcarrier authorization in order to qualify for the exemption.<sup>84</sup>

Another section in the new Act which places limitations on the copyright owner's exclusive right to publicly perform his musical work is found in section 107, often referred to as the "Fair Use" limitation.<sup>85</sup> This section provides exemptions for infringements which are for the purpose of "criticism, comment, news reporting, teaching, . . . scholarship, or research." Several factors are to be considered in the determination of whether the performance falls within this exemption. Section 107 lists the relevant factors for consideration as follows:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit 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.<sup>86</sup>

No Fair Use Doctrine was included in the 1909 Act but the doctrine has been developed and followed by the courts over the years.<sup>87</sup>

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83. *Id.* § 110(8).

84. *Id.* § 110(9).

85. *Id.* § 107.

86. *Id.*

87. See *Mathews Conveyor Co. v. Palmer-Bee Co.*, 135 F.2d 73 (6th Cir. 1943), where the court noted that:

Fair use is to be determined by a consideration of all of the evidence, and among other elements entering into the determination of the issue, are the extent and relative value of copyrighted material, and the effect upon the distribution of objects of the original work . . . . Whether a particular use of a copyrighted article, without permission of the owner, is a fair use, depends upon the circumstances of the particular case, and the court must look to the nature and objects of the selections made, the quantity and

The new Act specifically deals with the situations concerning broadcasts by cable systems, hotel systems or other secondary transmissions such as those involved in the case of *Fortnightly Corp. v. United Artists Television, Inc.*<sup>88</sup> Section 111(a) specifically exempts secondary transmissions of the primary transmission of a local licensed broadcast station if it is relayed by the management of a hotel, apartment house or similar establishment to the private rooms of guests or residents, and provided no direct charge is made to hear the secondary transmissions.<sup>89</sup> It appears that the new Act would not have encompassed the actions complained of in *Twentieth Century Music Corp. v. Aiken*,<sup>90</sup> where the proprietor of a restaurant played music over the radio in his establishment. Also, if the secondary transmission is made solely for the purposes set forth in clause (2) of section 110 (instructional broadcasting), it is exempted.

Another type of exempt secondary transmission is one made by a passive carrier who merely supplies the communication channel and has no direct or indirect control over the selection or content of the primary transmission and no control over who the recipients are of the secondary transmission.<sup>91</sup> Secondary transmissions by governmental bodies or non-profit organizations are also exempt as long as the recipients are not charged any more than the cost of the transmission service.<sup>92</sup> Secondary transmission to a controlled group of recipients rather than the public at large, such as closed circuit or background music systems, is not an infringement if: (1) the primary transmission is by an F.C.C. licensed broadcast station; (2) the carriage of the secondary transmission is required by F.C.C. rules; and (3) the secondary transmitter does not alter the signal of the primary transmitter.<sup>93</sup>

Clause (c) of section 111 establishes a compulsory license provision for cable systems.<sup>94</sup> Therefore, the cable transmission is a public performance by

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value of the materials used, and the degree in which the use may prejudice the sale, diminish the profits, or supersede the objects of the original work . . . . [F]air use is to be determined by a consideration of all the evidence in the case . . . .

*Id.* at 85. *Accord*, *Tennessee Fabricating Co. v. Moultrie Mfg. Co.*, 421 F.2d 279 (5th Cir. 1970) (use must be for some legitimate, fair and reasonable purpose to constitute fair use). *See also* Schulman, *Fair Use and the Revision of the Copyright Act*, 53 *IOWA L. REV.* 832 (1968).

88. 392 U.S. 390 (1968). *See also* 2 NIMMER, *supra* note 20.

89. 17 U.S.C.A. § 111(a)(1) (1976).

90. 500 F.2d 127 (3d Cir. 1974), *aff'd*, 422 U.S. 151 (1975). For a detailed explanation of this case, see note 50 *supra* and accompanying text.

91. 17 U.S.C.A. § 111(a)(3) (1977).

92. *Id.* § 111(a)(4).

93. *Id.* § 111(b). The purpose of this exemption is to allow licensed television stations to transmit pay television scrambled signals to a controlled group of subscribers. *See* H.R. REP. NO. 1476, 94th Cong., 2d Sess. 81, 92 (1976).

94. 17 U.S.C.A. § 111(c) (1977), which provides:

(1) Subject to the provisions of clauses (2), (3), and (4) of this subsection, secondary transmissions to the public by a cable system of a primary transmission made by a broadcast station . . . shall be subject to compulsory licensing upon compliance with the requirements of subsection (d) where the carriage of the signals comprising the secondary transmission is permissible under the rules, regulations, or authorizations of the Federal Communications Commission.

statute today. These systems must comply with F.C.C. rules in order to obtain such a license. The cost of the license is determined by the amount of non-local and non-network programming which is carried by the cable system.<sup>95</sup> The new law would seem to now require the purchase of a compulsory license, similar to the one in the *Fortnightly* case, by the community antenna television system owner.<sup>96</sup>

#### IV. INFRINGEMENT OF THE MUSICAL COMPOSITION COPYRIGHT

All persons who participate in the infringement of a copyright are liable for such infringement both jointly and severally.<sup>97</sup> This clearly means that a performer in an orchestra or band that renders an infringing performance of a copyrighted musical composition is liable for such infringement. However, it is rare that a musician or singer will be made a defendant in an infringement action.<sup>98</sup> The performing rights societies almost always seek redress from the proprietor of the establishment where the infringing performance takes place.<sup>99</sup> A person may be liable for copyright infringement even though he did not himself perform the protected musical work.<sup>100</sup>

While a landlord, who rents premises without any knowledge of an impending infringement, has no control over the tenant and receives no benefit from the infringement is not liable,<sup>101</sup> it has long been held that an owner, operator or manager of an establishment is liable for the actions of his per-

95. *Id.* § 111(d)(2)(b).

96. See *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968).

97. *Ted Browne Music Co. v. Fowler*, 290 F. 751, 754 (2d Cir. 1923).

98. *KECA Music, Inc. v. Dingus McGee's Co.*, 432 F. Supp. 72 (W.D. Mo. 1977). In *KECA*, owners of copyrighted musical compositions brought an infringement action against the owner of a cocktail lounge and restaurant for damages resulting from unauthorized performances of the compositions. The defendant claimed that he should not be held liable for the musical selections performed by the musical groups since he had specifically ordered them to play *only* original compositions. The court held that "liability as an infringer requires only that the infringing party have the *right* and *ability* to supervise the infringing activity and also that the infringer have a direct financial interest in such activity. *Gershwin Publishing Corp. v. Columbia Artists Management, Inc.*, 443 F.2d 1159 (2d Cir. 1971); *Shapiro, Bernstein & Co. v. H. L. Green Co.*, 316 F.2d 304 (2d Cir. 1963)." *Id.* at 74-75.

99. The mobile lifestyle of the majority of musicians renders suit against the individual performer difficult. Also, the financial stability of such musicians is probably a factor to consider in the injured party's choice of defendants. A business that is ongoing will more easily consent to paying performance fees in order to continue providing entertainment, as opposed to a performer who can choose to change his repertoire or just move on to another area where the societies are not as vigilant.

100. *Gershwin Publishing Corp. v. Columbia Artists Management, Inc.*, 443 F.2d 1159, 1161 (2d Cir. 1971). ASCAP brought suit against a local nonprofit community concert association and Columbia Artists Management for infringement. Columbia merely sponsored the association and supplied the artists who were to perform. Columbia was held liable for the infringing performances which took place.

101. *Deutsch v. Arnold*, 98 F.2d 686 (2d Cir. 1938) (tenant's unauthorized use of plaintiff's copyrighted handwriting analyzing chart while on defendant's premises held insufficient to form a basis for copyright infringement action since defendant did not know of or benefit from the infringement).

formers.<sup>102</sup> It is no defense for the proprietor that he had no voice in the selection of the musicians or the individual musical works played.<sup>103</sup> Liability as an infringer only requires that the party have the right and ability to supervise the infringing activity and also, that he have a direct financial interest in such activity.<sup>104</sup> Claiming that the musicians were not employees or servants, but merely independent contractors, will not relieve the proprietor of liability.<sup>105</sup>

Many nightclub owners have unsuccessfully attempted to escape liability on the defense that they expressly told the band not to perform copyrighted tunes and the band agreed not to do so. In addition, the owner has been held liable even where he obtains signed written contracts stating such an agreement was made and even if he posts placards in his establishment stating his objection to the performance of copyrighted music.<sup>106</sup> The proprietor is deemed to have acquiesced in the performances if he exerts no control over selection of the repertoire to be played.<sup>107</sup> Also, as in any other infringement action, an intent to infringe is not necessary for civil liability.<sup>108</sup> At this time, it appears that the liability of proprietors and broadcasters will not be significantly changed by any provisions for defense within the new Act.

One type of defense which has relieved some proprietors from liability for infringement of songs included in the ASCAP repertory is estoppel based upon the provisions of the Amended Consent Decree under which ASCAP now operates. In *Tempo Music, Inc. v. Myers*,<sup>109</sup> ASCAP was held to be estopped from asserting an infringement action against the owner of a supper club. The owner had requested the ASCAP agent to furnish him with a list of compositions which were covered by an ASCAP license. The agent failed to supply such a list to the owner. ASCAP was denied a cause of action because of its failure to act; in other words, such a cause of action was deemed to be precluded on the basis of the equitable doctrine of "unclean hands."

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102. *Dreamland Ball Room, Inc. v. Shapiro, Bernstein & Co.*, 36 F.2d 354 (7th Cir. 1929). In *Dreamland*, the owner of a ballroom was held liable for infringement caused by the performances of an orchestra which had been hired to play nightly. Although the owner had no control over the selection of the individual musicians, or the musical selections to be played, the court found liability to exist. Other defenses which the court rejected included the owner's lack of knowledge that the selections had been copyrighted, and the contention that the orchestra was an independent contractor. *Id.* at 355.

103. *Id.*

104. *KECA Music, Inc. v. Dingus McGee's Co.*, 432 F. Supp. 72, 74 (W.D. Mo. 1977).

105. *Dreamland Ball Room, Inc. v. Shapiro, Bernstein & Co.*, 36 F.2d 354, 355 (7th Cir. 1929); *M. Witmark & Sons v. Tremont Social Athletic Club*, 188 F. Supp. 787 (D. Mass. 1960).

106. *Shapiro, Bernstein & Co. v. Veltin*, 47 F. Supp. 648 (W.D. La. 1942). The court applied the agency principle of respondeat superior to sustain a finding of liability on the part of the proprietor.

107. See *Buck v. Jewell-LaSalle Realty Co.*, 283 U.S. 191 (1931); *Famous Music Corp. v. Bay State Harness Horse Racing and Breeding Ass'n, Inc.*, 423 F. Supp. 341 (D. Mass. 1976), *aff'd*, 554 F.2d 1213 (1st Cir. 1977). See also *M. Witmark & Sons v. Pastime Amusement Co.*, 298 F. 470 (E.D.S.C.), *aff'd*, 2 F.2d 1020 (4th Cir. 1924).

108. *Metro Associated Services, Inc. v. Webster City Graphic, Inc.*, 117 F. Supp. 224 (N.D. Iowa 1953).

109. 407 F.2d 503 (4th Cir. 1969).



The court held that ASCAP was under an obligation to provide prospective users of their works with a listing of their repertory or advise them of the availability of an editing service,<sup>110</sup> and as the result of its failure to so provide, it was precluded from complaining of any subsequent infringement.

However, a subsequent case held that ASCAP had met the consent de-

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110. See notes 29-31 *supra* and accompanying text for an explanation of the origination of the consent decree. The 1950 consent decree states, in part, that ASCAP is:

(B) Ordered and directed to issue to any unlicensed radio or television broadcaster, upon written request, per program licenses, the fee for which

(1) in the case of commercial programs, is, at the option of ASCAP, either (a) expressed in terms of dollars, requiring the payment of a specified amount for each program in which compositions in the ASCAP repertory shall be performed, or (b) based upon the payment of a percentage of the sum paid by the sponsor of such program for the use of the broadcasting or telecasting facilities of such radio or television broadcaster,

(2) in the case of sustaining programs, is at the option of ASCAP, either (a) expressed in terms of dollars, requiring the payment of a specified amount for each program in which compositions in the ASCAP repertory shall be performed, or (b) based upon the payment of a percentage of the card rate which would have been applicable for the use of its broadcasting facilities in connection with such program if it had been commercial, and

(3) subject to the other provisions of Section VIII takes into consideration the economic requirements and situation of those stations having relatively few commercial announcements and relatively greater percentage of sustaining programs, with the objective that such stations shall have a genuine economic choice between per program and blanket licenses;

(C) Enjoined and restrained from requiring or influencing the prospective licensee to negotiate for a blanket license prior to negotiating for a per program license.

VIII. Defendant ASCAP, in fixing its fees for the licensing of compositions in the ASCAP repertory, is hereby ordered and directed to use its best efforts to avoid any discrimination among the respective fees fixed for the various types of licenses which would deprive the licensees or prospective licensees of a genuine choice from among such various types of licenses.

IX. (A) Defendant ASCAP shall, upon receipt of a written application for a license for the right of public performance of any, some or all of the compositions in the ASCAP repertory, advise the applicant in writing of the fee which it deems reasonable for the license requested. If the parties are unable to agree upon a reasonable fee within sixty (60) days from the date which such application is received by ASCAP, the applicant therefore may forthwith apply to this Court for the determination of a reasonable fee and ASCAP shall, upon receipt of notice of the filing of such application, promptly give notice thereof to the Attorney General. In any such proceeding the burden of proof shall be on ASCAP to establish the reasonableness of the fee requested by it. Pending the completion of any such negotiations or proceedings, the applicant shall have the right to use any, some or all of the compositions in the ASCAP repertory to which its application pertains, without payment of any fee or other compensation, but subject to the provisions of Sub-Section (B) hereof, and to the final order of judgment entered by this Court in said proceedings . . .

The Decree provides:

IV. Defendant ASCAP is hereby enjoined and restrained from:

(A) holding, acquiring, licensing, enforcing or negotiating concerning any rights in copyrighted musical compositions other than rights of public performance on a non-exclusive basis;

(B) Limiting, restricting, or interfering with the right of any member to issue to a user non-exclusive licenses for rights of public performance;

cree requirements because its agent had advised the defendant of the editing service and also because the agent had informed the defendant that a list of the ASCAP repertory was available for inspection in the main office in New York City. The court reasoned that it was impracticable to require ASCAP to send each prospective user a list of *all works* which were covered by an ASCAP license.<sup>111</sup> As a result, in *Famous Music Corp. v. Bay State Harness Horse Racing & Breeding Ass'n, Inc.*,<sup>112</sup> ASCAP was deemed to have met the *Tempo Music* obligations and was therefore not estopped from bringing action for license infringement. The consent decree requirements were adequately complied with when ASCAP sent a letter to the defendant notifying him that an index of ASCAP works was available for examination and also informing him of the location of the listings which were available for inspection or purchase by the defendant.<sup>113</sup> The case law on consent decree defenses has not been changed by the new Act and the *Bay State* position is probably still controlling.

#### V. THE JUKE BOX EXEMPTION AND ITS TREATMENT UNDER THE 1976 COPYRIGHT ACT

One final change in the rights of public performance for profit which has been effectuated by the enactment of the new Copyright Act relates to juke boxes. Under the 1909 Act, the reproduction or rendition of a musical composition by or upon coin-operated machines was *not* deemed a public performance for profit unless a fee for admission was charged where the reproduction or rendition occurred.<sup>114</sup> This provision was commonly known as the Juke Box Exemption. The sole test for infringement liability was whether an admission fee was or was not charged.<sup>115</sup> Therefore, any establishment which operated

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111. *Big Sky Music v. Todd*, 388 F. Supp. 498 (S.D. Ga. 1974). In *Big Sky Music*, the owner of a nightclub attempted to assert the defense of equitable estoppel. Said owner had sent a letter to ASCAP requesting a list of all musical composition rights owned by ASCAP members. ASCAP refused to supply such a list but did advise defendant of an editing service which would inform him whether any specific song was owned by members of ASCAP.

112. 423 F. Supp. 341 (D. Mass. 1976), *aff'd*, 554 F.2d 1213 (1st Cir. 1977). ASCAP was held not to be estopped from asserting a claim of copyright infringement on the ground that their agent had failed to advise the defendants of the availability of an editing service furnished by the society.

113. *Id.* at 343. The following letter sent by ASCAP to the owner was held to satisfy the requirements of the 1950 consent decree:

With respect to the works in our repertory, please be advised that a three-volume ASCAP Index of Performed Works is available for your examination or you may purchase the set if you so desire. In addition, since compositions are added daily, the Society maintains a complete list of works of the ASCAP repertory in our New York office - One Lincoln Plaza - New York, New York, 10023.

Should you require any further information about our repertory, we shall be happy to furnish the same upon request.

114. 17 U.S.C. § 1(e) (1976).

115. *Quackenbush Music, Ltd. v. Wood*, 381 F. Supp. 904 (M.D. Tenn. 1974). The court found it immaterial that an admission fee was not charged every night, or for listening to the jukebox. Defendants only charged an admission fee on nights when a live band played and never

a juke box and charged an admission fee at any time was subject to performance licensing by the societies.

The new Act has lifted this exemption and now allows the proprietors of such coin-operated machines to obtain an annual compulsory license from the Copyright Royalty Tribunal.<sup>116</sup> The fee for such a license is eight dollars per year for each machine. There are several requirements in section 116 which the operator must comply with in order to obtain a compulsory license. These requirements include: (1) that the establishment must not charge a direct or indirect admission charge; (2) that the machine must have a list of the works available posted upon it; and (3) that the choice of which works are to be played must be made by the patrons.<sup>117</sup> The Tribunal collects these fees and then distributes them to the performing rights societies. With this compulsory license provision, establishments with only this type of performance will no longer need to pay for individual ASCAP, BMI or SESAC licenses. However, they may be held liable for infringement if they fail to comply with the licensing provisions or if they refuse to pay the annual fee. The real impact and proper application of this provision will become apparent in the future. Like so many of the new provisions in the 1976 Copyright Act, judicial interpretation will undoubtedly be relied upon to arrive at the true meaning of the juke box provisions.

## VI. CONCLUSION

The 1976 Copyright Act has caused many significant changes in the field of musical compositions publically performed for profit. Many sections of the new law are merely codifications of the previous case law established under the 1909 act. The previously limited protection for "public" performances has been eliminated by the new Act but replaced by several specific limitations which will make it much more difficult for private clubs or colleges to qualify for a statutory exemption, especially when considered in light of the limitations of "no commercial advantage" and "no compensation to performers."

The new Act removes the confusion previously encountered when attempting to determine whether or not cable television broadcasters were "performing" the copyrighted work. The requirements for an exemption are now specifically set forth in the new copyright law. Generally, cable television broadcasters will now be subject to compulsory performance licensing even though previously held to be exempt. The common-law Fair Use Doctrine has also been codified allowing exemptions for performances made for specific purposes set out in section 107.

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charged admission fees in the afternoons. The music played upon the jukebox was still "public performance for profit."

116. 17 U.S.C. § 116(b)(1)(A) (1976). The Copyright Royalty Tribunal is established and its purposes set forth in §§ 801-810 of the appendix to the 1976 Act. The Tribunal is an independent body under the legislative branch of government. Its duties are to set the royalty rates for compulsory licenses, set the payments, resolve disputes over the distribution of royalties and to actually distribute the royalties.

117. *Id.* § 116(e)(1).

The new Act has also lifted the prior Juke Box Exemption and now requires the owner of a juke box to obtain an annual compulsory license for having such a machine in his establishment. The new law also establishes a new agency to collect the fees and thereby relieves proprietors from the necessity of dealing with the performing rights societies.

Whether the new Copyright Act will be hailed as a highly comprehensive and well-written law is yet to be determined. However, it can be unquestionably stated that it was necessary in order to cope with the technological advances of the modern world.

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