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CONGRESS TRIPS OVER INTERNATIONAL LAW: WTO FINDS UNFAIRNESS IN MUSIC LICENSING ACT

Mary LaFrance*

I. INTRODUCTION

Intellectual property law reform in the United States frequently involves balancing the interest rights of holders against the interests of users. As international agreements play an increasingly important role in the development of domestic intellectual property law, striking this balance has become a more complicated process.

Whereas, a few decades ago, resolving the competing needs of owners and users often could be accomplished purely as a matter of domestic policy -- whether the outcome was based on high-minded principle, interest group politics, or simple pragmatism -- today the proposed resolution to such a conflict more often than not must be tested against the United States' international obligations under a growing list of trade agreements and intellectual property conventions.

A recent example of this phenomenon, and the focus of this article, involves Congress's 1998 decision to narrow the scope of the exclusive public performance right in non-dramatic musical compositions (e.g., "pop" music) by significantly broadening one of the longstanding exceptions to that right. This decision was of dubious merit purely as a matter of domestic policy; as discussed below, the amendment was largely the result of special interest lobbying by the hospitality industry.

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What domestic politics can do, however, it seems that international politics can undo. As the story of the expanded “homestyle exemption” continues to unfold, it appears that this relatively unprincipled amendment will be short-lived, not because our elected representatives have recognized the error of their ways, but because international law -- and the enormous political constituencies that have influenced that law -- will offer Congress no choice but to repeal or significantly curtail this broadened exemption.

Yes, Virginia, interest group politics now speaks with a global voice.

II. THE 1976 ACT’S HOMESTYLE EXEMPTION

The “homestyle exemption” made its first appearance in the Copyright Act of 1976. Prior to that, under the Copyright Act of 1909, a copyright owner’s public performance right was not subject to any explicit exceptions for background music used by small businesses. However, in the case of musical compositions, the 1909 Act gave copyright owners the exclusive right to perform the work “publicly for profit,” thus allowing unlicensed nonprofit public performances to take place.

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4 17 U.S.C. §§ 1 (c) - (e) (repealed by 1976 Act). Subsection (c) recognized the public performance right with respect to certain nondramatic literary works; subsection (d) recognized the right with respect to dramas; and subsection (e) recognized the right with respect to musical compositions See, e.g., Buck v. Jewell-LaSalle Realty Co., 283 U.S. 191, 200, 51 S.Ct. 410, 75 L.Ed. 971 (1931), finding an unauthorized public performance under section 1(e) where a hotel with a single radio receiver retransmitted unlicensed radio broadcasts of copyrighted music to its public rooms as well as to the individual guest rooms). Both subsections (c) and (e) gave the copyright owner an exclusive right only with respect to for-profit uses of the work; only subsection (d) encompassed public performances without regard for profit.

5 Id. §1(e).
In the waning days of the 1909 Act, the Supreme Court held in *Twentieth Century Music Corp. v. Aiken*\(^6\) that no unauthorized public performance occurred when a small fast-food restaurant, with a seating capacity of 38-40 patrons, played an authorized radio broadcast of music for its customers. The Court relied in part on its prior decisions holding that mere reception of a licensed broadcast was not itself a public performance for purposes of section 1(e).\(^7\) The Court noted the "practical unenforceability" of a rule that would impose infringement liability on every small business that had a radio or television on its premises.\(^8\) Further, the Court noted:

\[\text{[A]}\text{ ruling that a radio listener "performs" every broadcast that he receives would be highly inequitable for two distinct reasons. First, a person in Aiken's position would have no sure way of protecting himself from liability for copyright infringement except by keeping his radio set turned off. For even if he secured a license from ASCAP, he would have no way of either foreseeing or controlling the broadcast of compositions whose copyright was held by someone else. Secondly, to hold that all in Aiken's position "performed" these musical compositions would be to authorize the sale of an untold number of licenses for what is basically a single public rendition of a copyrighted work. The exaction of such multiple tribute would go far}\]

\(^6\) *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 95 S.Ct. 2040, 45 L.Ed.2d 84 (1975).

\(^7\) Id. at 160-61 (citing *Fortnightly Corp. v. United Artists*, 392 U.S. 390, 88 S.Ct. 2084, 20 L.Ed. 2d 1176 (1968); *Teleprompter Corp. v. CBS*, 415 U.S. 394, 94 S.Ct. 1129, 39 L.Ed. 2d. 415 (1974)). The court distinguished *Jewell-LaSalle* as involving a broadcast that was itself unlicensed. *Aiken*, 422 U.S. at 160. That ground for distinction is not terribly persuasive, however, since the only issue in *Jewell-LaSalle* was whether the hotel's actions constituted a public performance, not whether that performance was infringing.

\(^8\) Id. at 162.

\(^9\) The American Society of Composers, Authors and Publishers ("ASCAP") issues "blanket licenses" that permit licensees to publicly perform any copyrighted musical compositions owned by ASCAP's membership, which consists of music publishers and composers.
beyond what is required for the economic protection of copyright owners, and would be wholly at odds with the balanced congressional purpose of 17 U.S.C. § 1(e):

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

On the heels of the 1975 Aiken decision, Congress quickly drafted what became known as the homestyle exemption, incorporating it as section 110(5) of the bill that was ultimately enacted as the 1976 Copyright Act. At the same time, Congress broadened the scope of the copyright owner's exclusive rights to include most not-for-profit public performances. Thus, Congress

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10 Aiken, 422 U.S. at 162-64 (quoting H.R. Rep. No. 2222, 60th Cong., 2d Sess. 7 (1909)).
12 Under the 1976 Act, the owner of a copyrighted music work has the exclusive right "to perform the copyrighted work publicly." 17 U.S.C. § 106 (4) (2001). The House Report on the 1976 Act explained that:
   The right of public performance under section 106(4) extends to 'literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works and sound recordings' and, unlike the equivalent provisions now in effect, is not limited by any 'for profit' requirement. The approach of the bill, as in many foreign laws, is first to state the public performance right in broad terms, and then to provide specific exemptions for educational and other nonprofit uses. This approach is more reasonable than the outright exemption of the 1909 statute. The line between commercial and 'nonprofit' organizations is increasingly
overruled Aiken's holding that performing a radio broadcast for customers was not a public performance, \(^{13}\) but created a specific exemption for certain such performances. \(^{14}\) The original homestyle exception, which was not amended from 1976 until 1998, was brief:

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

* * *

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

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

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\(^{13}\) The House Report expressly noted, "[t]his basis for the [Aiken] decision is completely overturned by the present bill and its broad definition of 'perform' in section 101." *House Report, supra* note 12, at 86. See also Broadcast Music, Inc. v. Claire's Boutiques, Inc., 949 F.2d 1482, 1487-88 (7th Cir. 1991) (noting that 1976 Act rejected Aiken's rationale but not its result).

\(^{14}\) See Cass County Music Co. v. Muedini, 55 F.3d 263, 267 (7th Cir. 1995).
the transmission, or

(B) the transmission thus received is further transmitted to the public.\textsuperscript{15}

According to the 1976 House Report, the purpose of section 110(5) was “... to exempt from copyright liability anyone who merely turns on, in a public place, an ordinary radio or television receiving apparatus of a kind commonly sold to members of the public for private use.”\textsuperscript{16}

The basic rationale of this clause is that the secondary use of the transmission by turning on an ordinary receiver in public is so remote and minimal that no further liability should be imposed. In the vast majority of these cases no royalties are collected today, and the exemption should be made explicit in the statute.\textsuperscript{17}

The House Report described the scope of the exemption as follows:

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 represent 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 liability where the proprietor has a commercial "sound

\textsuperscript{16} Id.
\textsuperscript{17} House Report, supra note12, at 86.
system7 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. Factors to consider in particular cases would include the size, physical arrangement, and noise level of the areas within the establishment where the transmissions are made audible or visible, and the extent to which the receiving apparatus is altered or augmented for the purpose of improving the aural or visual quality of the performance for individual members of the public using those areas.18

In adopting the final language of section 110(5), the Conference Committee Report added:

With respect to section 110(5), the conference substitute conforms to the language in the Senate bill. It is the intent of the conferees that a small commercial establishment of the type involved in *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151 (1975), which merely augmented a home-type receiver and which was not of sufficient size to justify, as a practical matter, a subscription to a commercial background music service, would be exempt. However, where the public communication was by means of something other than a home-type receiving apparatus, or where the establishment actually makes a further transmission to the public, the exemption would not apply.19

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18 *Id.* at 87.
The limited scope of the exemption was further emphasized in the Senate Report, which noted that "[t]he 110(5) exemption will allow the use of ordinary radios and television sets for the incidental entertainment of patrons in small businesses and other establishments, such as taverns, lunch counters, hairdressers, dry cleaners, doctors' offices, etc."\(^{20}\)

The general principle underlying the homestyle exemption, including its limited scope, was -- and remains -- sound. Broadcasters pay licensing fees to organizations representing composers and music publishers for the privilege of publicly performing copyrighted musical compositions.\(^{21}\) Those fees are based on the revenues that the broadcaster derives from these performances. Since most radio broadcasters derive revenues from their advertising fees, the cost of public performance licenses for radio stations is based on their advertising revenues. The advertising fees are usually based on the anticipated listenership. However, when these broadcasts are received in commercial establishments, and used to enhance the profitability of a hotel, restaurant, bar or retail establishment by providing an inducement for customers to linger and spend money, the money spent by those customers does not benefit the broadcaster, and therefore cannot be considered in calculating the broadcaster's licensing fee. As a result, the composers and publishers who, under section 106(4), should be entitled to receive a share of any profits derived from the public performance of their music, receive no additional compensation that would reflect the profits which their music may have (at least indirectly) generated for the commercial establishment where the broadcast was received. Unless the true listenership, and the profits which businesses derive from making music available to their patrons, can be estimated with some


\(^{21}\) Those performing rights organizations include the American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music, Inc., (BMI), and SESAC, Inc. (the smallest of the three). While foreign copyright owners are typically represented by foreign performing rights organizations, the latter usually have reciprocity arrangements with the United States organizations. See, Al Kohn & Bob Kohn, KOHN ON MUSIC LICENSING 300-01, 871-73 (1996).
reasonable degree of accuracy, calculating appropriate blanket licensing fees, and thus the appropriate distribution of royalties to copyright owners, is extremely difficult. Any estimate of true listenership that purports to include patrons of commercial establishments is likely to be disputed by the broadcasters whose blanket licensing fees are increased as a result of such estimates, although it might be argued that the broadcasters can use those same estimates to justify increasing their advertising rates, thus passing the licensing costs on to advertisers. However, if the licensing fees also take into account the revenues received by businesses that are making broadcasts available to their customers, those fees are likely to increase significantly, making it extremely difficult for broadcasters to recoup the costs from advertisers. In short, there is a pool of profits captured by businesses that is able to attract and retain customers through the use of background music, and to the extent that this pool of profits is attributable to exploiting copyrighted works, the copyright owners have a reasonable claim to some share of those profits. The problem is how to determine that share, and how and from whom to collect it.\footnote{Compare Laura A. McCluggage, \textit{Section 110(5) and the Fairness in Music Licensing Act: Will the WTO Decide the U.S. Must Pay to Play?}, 40 IDEA: J.L. & TECH. 1, 37-39 (2000) (noting that Canada law does not require establishments to pay royalties for playing radio broadcasts, but does provide for collecting additional performance royalties from radio stations based on their listenership) with Laurence R. Helfer, \textit{World Music on a U.S. Stage: A Berne/TRIPs and Economic Analysis of the Fairness in Music Licensing Act}, 80 B.U. L.REV. 93, 188-90 (2000) (criticizing the broadcaster-pays approach).}

The original homestyle exemption was designed to carve out a small exception for some business users of broadcast music -- those businesses that did not derive significant revenues from the incidental public performance of such music -- while leaving the majority of business users to negotiate appropriate public performance licenses. Unfortunately, in the years which followed the enactment of section 110(5), the inconsistency between the rather imprecise statutory language and the statements of intent in the accompanying House, Senate, and Conference Committee Reports led to increasing confusion over the scope of the
exemption. In particular, courts were unable to reach a consensus on which factors should be considered in determining whether a particular establishment qualified for the exemption. For example, the Seventh and Eighth Circuits focused exclusively on whether the establishment's sound system complied with the statutory requirement of "a single receiving apparatus of a kind commonly used in private homes." Other courts, including the Second and Ninth Circuits, considered a variety of other factors that had been mentioned in the legislative history of section 110(5)—for example, the square footage of the establishment (in some cases, specifically comparing its square footage with the supposed square footage of the restaurant in *Aiken*), the number of patrons it could

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23 *E.g.*, *Edison Bros. Stores, Inc. v. Broadcast Music, Inc.*, 954 F.2d 1419, 1422-24 (8th Cir. 1992) (exemption applied where store used only a simple receiver and two speakers; physical size of establishment, number of stores in chain, and ability to pay for commercial music service were not decisive; statutory language did not limit exemption to "small commercial establishments," notwithstanding legislative history; apparatus must be evaluated on a per-store basis, without regard to apparatus at other stores in same chain), *cert. denied*, 504 U.S. 930, 118 L.Ed.2d 590, 112 S.Ct. 1995 (1992); *Cass County Music Co. v. Muedini*, 55 F.3d 263, 265-269 (7th Cir. 1995) (exemption applied to restaurant with music audible throughout its 1500 square foot dining area, and capacity of 128 patrons; court focuses solely on nature of receiving apparatus); *Broadcast Music, Inc. v. Claire's Boutiques, Inc.*, 949 F.2d 1482 (7th Cir. 1991) (nature of individual store's receiving apparatus is the only relevant factor, regardless of whether store is independent or part of a chain) (affirming *Broadcast Music, Inc. v. Claire's Boutiques, Inc.*, 754 F. Supp. 1324 (N.D. Ill. 1991)); *cert. denied*, 504 U.S. 911, 118 L.Ed.2d 547, 112 S.Ct. 1942 (1992); *NFL v. McBee & Bruno's, Inc.*, 792 F.2d 726, 731 (8th Cir. 1986) (bar's receipt of television broadcasts was not exempt because satellite dish was "not commonly found in private homes"); *Broadcast Music, Inc. v. Jeep Sales & Service Co.*, 747 F. Supp. 1190, 1193-94 (E.D. Va. 1990) (auto dealership was not exempt where it used at least four indoor and four outdoor speakers; court does not indicate square footage, focusing solely on the receiving apparatus, but also cites cases that did consider square footage); *National Football League v. Rondor, Inc.*, 840 F. Supp. 1160 (N.D. Ohio 1993) ("deep fringe antennas with preamplifiers and rotors are not commonly used in private homes"); *Blue Seas Music, Inc. v. Fitness Surveys, Inc.*, 831 F. Supp. 863 (N.D. Ga. 1993) (fitness club was nonexempt where it imposed a direct admission charge, used a non-home-type system with more than 13 speakers, and signal was further transmitted "throughout the facility").
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accommodate at one time, its revenues, whether it was an independent operation or part of a chain, and whether, in light of these factors, the establishment was, in the words of the Conference Committee Report, "of sufficient size to justify, as a practical matter, a subscription to a commercial background music service." \(^{24}\) Although each of these diverse approaches was

\(^{24}\) E.g., Sailor Music v. Gap Stores, Inc., 668 F.2d 84 (2d Cir. 1981), cert. denied, 456 U.S. 945, 72 L.Ed. 2d 468, 102 S.Ct. 2012 (1982). The Sailor Music opinion asserts, without support, that the fast food restaurant in Aiken covered 1055 square feet, of which 620 square feet were open to public. \(\text{Id. at}\) 86. However, as later pointed out by the court in Edison Stores, 954 F.2d at 1423 n.5, there is no record of this square footage in any of the published opinions in Aiken, or in the legislative history of section 110(5). Sailor Music held that a Gap store that was 2769 square feet in size was not exempt under section 110(5) because of its physical size, citing both the House and Conference Committee Reports. Although the court also noted that the store in question used four loudspeakers, it did not indicate the relevance of this information. \(\text{See also}\) Broadcast Music, Inc. v. Calvin's Furniture and Appliances, 1996 U.S. Dist. LEXIS 7566, at \(*9-*10\) (W.D.N.Y. 1996) (stores with 5000 square feet open to public, and between 9 and 30 speakers, were nonexempt regardless of whether the appropriate test is limited to their receiving apparatus or considers the size of the establishment as well); U.S. Songs, Inc. v. Downside Lenox, Inc., 771 F. Supp. 1220, 1222, 1226 (N.D.Ga. 1991) (exemption applies only if there is no direct admission charge or "further transmission," and only if the venue is "a small commercial establishment"); defendant's bar/restaurant was not exempt because disseminating radio signal from receiver behind bar to "separate bar and dining areas" of unspecified size constituted further transmission, and because defendant's equipment, which included 20 speakers, was not home-type); Crabshaw Music v. K-Bob's of El Paso, Inc., 744 F. Supp. 763, 766-67 (W.D. Tex. 1990) (restaurant was not exempt where it had 7000 square feet of dining area, commercial-type sound system with eleven speakers, and $800,000-$900,000 in annual revenues); Gnossos Music v. Di Pompo, 13 U.S.P.Q.2d (BNA) 1539, Copy. L. Rep. (CCH) P26,483, 1989 U.S. Dist. LEXIS 15988, \(*13-*14\) (D. Maine 1989) (restaurant with 1824 square feet open to the public, and seating capacity of 172, was too large compared to Aiken, and sound system was too commercial, with eight to ten speakers; music was further transmitted from one room to speakers in other rooms; and defendant had previously subscribed to commercial music service); Hickory Grove Music v. Andrews, 749 F. Supp. 1031 (D. Mont. 1990) (restaurant with seating area of 1192 square feet, with the transmission audible in an area of 880 square feet and seating capacity of 120 persons is too large, compared to 620 square feet of public area in Aiken; sound system was also commercial in nature, with five speakers; sound was "further transmitted" to
public rooms other than the room where the receiver was located; court indicated revenues would be relevant but defendant did not supply any data); Merrill v. Bill Miller’s Bar-B-Q Enter., Inc., 688 F. Supp. 1172, 1175-76 (W.D. Tex. 1988) (chain of 36 restaurants with 1000-1500 square feet of dining space per store, seating space for 100-125 people per store, over $500,000 in annual gross revenues per store, and over $30 million in annual gross revenues chain-wide, was not exempt; receiving apparatus was not home-type, even though it had only two speakers; performance was “further transmitted” from one room to another, and store was large enough to justify subscription to commercial music service); International Korwin Corp. v. Kowalczyk, 665 F. Supp. 652, 656-58 (N.D. Ill. 1987) (nightclub was not exempt where it had at least 2,640 square feet, annual net profits of $35,000 to $136,000, seating capacity of 200, and commercial sound system with eight speakers, and where the transmissions were further transmitted to the public through wiring from a private office to the public areas of the establishment), aff’d 855 F.2d 375 (7th Cir. 1988); Merrill v. County Stores, Inc., 669 F. Supp. 1164, 1170 (D.N.H. 1987) (hardware stores not exempt where music reached 13,000 square feet open to public; apparatus included 16-19 speakers and was not home-type, and stores had $2.5 million in annual retail sales); Rodgers v. Eighty Four Lumber Co., 617 F. Supp. 1021, 1022-23 & n.1 (W.D. Pa. 1987) (chain of stores was not exempt because sound system was commercial, using three to eight speakers, sound was further transmitted from office to public areas, and each store had over 10,000 square feet open to public); Springsteen v. Plaza Roller Dome, Inc. 602 F. Supp. 1113, 1118-1119 (M.D. N.C. 1985) (Miniature golf course covering 7500 square feet was exempt; it was not large enough to justify subscription to commercial music service because it was open only 6 months a year, and rarely had revenues of more than $1000 a month; it also used a sound system, with six outdoor speakers, that was not very audible due to the size and outdoor setting of the golf course); Lamminations Music v. P&X Markets, Inc., 1985 Copyright L. Dec. P35, 790, 1985 WL 17704 (N.D. Cal. 1985) (chain of grocery stores, each with 10,000 to 14,500 square feet open to the public, was large enough to justify subscribing to commercial music service; two had already used such services; music was “further transmitted”; and equipment was not homestyle, using six to ten speakers per store); Broadcast Music, Inc. v. United States Shoe Corp., 678 F.2d 816, 817 (9th Cir. 1982) (comparing square footage in Aiken, and concluding that chain of more than 600 Casual Corner stores was nonexempt because it exceeded the "outer limit" of the exemption both in the nature of its sound system as well as the "size and nature" of the retail operation, citing the House and Conference Committee Reports) (affirming 211 U.S.P.Q. 43 (C.D. Cal. 1980)).
supportable by drawing on either the statutory language of section 110(5) or its legislative history, the different approaches made it impossible to articulate a uniform rule with predictive value.

In addition, courts found themselves wrestling with the more technical questions of (1) whether each defendant's particular "receiving apparatus" was "of a kind commonly used in private homes," in light of rapid changes in home entertainment technology and the wide variety in types and numbers of speakers employed at various establishments, and (2) whether the broadcast, once received at the establishment, was "further transmitted" within the meaning of the section 110(5), in light of the vague definition of "transmitted" in section 101.


26 E.g., NFL v. McBee & Bruno's, Inc., 792 F.2d 726, 731 (8th Cir. 1986) (finding bar not exempt because satellite dishes were not, at that time, "commonly found in private homes"); National Football League v. Ellicottville Gin Mill, Inc., 1995 WL 737935, *3, *6 (W.D.N.Y. 1995) (refusing to issue injunction against establishment that received locally blacked-out broadcast from a distant location using a common roof-top antenna); National Football League v. Rondor, Inc., 840 F. Supp. 1160 (N.D. Ohio 1993) (finding bar not exempt because "deep fringe antennas with preamplifiers and rotors are not commonly used in private homes"). See Wilk, supra note 24, at 805 (noting the problem of applying section 110(5) to continually changing consumer technology); Luh, supra note 24, at 727-30 (similar).

27 See supra notes 22 - 23.

28 For example, several district courts have held that further transmission of a broadcast occurred where the signal was received in one room in the establishment, and was then transmitted through wires to loudspeakers located in other rooms in the establishment. Hickory Grove Music v. Andrews, 749 F. Supp. 1031 (D. Mont. 1990); Gnossos Music v. Di Pompo, 13 U.S.P.Q.2d (BNA) 1539, Copy. L. Rep. (CCH) P26,483, 1989 U.S. Dist. LEXIS 15988, *13-*14 (D. Maine 1989); Merrill v. Bill Miller's Bar-B-Q Enterprises, Inc., 688 F. Supp. 1172, 1175-76 (W.D. Tex. 1988); Red Cloud Music Co. v. Schneegarten, Inc., 1992 WL 535955, *1 (C.D.Cal. 1992). In addition, courts in at least two cases have held that "further transmission" occurred where a broadcast was sent to speakers scattered throughout an establishment, even though the opinions do not indicate whether the speakers and receiver were
actually in different rooms. See Blue Seas Music, Inc. v. Fitness Surveys, Inc., 831 F. Supp. 863 (N.D.Ga. 1993) (fitness club was nonexempt where it imposed a direct admission charge, used a non-home-type system with more than 13 speakers, and signal was further transmitted “throughout the facility”); U.S. Songs, Inc. v. Downside Lenox, Inc., 771 F. Supp. 1220, 1222, 1226 (N.D.Ga. 1991) (exemption applies only if there is no direct admission charge or “further transmission,” and only if the venue is “a small commercial establishment;” defendant’s bar/restaurant was not exempt because disseminating radio signal from receiver behind bar to “separate bar and dining areas” constituted further transmission, and defendant’s equipment, which included 20 speakers, was not home-type).

The Seventh Circuit appears to have rejected this broad interpretation of “further transmission.” Although that circuit affirmed a district court decision applying this interpretation in International Korwin Corp. v. Kowalczyk, 855 F.2d. 375, 378 (7th Cir. 1988) (affirming 665 F. Supp. 652 (N.D. Ill. 1987), the appellant in that case had not appealed the district court's infringement finding. When presented with this issue a few years later in Claire's Boutiques, the Seventh Circuit expressly rejected the argument that sending a signal to a speaker in another room is a “further transmission,” holding that “[t]o further transmit a performance must mean more than to run speaker wire through a wall. It must entail the use of some device or process that expands the normal limits of the receiver's capabilities.” 949 F.2d at 1495. The Seventh Circuit's reasoning is worth a closer look:

[Plaintiff] BMI argues that “it is undisputed that Claire’s causes sounds to be received beyond the place where the performance is initially received.” This argument assumes that the performance is initially received at the receiver and then “further transmitted” via wire to other areas. Whatever its technical merits, this view of “further transmission” is contrary to the legislative history. The system in Aiken consisted of a radio set connected, presumably by wires, to four speakers. Congress intended such a system to be exempt under § 110(5). Yet BMI's proposed rule would deny the exemption to the store in Aiken. In addition, the statute uses the term “receiving apparatus,” which . . . encompasses not just the receiver but all the components of an integrated music system. It is sensible to consider that the entire receiving apparatus, and not just the receiver, “receives” the performance.

BMI refines its argument by suggesting that the fact that the receiver is placed in a back room separate from the selling area means that the music is further transmitted. This argument also fails. The nature of the transmission does not change because the speaker wire passes over or through a
If Congress wanted the rule to be that the receiver must be in the same room as the speaker for the exemption to apply, it could easily have said so. 

_ Claire’s Boutiques, Inc., 949 F.2d at 1495 (citation omitted). _

Arguably, however, Congress did say so, in the section 101 definition of “transmit.” “To ‘transmit’ a performance or display is to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent.” 17 U.S.C. § 101 (1994 & Supp. 2001). Read too literally, this definition suggests that sending a signal from a receiver to a speaker just a few feet away could be a “transmission.” Surely this is not what Congress intended. _Compare_ Columbia Pictures Indus., Inc. v. Professional Real Estate Investors, Inc., 866 F.2d 278 (9th Cir. 1989) (transmission that takes place within a single room is not “received beyond the place from which it is sent”) _with_ On Command Video Corp. v. Columbia Pictures Indus., 777 F. Supp. 787 (N.D. Cal. 1991) (transmission from one room in hotel to individual guest rooms is “received beyond the place from which it is sent”). Read somewhat less literally, however, the definition could justify distinguishing between a receiver that is wired to speakers in the _same_ room and a receiver that is wired to speakers in _another_ room. This distinction enables _Professional Real Estate Investors_ to be reconciled with _On Command Video_. It also makes a sort of visceral sense; when section 110(5) was enacted in 1976, and arguably today as well, a radio or television of a kind that is typically found in a person’s home is normally turned on for the entertainment of persons who are present in the same _room_ as the device. Once the signal can be received in several rooms at the same time, as in _On Command Video_, the overall system begins to look more like a commercial entertainment system. _See generally_ Wilk, _supra_ note 24, at 807-11 (analyzing different interpretations of “further transmitted”); McCluggage, _supra_ note 21, at 12 (similar).

As an added complication, the term “receiving apparatus” has been widely interpreted in the section 110(5) case law as including not just the receiver, but also the speakers or monitors to which the receiver sends the signal. _See supra_ notes 22 and 23 (collecting cases); Wilk, _supra_ note 24, at 802-03 (noting that most courts use this term to refer to the entire system; _but see_ National Football League v. Ellicottville Gin Mill, Inc., 1995 WL 737935, *5 (W.D.N.Y. 1995) (one of the few cases applying the term “receiving apparatus” to the receiver alone, but relying on an erroneous reading of _McBee & Bruno’s_, 792 F.2d at 731). _See generally_ Helfer, _supra_ note 21, at 191-95 (favoring private collective licensing agreements over legislative solutions); Luh, _supra_ note 24, at 727-34 (discussing both the scope of “receiving apparatus” and the concept of “further transmission”). The broader interpretation of “receiving apparatus” was explicitly adopted in _Claire’s Boutiques_, 949 F.2d at 1493. If that interpretation is correct, then even an apparatus that runs wires through walls to a speaker/monitor would be a “single receiving apparatus,” and the fact that the wires run through walls would not indicate that a “further transmission” was...
The Seventh Circuit, in refusing to consider factors other than those explicitly listed in the statute, has noted that in all of the previously decided cases holding the exemption inapplicable to stores physically larger than the restaurant in *Aiken*, those courts had also found that the equipment in question was not "of a kind commonly found in private homes." 29 The Eighth Circuit, in contrast, has observed that no previously decided cases have relied solely on the defendant's financial situation, but has considered the physical size of the store as relevant to determining whether the system should be considered home-type.30

III. PROPOSALS FOR CHANGE

As indicated above, the case law under section 110(5) demonstrates that the scope of that exemption was far from clear, leading to costly and repetitive litigation. Under pressure from associations representing bars and restaurants, Congress began to consider revising the exemption, and a number of bills were introduced in the House and the Senate between 1994 and 1998.31 Some of these proposals were simple expansions of the original exemption, some so broad that there was little doubt they would occurring, since sending the signal from the receiver to a speaker/monitor would simply complete the initial act of receiving the transmission rather constitute a new transmission. The term "single" in "single receiving apparatus" presumably refers to the number of actual receivers rather than the number of speakers or monitors, since even in *Aiken* the sound system had four speakers. 29 Edison Bros. Stores v. Broadcast Music, Inc., 954 F.2d 1419, 1424 (8th Cir. 1992). That observation applies to post-1992 cases as well. See Broadcast Music, Inc. v. Calvin’s Furniture and Appliances, 1996 U.S. Dist. LEXIS 7566, at * 4*-10 (W.D.N.Y. 1996) (stores with 5000 square feet open to public, and between 9 and 30 speakers, were nonexempt regardless of whether the appropriate test is limited to their receiving apparatus or considers the size of the establishment as well).

30 Broadcast Music, Inc. v. Claire’s Boutiques, Inc., 949 F.2d 1482, 1494 (7th Cir. 1991) (fact that broadcast is audible only in a small area “strongly indicates that the stereo system is of a kind commonly used in private homes;” it will therefore be harder for larger establishments to qualify).

have placed the United States in violation of its international treaty obligations under the Berne Convention. Others, however,

32 Berne Convention for the Protection of Literary and Artistic Works (Paris 1971). For example, H.R. 4936, 103d Cong. (introduced Aug. 19, 1994, by Sen. Jack Reed, D-R.I.) and S. 2515, 103d Cong. (introduced Oct. 6, 1994, by Sen. Hank Brown, R-Colo.,) would have replaced section 110(5) with a broad exemption for performances by “television and radio sets located in a business establishment unless a direct or indirect charge is made to see or hear the transmission.” See 140 Cong. Rec. 14470 (introduction of S. 2515); 48 PAT. TRADEMARK & COPYRIGHT J. No. 1192, at p. 418 (Aug. 18, 1994); 48 PAT. TRADEMARK & COPYRIGHT J. No. 1192, p. 435 (text of H.R. 4936); 48 PAT. TRADEMARK & COPYRIGHT J. No. 1199, p. 659 (October 13, 1994). In the next Congress, House and Senate bills would have amended section 110(5) to exempt any television and radio performances that are “incidental to the main purpose of the establishment.” H.R. 789, 104th Cong. (Rep. James Sensenbrenner, R-Wis., introduced Feb. 1995); S. 1137, 104th Cong., (Sen. Craig Thomas, R-Wyo., introduced Aug. 9, 1995); see 51 PAT. TRADEMARK & COPYRIGHT J. No. 1270, p. 612 (Mar. 21, 1996); 51 PAT. TRADEMARK & COPYRIGHT J. No. 1271, p. 637 (Mar. 28, 1996). At a hearing on July 17, 1997, United States Register of Copyrights Marybeth Peters criticized H.R. 789 because it would have eliminated the ban on “further transmission” as well as the limitation requiring use of a single receiving apparatus of a kind commonly used in private homes. 54 PAT. TRADEMARK & COPYRIGHT J. No. 1336, p. 237 (July 24, 1997). Peters argued that the need for such a broadened exemption had not been established. Id. Both Peters and Robert Stoll, Legislative Affairs Administrator for the United States Patent and Trademark Office, cautioned that H.R. 789 would violate the Berne Convention and could lead to challenges under the TRIPs provisions of the WTO Agreement. Id. Commentators were divided. Compare Matthew Clarke, 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. LAW 141 (1997) (arguing in favor of H.R. 789); David M. Lilienfeld, Why Congress Should Eliminate the Multiple Performance Doctrine, 58 OHIO ST. L. J. 695, 725-28 (1997) (arguing in favor of a total exemption for radio and television broadcasts to customers); and Luh, supra note 24, at 736-39 (arguing in favor of the broad exemption proposed in H.R. 789, 104th Cong., 1st Sess. (introduced Feb. 2, 1995)) with McCluggage, supra note 21, at 47 (arguing that section 110(5)(B) violates TRIPs); Helfer, supra note 21, at 141-47 (arguing that section 110(5)(B) violates TRIPs and Berne); and M. NIMMER & D. NIMMER, NIMMER ON COPYRIGHT § 8.18 [2][e] (criticizing section 110(5)(B) both as poor policy and as a violation of Berne and TRIPs).
promised greater clarity and predictability, together with a more modest expansion of the scope of the exemption.33

A. The Fairness in Music Licensing Act of 1998

In the 1998 Fairness in Music Licensing Act,34 Congress finally revised the old “homestyle exemption.” However, rather than

33 For example, S. 1628, 104th Cong. (1996) (introduced Mar. 20, 1996 by Sen. Hank Brown, R-Colo.), would have exempted businesses smaller than 5000 square feet, using 10 or fewer speakers, if their annual revenues fell below a statutorily-prescribed maximum and there was no direct admission charge or further transmission to the public. See McCluggage, supra note 21, at 43-44 (endorsing S. 1628). Taking a different approach, S. 1619, 104th Cong. (Sen. Orrin Hatch, R-Utah, introduced March 15, 1996), would have preserved the existing section 110(5) exemption for all works other than nondramatic musical works. With respect to the latter category, S. 1619 would have allowed performances of musical compositions by “a small commercial establishment,” a term that was to be defined not by statute but by regulations that would be issued by the United States Copyright Office according to “specific, verifiable criteria” identified in the bill: (1) the area of the establishment, (2) the kind, number, and location of devices used, (3) gross revenues, (4) the number of employees, and (5) other relevant factors. In introducing S. 1619, Senator Hatch stated the intent was to use the same factors courts had found relevant under the old homestyle exemption, but to allow for greater flexibility in response to technological change, and more careful balancing of the interests of copyright owners and business establishments, by giving the Copyright Office the power to define the scope of the exemption. In addition, section 2(b)(2) of the bill specified that any definition developed by the Copyright Office must “not result in an exemption to the right of public performance or to the right of public display the scope of which exceeds that permitted under the international treaty obligations of the United States.” Senator Hatch noted that this provision was designed to address concerns, raised by the Copyright Office and the United States Patent and Trademark Office, that the broader exemptions proposed in H.R. 789 and S. 1137, see supra note 31, would violate US obligations under Berne. Cong. Rec. 3/15/96, p. S2192.; see 51 PAT. TRADEMARK & COPYRIGHT J. No. 1270 (“Text” section) (Mar. 21, 1996) (text of S. 1619 and introductory remarks of Sen. Hatch); 51 PAT. TRADEMARK & COPYRIGHT J. No. 1270, p. 612 (Mar. 21, 1996); 51 PAT. TRADEMARK & COPYRIGHT J. No. 1271, p. 637 (Mar. 28, 1996).

merely clarifying and modernizing the language of section 110(5), Congress left the old language virtually intact but added a safe harbor provision that encompasses a far greater number of commercial establishments than could ever have availed themselves of the old exemption. The 1998 amendment, which appears at 17 U.S.C. § 110(5)(B) (and redesignates the old section 110(5) exemption as new section 110(5)(A)), creates a safe harbor for audio or audiovisual public performances of non-dramatic musical works at commercial establishments based on specific guidelines addressing the size of the establishment and the nature of the equipment used. The safe harbor, widely known as the "Sensenbrenner amendment," has the effect of exempting the

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36 The 1998 amendments, and subsequent technical amendments in 1999, revised section 110 by redesignating the existing language (supra note 15) as section 110(5)(A), inserting at the beginning of that provision the phrase "except as provided in subparagraph (B)," redesignating old subsections (A) and (B) as (i) and (ii), and adding a new (and lengthy) subsection (B), which exempts public performances of licensed transmissions of nondramatic musical works, if there is no direct charge or further transmission, provided that the establishment conforms either to certain statutory square footage restrictions or to certain statutory restrictions on the number and size of performance devices (loudspeakers or audiovisual devices). See 17 U.S.C. § 110(5)(B) (2001) (setting forth those statutory restrictions in detail), as amended by Pub. L. No. 105-298, Title II, § 202, 105th Cong., 2d Sess., 112 Stat. 2830 (1998), and Pub. L. No.106-44, § 1(a), 106th Cong., 1st Sess., 113 Stat. 221 (1999) (technical amendments).

majority of bars and restaurants in the United States from liability for such performances.\textsuperscript{38}

Specifically, section 110(5)(B) exempts all smaller establishments (bars and restaurants under 3750 square feet, and other stores under 2000 square feet) that play licensed broadcasts for their customers \textit{regardless of the type of sound system employed}. With respect to larger establishments, a business of any size can fit within the exemption so long as it uses no more than 6 loudspeakers (no more than 4 per room), and, in the case of audiovisual works, no more than 4 audiovisual devices (up to 55 inches diagonal screen size, and no more than one screen per room). The new safe harbor retains the rule that there must be no direct admission charge to hear the transmission. However, it loosens the "no further transmission" rule by prohibiting only further transmission of a broadcast "beyond the establishment where it is received," in contrast to section 110(5)(A), which retains the prior rule that there can be no further transmission "to the public."

Thus, while the new safe harbor sets fairly specific limits in terms of square footage and the permissible number of speakers and/or audiovisual devices, thereby eliminating much of the ambiguity of the old homestyle exemption, the effect of the new provisions is nonetheless to dramatically broaden the scope of the exemption for public performances of nondramatic musical works. Because of the more generous rules on square footage and the number of speakers, and the loosening of the "further transmitted" rule, many of the establishments which were held to be non-exempt under the original homestyle exemption would probably

\textsuperscript{38} A 1999 study by Dun & Bradstreet (commissioned by the American Society of Composers, Authors and Publishers (ASCAP)) estimated that 70% of bars and restaurants qualify for the safe harbor, as do 45% of retail establishments. \textit{WTO Adopts Ruling that U.S. Law on Music Licensing Violates TRIPS}, 60 \textit{Pat. Trademark \\& Copyright J.}, No. 1485, at 282 (Aug. 4, 2000).
have satisfied the new safe harbor. Yet nothing in the history of the homestyle exemption and the proposals to reform demonstrated a need for a broader exemption -- only for a clearer one.

Testimony at the hearings on the Sensenbrenner amendment reveals quite clearly that the primary purpose of the amendment was to allow more businesses to publicly perform music.

For example, the Gap store held to be nonexempt in Sailor Music (discussed at note 22, supra) would have passed muster under section 110(5)(B), because it used only four speakers. Other cases which would have come out differently include: Gnosso Music v. Di Pompo, 13 U.S.P.Q.2d (BNA) 1539, Copy. L. Rep. (CCH) P26,483, 1989 U.S. Dist. LEXIS 15988, *13-*14 (D. Maine 1989) (restaurant with 1824 square feet open to the public, and seating capacity of 172, was too large compared to Aiken; sound system was too commercial, with eight to ten speakers; music was further transmitted from one room to speakers in other rooms; and defendant had previously subscribed to commercial music service); Hickory Grove Music v. Andrews, 749 F. Supp. 1031 (D. Mont. 1990) (restaurant with seating area of 1192 square feet, with the transmission audible in an area of 880 square feet and seating capacity of 120 persons was too large, compared to 620 square feet of public area in Aiken; sound system was also commercial in nature, with five speakers; sound was "further transmitted" to public rooms other than the room where the receiver was located; court indicated revenues would be relevant but defendant did not supply any financial data); Merrill v. Bill Miller's Bar-B-Q Enterprises, Inc., 688 F. Supp. 1172, 1175-76 (W.D. Tex. 1988) (chain of 36 restaurants was not exempt where each store had 1000-1500 square feet of dining space, seating space for 100-125 people, and more than $500,000 in average annual gross revenues; entire chain had over $30 million in annual gross revenues; receiving apparatus was not home-type, but used only two speakers; broadcast was "further transmitted" to other rooms; and chain was large enough to justify subscription to commercial music service); International Korwin Corp. v. Kowalczyk, 665 F. Supp. 652, 656-58 (N.D. Ill. 1987) (nightclub was not exempt where it had at least 2,640 square feet, annual net profits of $35,000 to $136,000, seating capacity of 200, and commercial sound system with eight speakers, and where the transmissions were further transmitted to the public through wiring from a private office to the public areas of the establishment), aff'd 855 F.2d 375 (7th Cir. 1988). Ironically, one of the few decisions that found the old exemption applicable would also come out differently. See Springsteen v. Plaza Roller Dome, 602 F. Supp. 1113, 1118-1119 (M.D.N.C. 1985) (miniature golf course covering 7500 square feet was exempt; it was not large enough to justify subscription to commercial music service because it was open only 6 months a year, rarely had revenues of more than $1000 a month, and used a sound system, with six outdoor speakers, that was not very audible due to the size and outdoor setting of the golf course).
broadcasts for their patrons without paying royalties to copyright owners. Proponents of the amendment spoke almost exclusively of the benefits to the businesses that wanted to use these broadcasts, and minimized the detriments to copyright owners. They were silent on the rationale for allowing businesses to use such large amounts of intellectual property without compensating the owners. Opponents of the bill noted the absence of any attempt to justify this transfer of wealth away from copyright owners, and warned that the proposed exemption would probably violate the United States' international treaty obligations under the TRIPs provisions of the WTO Agreement. Ironically, the new

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40 Here are a few examples:

Rep. F. James Sensenbrenner, of Wisconsin: "This bill is a victory for small business and a tribute to the commitment of its supporters. . . . [The amendment] had the strong endorsement of groups, including the National Federation of Independent Business and the National Restaurant Association." 144 Cong. Rec. H9946-01, *H9949.

Rep. Jackson-Lee of Texas: "[W]e have recognized the importance of our small businesses like restaurants, like various other centers who need to have the ability to create and improve their enjoyment." Id.

41 Rep. Nadler of New York, a member of the House Committee on the Judiciary, asked: "What showing of necessity have we here? Restaurants that pay an average of $400 a year in music licensing fees, a rather small, I would say minute percentage of the revenues of an average restaurant, do not want to pay the $400 a year to the songwriters. Well, that is interesting. Let them try to negotiate a different deal. Or let them not use the music. But what necessity, what public interest is served by the government coming in and making a decision and saying 'Thou shalt not pay the $400; you shall get it free?'" "Is there a great housing shortage that necessitates rent control? Is there a great shortage of restaurant musicians or of restaurant radios that necessitates that, my God, if we do not pass this bill, people are not going to be able to eat because they will be so nervous without the radio music as to justify the government intervention in the free market here, to come in and say, 'We're not going to let you make this deal, we're going to upset the licensing arrangements.'" Id. at *H9950.

42 The Clinton Administration strongly opposed the broadened exemption because of these concerns. Id. at H9952-54, See, e.g., Richard W. Fisher, Acting U.S. Trade Representative (Letter to Congresswoman Mary Bono, Aug. 26, 1998): "If this legislation is passed, we believe that our trading partners will argue that it violates our international obligations under the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights." Id. at *H9952. See also William M. Daley, Sec'y of Commerce (Letter to Speaker Newt Gingrich,
safe harbor provisions were included in the same bill that added twenty years to all subsisting federal copyrights -- the Sonny Bono Copyright Term Extension Act\textsuperscript{43} -- and which was touted as an essential step toward strengthening the rights of United States copyright owners. In a double irony, the late Rep. Bono himself, in whose honor the Act was named, had himself \textit{opposed} the effort to broaden the scope of the section 110(5) exemption.\textsuperscript{44} And, since all good ironies should come in threes, it is worth noting that the international treaty provisions cited by the bill's opponents -- the TRIPs provisions of the WTO Agreement -- were partly the result of the United States' continuing crusade to encourage other nations to increase their levels of intellectual property protection for the benefit of American exports. It was hardly a surprise, then, that foreign copyright owners almost immediately challenged the broadened public performance exemption as a violation of those treaty provisions.

\textit{B. The WTO Dispute Panel Decision}

In the summer of 2000, responding to a complaint by the European Union on behalf of the Irish Music Rights Organization,
a World Trade Organization (WTO) Dispute Panel ruled that section 110(5)(B) violates Articles 9 and 13 of the TRIPs (Trade-Related Aspects of Intellectual Property Rights) provisions of the WTO Agreement (also known as the General Agreement on Tariffs and Trade, or “GATT”), because it created too broad an exception to the public performance right in musical compositions, a right which Article 9.1 of TRIPs requires all WTO countries to guarantee to the owners of such copyrighted works. The requirements of Article 9.1 are subject to exceptions only in "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," an exception which the Panel found inapplicable in this case.

However, the Panel rejected a similar challenge to the newly amended section 110(5)(A), concluding that the scope of the section 110(5)(A) privilege was sufficiently narrow that it did not unreasonably prejudice the rights of copyright holders. However, in the pursuit of this favorable ruling, the United States' representatives advanced a narrow interpretation of section 110(5)(A), suggesting that the 1998 revisions of section 110(5) had the effect of narrowing the scope of subsection (A) so that it

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46 WTO, Report of the Panel, United States - Section 110(5) of the U.S. Copyright Act, WT/DS160/R, 2000 WL 816081 (June 15, 2000) (adopted by WTO Dispute Settlement Body on July 27, 2000) (hereinafter Panel Report). Article 9.1 of TRIPs incorporates most of the 1971 Berne Convention for the Protection of Literary and Artistic Works, Article 11bis(1) of which requires member countries to protect the exclusive rights of authors with respect to broadcasts or public performances of their works, including, inter alia, musical compositions. For a detailed discussion of the pertinent provisions of Berne and TRIPs, see McCluggage, supra note [21], at 19-36 (arguing that section 110(B)(5) violates these provisions); Helfer, supra note 21, at 142-85 (similar); Lydia Pallas Loren, Paying the Piper, 3 J. SMALL & EMERGING BUS. L. 231, 256-65 (1999) (arguing that section 110(5)(B) does not violate either Berne or TRIPs).

47 TRIPs, Art. 13.

48 Panel Report, supra note 45, at *40.
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applies only to works other than nondramatic musical works.\textsuperscript{49} Pre-1998 case law had routinely applied the homestyle exemption (that is, the version that predated the 1998 amendments) to transmissions of nondramatic musical works, and, indeed, such works were the subject of the vast majority of those cases.\textsuperscript{50} However, the insertion of the prefatory “except as” language in subsection (A), coupled with the broad safe harbor in subsection (B), does seem to make subsection (A) largely irrelevant for establishments that perform nondramatic musical works, since it appears that most performances of such works that would be exempt under subsection (A) will also be exempt under the safe harbor of subsection (B). Thus, the safe harbor effectively eliminates the need for most potential defendants to invoke subsection (A) with respect to unauthorized performances of nondramatic musical works. It remains at least theoretically possible, however, that certain performances of broadcast works could fall outside subsection (B) yet qualify under subsection (A) if the latter is interpreted to include nondramatic musical works.\textsuperscript{51} Thus, while the narrow interpretation of subsection (A) may have no support in the legislative history of the 1998 amendments, and only ambiguous support in the statutory language, it may reflect the reality that subsection (A) henceforward has very little application to popular music.

If Congress does not repeal or amend section 110(5)(B) in order to bring the United States into compliance with TRIPs, the WTO may authorize trade sanctions against the United States. Although the WTO originally imposed a deadline of July 27, 2001, for the

\textsuperscript{49} Id. at *39.

\textsuperscript{50} E.g., Cass County Music Co. v. Muedini, 55 F.3d 263, 265 n.5 (7th Cir. 1995) (listing various pop tunes allegedly infringed by the defendant restaurant); Broadcast Music, Inc. v. Claire’s Boutiques, Inc., 949 F.2d 1482, 1484 n.2 (7th Cir. 1991) (similar), cert. denied, 504 U.S. 911, 112 S.Ct. 1942, 118 L.Ed.2d 547 (1992).

\textsuperscript{51} Lydia Loren poses the example of someone playing a "boom box" in public, Loren, supra note 45, at 239-40 n.30; David Nimmer envisions a bar greater than 3750 square feet, with a single television screen greater than 55 inches, M. NIMMER & D. NIMMER, supra note 31, at § 8.18[c][i]. While Professor Loren’s example probably would constitute fair use, surely a potential defendant in these circumstances should be entitled to rely on a less elusive doctrine.
United States to amend section 110(5) to eliminate the conflict with Article 13, it extended that deadline until the end of the current session of Congress or December 31, 2001, whichever is earlier. In light of the terrorist activities of September 11, 2001, and the military and security-related concerns now demanding the attention of Congress and the Administration, it seems unlikely that the United States will meet this extended deadline.

The United States and the European Union submitted to binding arbitration to determine the amount of annual trade sanctions to which the United States would be subject if it failed to amend section 110(5)(B) by the agreed deadline, and, on November 9, 2001, the arbitrators set that figure at $1.08 million.

IV. CONCLUSION

The section 110(5)(B) safe harbor is a far cry from the limited exemption recognized in Aiken and the 1976 Act. Although consumer entertainment technology has changed a great deal since 1976, so that the notion of what constitutes “homestyle” equipment certainly warrants updating, there was no need for Congress to create such an expansive safe harbor. The WTO

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52 WTO, Award of the Arbitrator, United States - Section 110(5) of the U.S. Copyright Act, WT/DS160/12, 2001 WL 325556 (Jan. 15, 2001).
53 WTO, Action by the Dispute Settlement Body, WT/DSB/M/107 (July 24, 2001) (adopting U.S. proposal contained in WT/DS160/14, 2001 WL 810146 (July 18, 2001)).
54 WTO, Communication from the Permanent Mission of the United States and the Permanent Delegation of the European Commission, United States Section 110(5) of the U.S. Copyright Act, WT/DS160/15, 2001 WL 874574 (Aug. 3, 2001); WTO, Note by the Secretariat of the United States Section 110(5) of the U.S. Copyright Act, WT/DS160/16, 2001 WL 903421 (Aug. 13, 2001); WTO, Award of the Arbitrators: United States—Section 110(5) of the U.S. Copyright Act, WT/DS160/ARB25/1, 2000 WL 1397425 (Nov. 9, 2001) (setting the figure at $1.08 million per year).
55 The breadth of the exemption seems to reflect the political clout of the hospitality industry. After ASCAP and BMI reached an agreement with the National Licensed Beverage Association which would have exempted all establishments under 3500 square feet, the National Restaurant Association rejected this agreement even though it would have exempted almost 70 percent of the restaurants and taverns in the country. See May 8, 1996 hearing on H.R.
Dispute Panel decision provides Congress an opportunity to correct this mistake while enjoying some "political cover." Very few countries provide such a broad exemption from public performance rights in broadcast music.\textsuperscript{56} Updating and clarifying the exemption should be possible without expanding it significantly beyond the scope envisioned by the 1976 Congress. Conversely, if there is a good argument for expanding the exemption -- other than the argument that businesses would simply prefer not to pay for music -- that argument has yet to be heard.

If section 110(5)(B) is repealed as a result of the WTO decision, Congress will have to consider the effect of this repeal on the scope of the original homestyle exemption that is currently embodied in section 110(5)(A). A simple repeal of the subsection (B) safe harbor will once again make it necessary to include nondramatic musical works in subsection (A), thus largely restoring the pre-1998 homestyle exemption. It seems likely, however, that rather than revert to the 1976 provisions, Congress will attempt another overhaul and updating of that exemption in order to provide clearer guidelines to bars, restaurants, and other establishments. This time, however, Congress should take a more policy-oriented approach, balancing the reasonable entitlements of copyright owners against the reasonable expectations of users, rather than simply surrendering to pressure from hotels, restaurants, and retailers.

Replacing the former section 110(5) with clearer guidelines should not be that difficult. Because the nature of the "receiving apparatus" was outcome-determinative in almost all of the old section 110(5) cases, an apparatus-oriented safe harbor may offer the most practicable approach. Alternatively, the guidelines could simply specify the maximum square footage of the establishment, setting that figure low enough to prevent the exemption from "swallowing the rule." Limitations based on square footage, or on

\textsuperscript{56} See Helfer, supra note 21, at 171-85 (comparing laws of other nations and concluding that very few have exemptions as broad as 110(5)(B)); McCluggage, supra note [21], at 37-39 (comparing foreign laws and reaching similar conclusion).
measurable volume and/or number of speakers, would appear to provide a good proxy for the "small commercial establishment" that was apparently intended to be the original beneficiary of the exemption in 1976. For example, it hardly seems likely that stores as large as the Gap or Casual Corner would settle for a 2-speaker radio system; thus, those establishments would likely opt to pay for a music license.

If such a narrow exemption seems niggardly to some, others might ask why there should be any exemption at all. Surely the only reason for carving out such an exemption to the valuable public performance right is to avoid inconvenience and expense where the public enjoyment of broadcast music bears little or no relationship to the revenue-generating activities of a business. If a business finds it at all beneficial to play music for customers on a high-quality sound system, then where is the unfairness in asking the business to pay a reasonable price value for that service? The alternative of collecting additional royalties from broadcasters would be difficult to administer, and would require developing a formula that takes account of the size and profitability of this remote "business" audience. It may be, therefore, that Congress should opt for the more direct approach -- allowing performing rights societies to negotiate directly with the business audience with respect to all but the most de minimus (e.g., two-speaker) sound systems or establishments (based on square footage). The hospitality and retail industries, however, can be expected to exert considerable pressure to replace section 110(5)(B) with as generous an exemption as possible. For those in Congress who have difficulty saying "no" to these industries, the World Trade Organization may have handed them the answer to their woes, along with an opportunity to recapture the minimalist spirit of the original homestyle exemption.

57 Professor Helfer, in fact, has argued that privately negotiated licensing agreements would be superior to any legislative exemption. Helfer, supra note [21], at 191-95.