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Can You Turn Your Radio On? 
The Public Performance Exemption Under Section 110(5) of the 1976 Copyright Act

Deborah LaGioia*

I. INTRODUCTION

One of the primary goals of the 1976 Copyright Act1 was to ease the tension between promoting creativity among authors and artists, while promoting the public policy of making such works available for public consumption.2 Congress attempted to balance these competing demands by granting copyright owners a set of exclusive protections that promote creativity and authorship,3 while providing a set of limited statutory exemptions from copyright liability that enhance the public’s access to such works.4 Consequently, Congress defined the term “to perform” broadly within these statutory protections.5 Thus, every time a radio broadcast is received in a private home or a song is sung in the shower, a copyrighted work is performed.6

Unfortunately, such a broad category of potential infringements would require immeasurable tactics by licensing groups such as the American Society of Composers, Authors and Publishers (ASCAP) or Broadcast Music, Incorporated (BMI) to detect and deter illegal uses of copyrighted works, as well as require impracticable and costly licensing negotiations for small scale, private uses of such works.7 Thus, Congress required that the performance also be “public” to

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6. Under 17 U.S.C. §110(5), the law applicable to television broadcasts is virtually identical to that of radio broadcasts.
7. See 1 GOLDSTEIN, COPYRIGHT PRINCIPLES, LAW & PRACTICE, §5.9, at 693-695 (1989). ASCAP and BMI hold the rights to license the performance rights of virtually every domestically copyrighted song. The authors, composers and publishers transfer to ASCAP and/or BMI the right to
find infringement upon the rights of the copyright owner. A copyrighted work is "publicly performed" if it is broadcast to members of the public capable of receiving the broadcast. Obviously, a performance in "a place open to the public," a place where there are no restrictions on who may enter to see or hear the performance, constitutes a public performance. However, a performance limited to family members and their social acquaintances is a non-infringing private performance exempt under the 1976 Copyright Act.

Troublesome, however, is the fact that some establishments, which publicly perform musical compositions by broadcasting radio transmissions into public areas, are too small to justify licensing. Although detecting and deterring illegal performances by a "private performer" singing in a shower is more difficult than detecting and deterring illegal performances in a local bar and grill, the tactics ASCAP and BMI would have to employ with the former "private performers" would be as impractical in the context of the small commercial establishment. It would cost ASCAP and BMI considerably more to detect and deter illegal uses by a multitude of small proprietors than it would likely cost those proprietors to obtain a license from them.

Thus, §110(5) of the 1976 Copyright Act exempts from copyright liability "[s]mall commercial establishments whose proprietors merely bring onto their premises standard radio equipment and turn it on for their customers' enjoyment." Yet, uncertainty surrounds the meaning of §110(5), which generally requires a proprietor to utilize a single set of stereo equipment of a kind commonly found in the homes of private consumers in order to publicly perform a copyrighted work lawfully. Moreover, the proprietor can neither directly charge the public to hear the radio transmissions sent to his stereo equipment nor further transmit those broadcasts to other places the public may hear.

license their copyrighted works; and, as licensor, ASCAP and BMI negotiate a blanket license allowing a licensee, for a specified fee, to publicly perform any work in their repertory an unlimited number of times for a specified period of time. Id.

9. Id.
10. Id. Cases illustrative of the problems encountered when determining whether a performance is public or private in nature include: Columbia Pictures Industries, Inc. v. Redd Horne, Inc., 749 F.2d 154 (3d Cir. 1984) (movies shown in small, private booths located in a public establishment were held to be public performances, since they occurred in a place open to the public); Columbia Pictures Industries, Inc. v. Professional Real Estate Investors, Inc., 866 F.2d 278 (9th Cir. 1989) (movies shown in individual hotel rooms were not held to be public performances, because hotels are open to the public; but a hotel room, once rented, is no longer a place open to the public); On Command Video Corp. v. Columbia Pictures Industries, Inc., 777 F. Supp. 787 (N.D. Cal. 1991) (hotel video viewing system centrally located in the building, allowing only one customer at a time to view the available movies, was held to be a public performance, because the transmission was received beyond the place from which it was sent; and it was viewed by members of the public, regardless of the fact they were in private hotel rooms).
them. Although these factors do not appear troubling at first glance, the courts are in disagreement over whether the plain meaning of the statute or its legislative history is the appropriate method for determining the scope and application of the statute’s language, as well as the relevant factors that dictate whether the statutory requirements are being met.

Some courts follow a textualist approach, which is an interpretation of the plain meaning of the words in a statutory provision. Textualists believe that the courts use the legislative history to interpret statutes in a manner inconsistent with their plain meaning, because the legislative history may reflect unenacted legislative intentions; and intentions are not law. Moreover, there may be so much legislative history that the court is free to choose which passages to emphasize or de-emphasize in order to manipulate the law and reach the conclusion it desires. Therefore, textualists limit the courts’ use of the legislative history. A court may use legislative history to discover what Congress meant by the statute, but it cannot be used as a secondary source of legal rules that changes the ordinary meaning of the statute.

Nevertheless, other courts believe that the legislative history is vital to statutory interpretation, because “[w]ords often do not, and perhaps cannot, have a ‘plain meaning.’” These courts believe that the circumstances influencing a statute’s enactment will change over time; and, because Congress may not have anticipated some of those circumstances, they will not be embodied in the statute. Moreover, Congress may intentionally enact a broad statute and expect the courts to fill in the missing details on a case by case basis over time, which

14. Id.
15. In the Matter of Sinclair, 870 F.2d 1340, 1343 (7th Cir. 1989). The Sinclair court followed a textualist approach to determine that a statute must prevail when a conflict exists between it and its legislative history. The court maintained that the statute was enacted by both Congress and the President, whereas the legislative history was merely the staff’s explanation of that law. The court stated that such legislative history was “‘only admissible to solve doubt [with regard to the statutory language] and not to create it’ [by allowing the unenacted intent of Congress to be relied on as law] . . . [Congressional intent] is not a source of legal rules competing with those found in the U.S. Code.” Id. at 1344 citing Wisconsin R.R. Commission v. Chicago, Burlington & Quincy R.R., 257 U.S. 563, 589, 42 S. Ct. 232, 238, 66 L. Ed. 371 (1922). Sinclair was cited for this proposition in the most prominent §110(5) textualist cases: Broadcast Music, Inc. v. Claire’s Boutiques, Inc., 754 F. Supp. 1324 (N.D. Ill. 1990), aff’d, 954 F.2d 1419 (7th Cir. 1992), cert. denied, 112 S. Ct. 1995 (1992) (chain store exempt from copyright liability); Edison Brothers Stores, Inc. v. Broadcast Music, Inc., 760 F. Supp. 767 (E.D. Mo. 1991), aff’d, 954 F.2d 1419 (8th Cir. 1992), cert. denied, 112 S. Ct. 1995 (1992) (same).
16. Sinclair, 870 F.2d at 1343.
17. Id. at 1344.
19. Greenberger, supra note 18, at 60.
relieves Congress from having to resolve the infinite amount of issues that could arise under merely one statutory provision. Consequently, if the courts discount Congress’ intentions regarding the appropriate scope of the statute, they effectively substitute their judgment for that of Congress.

This comment analyzes the scope and application of the factors provided in both §110(5) and its legislative history. Yet, before evaluating §110(5) itself, Section II will briefly overview the pertinent case law under the 1909 Copyright Act, which led to the enactment of the §110(5) exemption under the 1976 Copyright Act. Section III will then analyze each of §110(5)’s various components according to both a textualist and a legislative history approach. Although establishing guidelines as to the appropriate parameters of the individual requirements is difficult at best, Section IV will argue that the desired approach is to rely on the plain meaning of §110(5) to extrapolate the appropriate factors of analysis, while eliminating any wholly independent elements of analysis provided in the legislative history. If the courts rely on the textualist approach, they will likely define the statute consistently with its plain meaning, which has not occurred with the poorly defined elements provided in the legislative history.

II. CASE LAW UNDER THE 1909 COPYRIGHT ACT

Prior to the enactment of the 1976 Copyright Act, the established precedent defining the scope of a “performance” was Buck v. Jewell-LaSalle Realty Co. In Jewell-LaSalle, the defendant wired a radio receiving set to each of the hotel’s public and private rooms, which allowed the radio broadcasts to be heard throughout the hotel. A “performance” question was certified to the Supreme Court, and it held that the defendant’s conduct constituted a performance under the 1909 Copyright Act. The Court reasoned that radio waves alone are not audible but require a receiver to reproduce them into sound waves audible to the listener. The Court maintained that, rather than hearing the original program, the listener was hearing a reproduction of that program, which it considered a second, simultaneous performance with that of the broadcasting station. Thus,

20. Id. at 62.
21. Id. at 70.
25. 283 U.S. 191 (1931). See also, Society of European Stage Authors and Composers, Inc. v. New York Hotel Statler Co., Inc., 19 F. Supp. 1, 5-6 (S.D.N.Y. 1937) (Since a hotel is a place of public accommodation, “reproduction by the hotel’s master receiving sets of the electric impulses of the broadcast, and their distribution among its rooms . . . is a public performance . . . of the broadcast program.”).
27. Id. at 202.
28. Id. at 200-201.
29. Id. But see, e.g., Buck v. Duncan, 32 F.2d 366, 367 (W.D. Mo. 1929) (one operating a radio is not performing by merely receiving inaudible radio waves and translating them into audible sound
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the Court assumed that any business desiring to legally rebroadcast radio programs for its customers required a license from the copyright owner in order to avoid liability.\textsuperscript{30}

The Supreme Court displaced the Jewell-LaSalle “performance” doctrine over thirty-five years later when it held that no “performance” took place in two cable television (CATV) cases.\textsuperscript{31} In Fortnightly Corp. v. United Artists Television, Inc.,\textsuperscript{32} the plaintiff operated a cable television system which enhanced the television signals received from television stations and rechanneled them to CATV subscribers.\textsuperscript{33} The Court found the Buck v. Jewell-LaSalle Realty Co. decision questionable and created a functional test under which “[b]roadcasters perform [and v]iewers do not perform,” because broadcasters were active performers and the viewers passive beneficiaries of that performance.\textsuperscript{34} The Court reasoned that CATV fell on the viewer’s side of the line, because it merely carried “[w]ithout editing, whatever programs [it] receive[d], while b]roadcasters procure[d the] programs and propagate[d] them to the public.”\textsuperscript{35}

The Court reached the same result six years later in Teleprompter Corp. v. Columbia Broadcasting System, Inc.,\textsuperscript{36} which involved allegations similar to those in Fortnightly. Applying Fortnightly’s functional test, the Court held that the relay of distant television signals to viewers normally unable to receive such signals without the help of CATV still did not transform CATV’s status into that of a broadcaster.\textsuperscript{37} CATV was, once again, merely receiving and carrying, without editing, the programs that broadcaster’s had acquired and dispersed to the public; and the court found irrelevant the distant origin of such television signals.\textsuperscript{38}

The Supreme Court finally reached the seminal “performance” case, Twentieth Century Music Corp. v. Aiken (hereinafter Aiken),\textsuperscript{39} forty-three years after

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\bibitem{Debaum} Buck v. Debaum, 40 F.2d 734, 735 (S.D. Cal. 1929) (“The performance in such cases takes place in the studio of the broadcasting station.”).
\bibitem{Jewell-LaSalle} Yet, in dictum, the Court in Jewell-LaSalle noted a difference between licensed and unlicensed broadcasts by radio stations. This distinction was first noted in Debaum, which explained that when a copyright owner licenses a station to perform a radio broadcast of his composition he consents to any reception of that performance by others. The radio station in Jewell-LaSalle, however, was not licensed; but the Court implied that, if it had been, the hotel’s conduct may have been impliedly consented to by the copyright owner. Later cases largely ignored this distinction. Jewell-LaSalle, 283 U.S. at 199, n. 5.
\bibitem{Fortnightly} Id. at 200-201.
\bibitem{FORTNIGHTLY1} 32. Fortnightly, 392 U.S. 390 (1968).
\bibitem{FORTNIGHTLY2} 33. Id. at 392.
\bibitem{FORTNIGHTLY3} 34. Id. at 398-399.
\bibitem{FORTNIGHTLY4} 35. Id. at 400.
\bibitem{FORTNIGHTLY5} 36. 415 U.S. 394 (1974).
\bibitem{FORTNIGHTLY6} 37. Id. at 410.
\bibitem{FORTNIGHTLY7} 38. Id.
\end{thebibliography}
deciding *Buck v. Jewell LaSalle Realty Co.* Although the Court decided this case under the 1909 Copyright Act, it formed the basis, as well as the boundaries, of §110(5) under the 1976 Copyright Act. The central issue was whether a performance had occurred when the defendant installed a radio and four ceiling mounted speakers in his fast food establishment and, without a license from ASCAP or BMI, tuned in radio broadcasts for his employees' and customers' enjoyment. The Court held that no "performance" had taken place even though the decision in *Jewell-LaSalle* was directly on point. It maintained that the later cable television cases had impliedly overruled *Jewell-LaSalle* in favor of the functional test created in *Fortnightly Corp. v. United Artist Television, Inc.* and *Teleprompter Corp. v. Columbia Broadcasting System, Inc.* Thus, the Court strictly limited *Jewell-LaSalle* to its facts, without expressly overruling it, and maintained that Aiken's conduct fell on the viewer's side of the line because it was a passive beneficiary of the programs procured by the broadcasters. Thus, no "performance" had taken place.

### III. CASE LAW UNDER THE 1976 COPYRIGHT ACT

Section 110(5) exempts from copyright liability "[s]mall commercial establishments whose proprietors merely bring onto their premises standard radio . . . equipment and turn it on for their customers' enjoyment." Congress restricted this provision by stating that the factual situation present in *Aiken* (four ordinary ceiling mounted speakers in close proximity to the receiving set) represented "the outer limit" of the exemption. Section 110 provides:

> [T]he following are not infringements of copyright . . .
> (5) communication of a transmission embodying a performance or display of a work by the public reception of the transmission on a single receiving apparatus of a kind commonly used in private homes, unless—
> (A) a direct charge is made to see or hear the transmission; or
> (B) the transmission thus received is further transmitted to the public.

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40. 1909 Copyright Act, 35 stat. 1075 (1976).
42. *Aiken*, 422 U.S. 151, at 152.
43. Id. at 160-161.
44. Id. at 161. See also, David E. Shiplely, *Copyright Law and Your Neighborhood Bar and Grill: Recent Developments in Performance Rights and the Section 110(5) Exemption*, 29 ARIZ. L. REV. 475, 483 (1987).
45. *Aiken*, 422 U.S. at 161-162.
46. *Id.*
48. *Id.*
49. 17 U.S.C. §110(5) (1988). Section 110(5)(A)'s requirement that no direct charge be made to see or hear the performance has not proved to be problematic. The parties usually stipulate that no direct charge was made by the defendant which would disqualify him from claiming exemption under the statute. Under this provision, there is no prohibition against indirect charges such as club membership fees or minimum food charges in restaurants. However, a cover charge for admission into an
Despite these statutory precepts, the legislative history also calls for the evaluation of an additional factor: Exemption should be denied if an establishment is of sufficient size to justify obtaining a background music service license. Since the courts are split as to whether the statutorily mandated requirements alone are to be utilized in their evaluation of §110(5) or whether the factors provided in the legislative history are to be added to this analysis, the following discussion encompasses the criteria provided in both the statute and its legislative history.

A. Single Receiving Apparatus of a Kind Commonly Used in Private Homes

In order to be exempt from liability, §110(5) requires that an establishment use a “single receiving apparatus of a kind commonly used in private homes.” To help determine whether a home-type system is being used on the premises, Congress provided several factors in the legislative history for the courts to evaluate when deciding whether or not to exempt a particular establishment. These factors include:

1. The Legislative Approach

Since the statute itself provides no explicit boundaries for defining what constitutes a home-type apparatus, the courts following the legislative history

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This requirement should not be confused with the “for profit” principle, which §110(5) does not deal with. Under the 1909 Act, an unauthorized performance would infringe only if it was for profit. However, this requirement was limited under the 1976 Copyright Act, because it became difficult to distinguish between “for profit” and “not for profit” performances. This was due to the fact that many “not for profit” enterprises were capable of paying for performance licenses. However, sections 110(1)-(4) “[deal with performances … now generally exempt under the ‘for profit’ limitation or other provisions of the copyright law …”” H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 81 (1976). See 2 Nimmer, §8.15[A], at 8-174.2; Herbert v. Shanley Co., 242 U.S. 591 (1917); LaSalle Music Publishers, Inc. v. Highfill, 622 F. Supp. 168, 169 (W.D. Mo. 1985); Almo Music Corp. v. 77 East Adams, Inc., 647 F. Supp. 123 (N.D. Ill. 1986).

52. H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 87 (1976) (liability is also imposed under the legislative history when a proprietor has a commercial sound system installed or converts a home-type receiving apparatus into one analogous to a commercial sound system).
approach have relied heavily on the above legislative factors when determining the scope and depth of Aiken's outer limit. The court in *Sailor Music v. The Gap Stores, Inc.* for example, examined the "size" of defendant's establishment. The average size of all 420 stores was 3500 square feet of publicly accessible space; and the radio receivers in two stores were connected, via hidden wiring, to four or seven speakers recessed behind ceiling grids. These speakers were arranged in a manner which allowed the music to be heard throughout the establishments. The court held that Congress did not intend to exempt stores such as The Gap, because its average square footage greatly exceeded the outer limit of Aiken's store, which was 620 square feet. Moreover, the court maintained that the equipment may have been converted into a commercial system because it contained built in wiring and four or seven speakers recessed behind ceiling grids. Thus, the square footage, combined with what the court considered an elaborate sound system, compelled the court to place The Gap beyond the scope of §110(5), and exemption was denied. The appellate court affirmed, and the Supreme Court denied certiorari.

Since the music was audible throughout the store, and the system contained no public address system, the factors evaluating the noise levels in the transmission areas and the augmentation of the system did not need consideration. The "size" determination was relevant to the court's evaluation; yet, the court still failed to examine the physical arrangement of the equipment, although it, too, was relevant to the determination. "Size" is only one of the factors to be examined; and, if a court insists on following the legislative history approach rather than a textualist approach, all of the factors should be considered before a final determination is made. This will deter a court, at least somewhat, from picking particular factors and emphasizing certain judicially-created definitions of those factors. Moreover, a factor evaluated later in the analysis could provide a stronger basis for denying exemption than the first one examined; and future courts may find such an analysis useful, if not determinative, in their analyses, should a legislative history approach be adopted or mandated in their circuit.

The "size" or square footage of *Sailor Music v. The Gap Stores, Inc.* was

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55. *Id.*
56. *Id.* at 925. Neither the *Aiken* case nor the legislative history explicitly mention the square footage of Aiken's establishment, but almost all the cases relying on the legislative factors apply that square footage when comparing the size of the establishments.
57. *Id.*
58. *Id.*
61. See Springsteen v. Plaza Roller Dome, Inc., 602 F. Supp. 1113, 1118 (N.D.N.C. 1985) (noting that all of the factors in the legislative history should be considered when evaluating §110(5)).
compared to the defendant’s stores in Rodgers v. Eighty Four Lumber Co.,62 which had public areas in excess of 10,000 square feet.63 The court declared that the equipment used was not of a type commonly found in private homes, since the defendant had used a radio receiver, separate amplifiers and three to eight mounted speakers both inside and outside of the stores.64 Moreover, most of the speakers were located 150 feet from the receiver, and the system also contained a public address system.65 Even though the defendant argued that the primary purpose for using the music was to muffle nearby industrial noise for the benefit of its employees and to attract the public to its stores, the court declared that the purpose for which music was used was irrelevant to the question of infringement.66

Even though the “size” of the establishment (10,000 square feet), the physical arrangement of the equipment (receiver 150 feet from the speakers) and augmentation of the system (integration of a public address system) would have justified denying exemption for exceeding Aiken’s outer limit, an application of all the legislative history factors should still have been required.67 Instead of manipulating the legislative history to reach the result they desired, the court, at a minimum, should have explained why it felt that an examination of the noise levels in the transmission areas was not applicable to its determination. By purchasing their goods, customers are the proprietors’ livelihood. Thus, the noise level may have been the primary reason for the installation of the equipment, since customers find shopping in a pleasant atmosphere much more enjoyable than hearing industrial equipment pounding in the background.

In Hickory Grove Music v. Andrews,68 defendants owned a restaurant with a public area of 1,192 square feet.69 They attached five recessed ceiling speakers, via hidden wiring, to a used radio receiver located between thirty and forty-five feet from the speakers.70 The system was professionally installed and was originally intended to operate a public address system.71 Yet, at that time, the

63. Id. at 1023.
64. Id.
65. Id.
66. Id. at 1022.
67. Id. at 1023. See also Crabshaw Music v. K-Bob’s of El Paso, Inc., 744 F. Supp. 763 (W.D. Tex. 1990) (finding a public address system integrated into stereo system containing eleven speakers dispersed throughout the public areas of the establishment a commercial system designed for dissemination of sound in a commercial building); Broadcast Music, Inc. v. Jeep Sales & Service Co., 747 F. Supp. 1190 (E.D. Va. 1990). In Jeep Sales the court denied relief after noting that defendant utilized at least four ceiling recessed speakers in the establishment and four public address speakers mounted on light poles outside the establishment. The court stated that the Aiken outer limit “has been strictly construed[,] and that] courts have been unwilling to apply the exemption where the physical size of the public space in which communication . . . occurred is larger than that in Aiken or where the receiver used had features and power typical of a commercial receiver.” Id. at 1193.
69. Id. at 1034.
70. Id.
71. Id.
system was only used to broadcast radio transmissions, and it was not optimal for playing background music for its customers.\textsuperscript{72} The court reasoned that recessed ceiling speakers in combination with a substantial length of hidden wiring did not constitute a home-type system.\textsuperscript{73} Furthermore, the court maintained that the physical arrangement exceeded the \textit{Aiken} outer limit, because the speakers were dispersed greater distances than the four speakers in close proximity to the receiving set in Aiken's shop.\textsuperscript{74} With regard to the system itself, the court stated that the entire system and the context of its use must be evaluated, because, even though "individual components of a system may be commonly used in homes, the whole apparatus once installed may not qualify as a 'home-type' system."\textsuperscript{75} The court noted that defendant's system did in fact contain some components commonly found in private homes but found the overall system to be commercial in nature.\textsuperscript{76}

The \textit{Hickory Grove} court did not examine the square footage or "size" of defendant's establishment under the home-type apparatus factor, but rather evaluated it under the small commercial establishment factor along with the revenues and seating capacity of the establishment.\textsuperscript{77} It did, however, find determinative to its result the physical arrangement of the system. Yet, it was unclear whether the court took into account that the system was originally installed to maintain a public address system and may have been the type of augmentation that Congress intended to be examined. Alteration and/or augmentation of the system was a factor explicitly listed in the legislative history for the courts to examine;\textsuperscript{78} and the court should have noted that it could have applied this factor as well. Nevertheless, the court glossed over this factor and focused on the factors it believed determinative to its evaluation.

Aside from determining that the system as a whole was commercial in nature, the court should have also taken into account the poor audibility of the system in connection with the noise levels in the transmission areas. Since the system was not optimal for playing background music, it may have somewhat tipped the balance in favor of finding a home-type rather than a commercial system.\textsuperscript{79} Yet, in light of all the factors available, the poor audibility still may not have been enough to exempt defendant from liability, since the overall system was commercial in nature.\textsuperscript{80}

\textsuperscript{72.} \textit{Id.}
\textsuperscript{73.} \textit{Id.} at 1038.
\textsuperscript{74.} \textit{Id.}
\textsuperscript{75.} \textit{Id.}
\textsuperscript{76.} \textit{Id.}
\textsuperscript{77.} \textit{Id.} See Section III(B) and accompanying text.
\textsuperscript{80.} See also \textit{Broadcast Music, Inc. v. U.S. Shoe Corp.}, 678 F.2d 816 (9th Cir. 1982) (relying on the legislative history, the court denied defendant exemption from liability, because each store had a commercial monaural system, with widely separated speakers of a type not commonly used in private homes); \textit{Laminations Music v. P\&X Markets, Inc.}, No. C 84 6840 (N.D. Cal. 1985) (finding the
It should now be apparent that almost every case examined under the legislative history approach has denied §110(5) exemption to the establishment's owner. The only case where the court employed the legislative history approach to grant the proprietor exemption from liability is Springsteen v. Plaza Roller Dome, Inc.\(^{81}\) Unlike Rodgers v. Eighty Four Lumber Co., the court in Springsteen found determinative the poor audibility of the transmissions in the public areas.\(^{82}\) Defendant's system incorporated a radio receiver wired to six speakers mounted on light poles over a 7,500-square-foot miniature golf course.\(^{83}\) However, the speakers were very unsophisticated and could be heard without distortion only at close ranges.\(^{84}\)

The court noted that defendant's establishment clearly exceeded that of Aiken in square footage; however, it maintained that "the size of the allegedly offending facility and the number of speakers are not, however, standing alone, the sole or even predominate factors to consider in determining the applicability of the exemption."\(^{85}\) Instead, the court asserted that all of the factors provided in the legislative history should be considered in determining whether a receiving apparatus has been converted into a commercial system beyond the scope of §110(5).\(^{86}\) The court then declared that defendant's sound system was obviously of poorer sound quality than the systems in Aiken and Sailor Music v. The Gap Stores, Inc., where the music could be heard clearly throughout the stores.\(^{87}\) Therefore, the court held that this was not a commercial sound system, and

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\(^{81}\) Springsteen, 602 F. Supp. 1113.

\(^{82}\) Id. at 1118.

\(^{83}\) Id. at 1114.

\(^{84}\) Id. at 1118.

\(^{85}\) Id. at 1117-1118.

\(^{86}\) Id. at 1118.

\(^{87}\) Id.
defendant was exempt from copyright liability.\footnote{Id.} 

Notwithstanding the court's assertion that all of the factors were determinative to the analysis, the court emphasized a single factor, namely the quality/audibility of the components utilized, in order to exempt the defendant's establishment from liability. Although the court noted the applicability of the other factors, it failed to discuss what bearing the size of the establishment and the physical arrangement of the equipment would have had in the balancing process. If these other factors were considered in combination, and pitted against the inferior quality of the equipment used throughout the 7,500-square-foot establishment, they may have outweighed a finding of exemption. The square footage of the establishment and the physical arrangement of the equipment clearly exceeded the \textit{Aiken} outer limit regardless of the sound quality of the system itself.

As the above analysis exemplifies, the random and discretionary emphasis and de-emphasis of the factors provided in the legislative history is one of the primary evils of the legislative history approach. Relying on this approach requires the courts to make case-by-case factual evaluations of a problematic list of factors, and the courts have been inconsistent when choosing and defining the particular factors that are determinative to finding copyright liability. For example, the court in \textit{Sailor Music v. The Gap Stores, Inc.} examined the size of the establishment; but it failed to evaluate the physical arrangement of the equipment, which may have exceeded the set-up allowed under the \textit{Aiken} outer limit. However, the court in \textit{Rodgers v. Eighty Four Lumber Co.} did analyze the physical arrangement of the equipment, along with the establishment's size and the augmentation of the system; but it failed to examine the noise levels in the transmission areas, although defendant claimed the music was to muffle nearby industrial noise. These inconsistencies force the courts to make subjective and arbitrary decisions regarding exemption. More importantly, proprietors of public establishments who wish to tune in radio broadcasts are forced to do so under conditions of uncertainty with regard to potential copyright liability.\footnote{Misner, \textit{supra} note 2, at 250.}

2. \textit{The Textualist Approach}

Due to the problems emanating from the legislative history approach, other courts believe that the legislative factors may be used only to help interpret vague statutory text but not to supply additional elements to the statute itself.\footnote{In the Matter of Sinclair, 870 F.2d 1340, 1344 (7th Cir. 1989).} To textualists, the use of the legislative history thwarts the statute's plain meaning and delves into Congressional intentions, which are not enacted law.\footnote{Id. at 1343. \textit{See also} International Korwin Corp. v. Kowalczyk, 665 F. Supp. 652 (N.D. Ill. 1987) (examining the plain meaning of the statutory language and later noting that the legislative history supported the conclusions).}

The prominent textualist cases are \textit{Broadcast Music, Inc. v. Claire's Boutiques, Inc.}\footnote{754 F. Supp. 1324 (N.D. Ill. 1990), aff’d, 949 F.2d 1482 (7th Cir. 1991), cert. denied, 112 S.} and \textit{Edison Brothers Stores, Inc. v. Broadcast Music, Inc.}.\footnote{International Korwin Corp. v. Kowalczyk, 665 F. Supp. 652 (N.D. Ill. 1987) (examining the plain meaning of the statutory language and later noting that the legislative history supported the conclusions).}
In Claire's, the average size of the two types of stores owned by the company were 861 square feet and 2022 square feet.\textsuperscript{94} The equipment in each store included a 5-watt Radio Shack receiver with two speaker connections, an indoor antenna, speaker wire and two Radio Shack speakers attached to the ceiling behind grids.\textsuperscript{95} One speaker was an average distance of five to fifteen feet from the receiver, and the other one was twenty to thirty-five feet from the receiver.\textsuperscript{96}

The court initially analyzed the chain store-by-store and noted that each store used only a single receiving apparatus.\textsuperscript{97} It then went on to analyze the entire stereo system and concluded that the factors to be evaluated included: whether the equipment is generally sold for commercial or private use; the number of speakers the receiver can accommodate; the number of speakers actually used; the manner in which the speakers are installed; whether concealed wiring is utilized; the distance of the speakers from the receiver; and whether the receiver is integrated with a public announcement system or telephone lines.\textsuperscript{98} The court...
maintained that all of the factors weighed in Claire’s favor with the exception of the use of concealed wiring and ceiling-mounted speakers.99 However, it reasoned that two negative factors were not sufficient to deny defendant exemption from liability, because no one factor is determinative in the analysis.100 Instead, the entire system must be weighed; and, after doing so, the court held that the sound system was of a type commonly found in private homes.101 The appellate court affirmed,102 and the Supreme Court denied certiorari.103

The court’s analysis did not encompass a “size” determination, as the legislative history approach dictates, because such a determination is irrelevant to the type of equipment implemented and whether such equipment is commonly found in a private home. Under the court’s approach, it also appeared that the list of factors emerged easily from the statutory language, since they focused on what type of system an average consumer would own versus what components a commercially installed system, likely unaffordable to a private consumer, would include. Furthermore, the court commented on every factor on its list, something those following the legislative history approach have failed to do by picking and choosing the factors and their definitions in order to reach the result desired. The factors are also self-defining, unlike the broadly stated ones found in the legislative history. For example, when attempting to determine whether the Aiken outer limit has been surpassed, it is much easier to apply and define “the distance of the speakers from receiver”104 rather than “the physical arrangement of the equipment in the establishment.”105

The approach taken in Broadcast Music, Inc. v. Claire’s Boutiques, Inc. was followed by the court in Edison Brothers Stores, Inc. v. Broadcast Music, Inc.106 The plaintiff had enacted a store Radio Policy requiring simple receivers, the use of only two portable box speakers within fifteen feet of the receiver, and permitting only radio broadcasts to be played in the stores.107 Thus, the plaintiff attempted to approximate, as closely as possible, the physical arrangement and quality of equipment found in Aiken’s establishment.108 As in Claire’s, the court dismissed defendant’s argument that the chain must be examined as a whole.109 It then noted that the system as a whole consisted of components sold for private consumer use, and strict enforcement of the Radio Policy would ensure that no abuses would occur.110 Moreover, the court

99. Id. at 1331.
100. Id.
101. Id.
102. Claire’s, 949 F.2d 1482.
103. Claire’s, 112 S. Ct. 1942.
104. Claire’s, 754 F. Supp. at 1329.
107. Id. at 769-770.
108. Id. at 771.
109. Id. at 770.
110. Id. at 771.
maintained that the physical arrangement duplicated the placement found in a common household, since the speakers were not ceiling mounted and the wiring was exposed to view. The Court also maintained that placing the speakers no more than fifteen feet from the receiver was within the range of any "modest homestyle setup." Thus, the court concluded that Edison Brothers was trying to "focus on the simplicity, and the spirit of the exception when it was first promulgated in 1976." As in Claire's, the appellate court affirmed, and the Supreme Court denied certiorari.

Thus, the Edison Brothers set-up was as simplistic as Aiken's and met the requirements provided in Claire's: a home type receiver, which likely only accommodated two speakers; the use of only two speakers which were not mounted, did not use concealed wiring, and were kept at a modest distance from the receiver; and prohibiting the system's integration with other types of systems. As in Claire's, the court's analysis, once again, did not encompass an irrelevant "size" determination.

B. Of Sufficient Size to Justify Licensing

The background music service test considers the establishment's "size," and it states "[t]hat a small commercial establishment . . . 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." Section 110(5) does not require the courts to apply this test; this factor originates entirely from the legislative history surrounding the statute. Nevertheless, the courts following the legislative history approach rely heavily on this factor, while textualist courts refuse to examine this factor, because it is neither an element listed in the statute nor an aid to interpreting those elements. This "factor" merely represents a legislative determination that the size of the Aiken establishment did not justify subscription to a background music service; but, beyond this, the elements a court is permitted to use in applying this "test" are left unresolved. Moreover, the courts have split on whether "size" refers to the physical size or the financial size, or both, of the establishment involved.

111. Id.
112. Id.
113. Edison Brothers, 954 F.2d 1419 (8th Cir. 1992).
116. 2 NIMMER, supra note 49, §8.18[C], at 8-216.
117. Id. However, if the small commercial establishment requirement is an outgrowth of the factors used to determine the home-type receiving apparatus, it could be argued that the small commercial establishment criteria is an interpretive aid to that determination. Yet, the small commercial establishment requirement would have to be limited to an examination of the physical size of the establishment rather than the size of the establishment's revenues, because the home type receiving apparatus only examines the former of the two. This would be useful, because it will define what Congress meant by "size", as well as limit the determination the court must make in deciding whether an establishment is of sufficient size to justify licensing.
Sailor Music v. The Gap Stores, Inc.\textsuperscript{118} was one of the first cases to examine this "factor," and the court denied exemption to The Gap, a 420-store chain with revenues of nearly $300 million and an average size of 3,500 square feet.\textsuperscript{119} Without explanation as to whether it was relying on The Gap's 3,500 square feet, its $300 million in revenues or both, the Court decided that The Gap was of sufficient size to justify licensing.\textsuperscript{120}

Although the court in Sailor Music v. The Gap Stores, Inc. never specified whether it was examining the physical or financial size of the establishment, Rodgers v. Eighty Four Lumber Co.\textsuperscript{121} compared only the physical sizes of the establishments. It maintained that defendant's establishment greatly exceeded, at 10,000 square feet, both the outer limit of the Aiken exemption, which called for no more than 620 square feet open to the public, and the 3,500 square feet of the Gap stores, which was found of sufficient size to justify licensing.\textsuperscript{122} Thus, the court found defendant's stores of sufficient size to justify subscription to a background music service as well.\textsuperscript{123}

Nevertheless, the court in Springsteen v. Plaza Roller Dome, Inc.\textsuperscript{124} took the opposite course of analysis and examined the revenues generated by defendant's establishment. Defendant's miniature golf course consisted of 7,500 square feet and rarely generated over $1,000 per month during the six months of the year it was open to the public.\textsuperscript{125} Although the court noted that the defendant's establishment was twelve times larger than the one in Aiken, it maintained that its revenues were insufficient to justify obtaining a background music license.\textsuperscript{126} The court compared defendant's establishment to the establishments in Sailor Music v. The Gap Stores, Inc.,\textsuperscript{127} with its 420 stores and $300 million in yearly revenues, and Aiken,\textsuperscript{128} which was a chain operating year round and assumed by the court to be generating substantial revenues. It asserted that if any operation was not of sufficient size to justify licensing it was defendant's $1,000


\textsuperscript{119} The Gap Stores, 516 F. Supp. at 923-924.

\textsuperscript{120} Id. at 925. See also Broadcast Music, Inc. v. U.S. Shoe Corp., Inc., 678 F.2d 816, 817 (9th Cir. 1982) ("[T]he size and nature of the operation justifies the use of a commercial background music system.") (emphasis added); Lamimations Music v. P&X Markets, Inc., No. C 84 6840 (N.D. Cal. 1985) (same); Merrill v. Bill Miller's Bar-B-Q Enterprises, Inc., 688 F. Supp. 1172, 1176 (W.D. Tex. 1988) ("It is clearly 'practical' for a chain of restaurants, each restaurant having 1000 to 1500 square feet of public dining area and grossing well over $500,000 annually, to subscribe to a commercial background music service."). But see, e.g., International Korwin Corp. v. Kowalczyk, 665 F. Supp. 652 (N.D. Ill. 1987) (finding both physical and financial issue to justify the subscription to a background music service).

\textsuperscript{121} 617 F. Supp. 1021 (W.D. Pa. 1985).

\textsuperscript{122} Id. at 1023.

\textsuperscript{123} Id.

\textsuperscript{124} 602 F. Supp. 1113 (M.D.N.C. 1985).

\textsuperscript{125} Id. at 1117, 1119.

\textsuperscript{126} Id. at 1118-1119.

\textsuperscript{127} The Gap Stores, 516 F. Supp. 923.

\textsuperscript{128} Aiken, 422 U.S. 151 (1975).
per month operation. Thus, the golf course was exempt from liability.

Unlike previous cases relying on the legislative history approach, the court in *Hickory Grove Music v. Andrews* not only took into account the physical and financial size of the establishment, but added the seating capacity of the business to the analysis. Defendant’s establishment contained 1,192 square feet of public area and a seating capacity of 120 persons. Since the revenues of the establishment were never disclosed by defendant, the court relied on the fact that 1,192 square feet greatly exceeded the 620 square feet *Aiken* outer limit. On that basis alone, the court found that this was not a small commercial establishment, but it went on to hold that “[o]ther courts have refused to find that restaurants with comparable seating capacities qualify as ‘small commercial establishments’.” Thus, defendant’s establishment was of sufficient size to justify subscribing to a background music service.

In light of the cases discussed, an establishment may be exempt if it stays under approximately 620 square feet (*Aiken*), but if it reaches 2,769 or more square feet (*Sailor Music v. The Gap Stores, Inc.*) it may fall outside of the §110(5) exemption and require licensing. Yet, this is applicable only if the court is defining “size” in its physical sense. No attempt was even made by the courts relying on the financial size of an establishment to determine the appropriate financial boundaries that would justify a subscription to a background music service. These courts merely noted the financial size of the establishment and guessed as to whether or not they believed that this particular establishment could afford a background music subscription. Thus, with regard to the cases discussed, if a defendant’s profits are less than that of *Springsteen v. Plaza Roller Dome, Inc.* (approximately $1,000 per month for six months), but at least not greater than that of *Sailor Music v. The Gap Stores, Inc.* (at least $300 million per year), the defendant may be found exempt.

In sum, the only thing that has been accomplished by applying the background music service test, which is not enacted law, is a failure to focus on the plain meaning of the statute. The courts appear unsure of the meaning of “size,”

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130. *Id.* at 1119. See also *Merrill v. The County Stores*, 669 F. Supp. 1164, at 1170 (D. N.H. 1987) (holding that “[d]efendant’s $2.5 million in annual retail sales justified subscription to a commercial background music system.”).
132. *Id.* at 1034.
133. *Id.* at 1039.
134. *Id.*
135. See also *Gnossos Music v. DiPompo*, No. 89-0051 P, 1989 U.S. Dist. LEXIS *1, at *13 (D. Me. 1989) (with 1,824 square feet of space open to the public and two dining rooms seating 172 people, a lobby, lounge and banquet room, defendant’s is a far more sophisticated operation than Aiken’s and is of sufficient size to justify licensing).
and the addition of this element to §110(5) forces the courts to make arbitrary and unpredictable case-by-case determinations of what is "of sufficient size to justify licensing." If the courts cannot define "size" or identify with more precision the commonalities among cases, such explorations into the legislative history are unwarranted.

C. Further Transmission to the Public

The last component of §110(5) requires that a "transmission thus received . . . [not be] further transmitted to the public." 141 Under the 1976 Copyright Act, to "transmit" a performance is "to communicate it by any device or process whereby . . . sounds are received beyond the place from which they are sent." 142 Consequently, Congress provided no definition as to what constituted a "further transmission," and the legislative history surrounding this concept is sparse. It appears, however, that Congress denies exemption to performances further transmitted "beyond the place where the receiving apparatus is located, and this may encompass performances by public establishments whereby radio transmissions are sent to various places or rooms within the establishment." 143

I. The Legislative History Approach

The "further transmission" limitation has proved difficult to apply, since the legislative history courts examine the equipment carrying the transmission, 144 while the textualist courts examine the transmission itself. 145 Moreover, very few of the cases following the legislative history approach even applied the "further transmission" factor. 146 Eliminating an entire statutory factor lends credence to the argument that the legislative history approach fails to focus on the language of the statute, which is enacted law. Accordingly, it gives the courts free reign to define and apply the factors that weigh in favor of the result they desire.

For example, Sailor Music v. The Gap Stores, Inc. 147 was one of the few

145. See, e.g., Broadcast Music, Inc. v. Claire's Boutiques, Inc., 754 F. Supp. 1324, at 1332 (N.D. Ill. 1990) (further transmission encompasses a rebroadcast or use of multiple speakers rather than the location of the receiver and speakers).
legislative history cases to apply this statutory factor. The court, without
discussion, concluded that The Gap had further transmitted the radio broadcasts,
because the broadcasts were received on the radio receiver and transmitted from
there to the recessed ceiling speakers and played for the public.\textsuperscript{148}

This argument assumed, however, that a further transmission occurred because
the broadcast traveled over the speaker wires.\textsuperscript{149} Yet, this result goes against
the legislative history's "outer limit." If the court's analysis is considered viable,
the entire Aiken exemption is eliminated from the legislative history, since the
broadcasts received in Aiken's establishment were also sent to his speakers over
speaker wire.

The court in \textit{Hickory Grove Music v. Andrews},\textsuperscript{150} however, examined the
distance of the speakers from the receiver. It stated that the courts have
interpreted this factor under §110(5) to mean "any dispersal of sound from a
point of reception through a[n]... establishment."\textsuperscript{151} Since the receiver was
located in the lobby and the speakers in the dining room, the court reasoned that
defendants had further transmitted the radio broadcasts by merely placing the
speakers apart from the receiver.\textsuperscript{152} It appears, therefore, that had the receiver
been in the dining room with the speakers, it would have satisfied the last re-
quirement for exemption. Nonetheless, even in this instance the defendants would
not have been exempt under \textit{Sailor Music v. The Gap Stores, Inc.}, since a further
transmission occurred when the broadcast was carried over the speaker wires.

Therefore, the \textit{Hickory Grove} court appeared to maintain that, by placing a
"wall" between the receiver and the speakers, a broadcast was converted into a
"further transmission." However, this analysis seems to encompass the dispersal
of a primary transmission, and this is inappropriate. The location of the receiver
and the speakers is irrelevant; it is the same transmission received by the radio
receiver and made audible by the speakers, not a reproduction or secondary
transmission further transmitted to the public.\textsuperscript{153}

\section*{2. The Textualist Approach}

Unlike the legislative history approach, the textualist approach does not assert
that a "further transmission" occurs just because a broadcast is received on a

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{148} The \textit{Gap Stores}, 516 F. Supp. at 925.
\item \textsuperscript{149} See \textit{Claire's}, 949 F.2d at 1495 (7th Cir. 1991) (court found that a further transmission via
speaker wire to other areas contrary to the legislative history, because "receiving apparatus" encom-
passes all the components of the stereo system).
\item \textsuperscript{150} 749 F. Supp. 1031 (D. Mont. 1990).
\item \textsuperscript{151} \textit{id.} at 1038.
\item \textsuperscript{152} \textit{id.} (noting that, although the performance was not optimal due to poor speaker quality, the
songs were still recognizable and audible to the public and were further transmissions).
\item \textsuperscript{153} See also \textit{Merrill v. Bill Miller's Bar-B-Q Enterprises}, Inc., 688 F. Supp. 1172, 1176 (W.D.
Tex. 1988) (finding that a "further transmission" had taken place, not only because the broadcasts
were received in a room separate from the speakers, but because the transmissions were sent via \textit{forty
feet of wiring}) (emphasis added); \textit{U.S. Songs, Inc. v. Downside Lenox, Inc.}, 771 F. Supp. 1220 (N.D.
Ga. 1991) ("further transmission" defined and applied in the same manner as \textit{Hickory Grove}).
\end{itemize}
\end{footnotesize}
radio receiver and relayed over speaker wire to a set of speakers in another room. For example, the court in *Broadcast Music, Inc. v. Claire's Boutiques, Inc.*\(^{154}\) examined the use of speaker wire, the length of the speaker wire and the location of the speakers, and it found that no “further transmission” had occurred.\(^{155}\) The receivers were kept in storage closets inaccessible to the public, and they were connected via concealed wiring to two speakers located in the public selling areas of the stores.\(^{156}\) The court first noted that a “further transmission” accomplished by mere transmission over speaker wires read the entire factor out of the statute, because “every radio requires wiring . . . to reach the speakers which make the sound. To describe this as a further transmission means that every sound system utilizes a further transmission.”\(^{157}\)

The court similarly held that the length of the speaker wires and the location of the speakers away from the receiver were not determinative of whether a “further transmission” had occurred.\(^{158}\) The court reasoned that any length of wire would not alter the transmission itself, because it was the same transmission received by the radio receiver and simultaneously played on the speakers.\(^{159}\) Yet, the court also noted that if an establishment had used extensive lengths of speaker wire, it likely would have utilized other components that would have made the entire system commercial rather than private in nature.\(^{160}\) The court also reasoned that the fact that the receiver and its speakers were located in different places or rooms also did not alter the transmission itself, because the manner in which speaker wire is routed is basically irrelevant to whether there has been a “further transmission.”\(^{161}\) According to the court, a system that would have otherwise been exempt for utilizing a home-type system would no longer be, merely because of the physical configuration of the components.\(^{162}\) The court found this to be an insignificant distinction.\(^{163}\)

Thus, the court, by following a textualist approach, appeared to emphasize aspects more important to the evaluation of a “further transmission to the public” -- the communication itself rather than the components that carry it there. The court felt that a “further transmission” must mean something more “substantial, such as a re-broadcast of a transmission or the use of cable to service multiple

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156. *Id.* at 1326.
157. *Id.* at 1331. Had that been the case, no store could be found exempt from liability; and the *Aiken* outer limit, allowing small commercial establishments to bring in standard radio equipment for their customers enjoyment, would be thwarted.
158. *Id.* at 1332.
159. *Id.*
160. *Id.*
161. *Id.* The court did note, however, that if a receiver feeds a large number of speakers in different rooms the exemption may not apply. Yet, the court felt such a determination was more relevant to the home-type apparatus factor. *Id.*
162. *Id.*
163. *Id.*
receivers." Thus, it is more important that the communication be received beyond the place from which it was sent, because this indicates that a secondary transmission may have taken place. How the transmission travels from the receiver to the speakers is irrelevant, since the broadcast received by the radio receiver is the same primary transmission simultaneously emerging from the speakers. Moreover, a "primary transmission" to the receiver would be inaudible without the speakers; the sound emerging from the speakers is merely a conversion of a radio wave into an audible sound wave.

The court in *Edison Brothers Stores, Inc. v. Broadcast Music, Inc.* also held that no "further transmission" had occurred in the establishments at issue. As in *Broadcast Music, Inc. v. Claire's Boutiques, Inc.*, the court doubted the validity of examining the distance of the speakers from the receiver; yet, it reasoned that the store policy of placing the speakers at a maximum distance of fifteen feet from the receiver would not exceed the range of any "modest home-style set up." Instead, the court stated that a "homestyle operator may not re-broadcast or secondarily broadcast a radio transmission to the public without liability." The rebroadcast would occur when an operator tapes a radio broadcast and plays it later with or without editing. This could not occur in the establishments involved, because tape players and compact disc players were prohibited under the store policy; only radio broadcasts could be utilized. Thus, if a broadcast could not be taped, it could not be secondarily transmitted at a later time.

Although the court did not examine the length of the speaker wires or the transmissions over those wires, the method used appears to be a logical way to define what is meant by a "further transmission." By sending the original broadcast to the public a second time, the court can clearly deny exemption on a predictable basis, because it will always entail something other than the original broadcast received by the radio receiver and simultaneously made audible by the stereo speakers.

In sum, the textualist approach, which looks to the transmission itself rather than the components that carry it there, appears much easier to apply to a particular set of circumstances. Moreover, the results reached by the legislative history courts are unpredictable, since no boundaries have been drawn with regard to the appropriate distance of the speakers from the receiver or the allowable length of wiring which may be utilized. By realizing that the transmission

164. *Id. See also Claire's*, 949 F.2d at 1495 (appellate court agreed with district court's conclusions and stated that to "further transmit" a performance "must entail the use of some device or process that expands the normal limits of the receiver's capabilities.").


167. *Id.*

168. *Id.* Moreover, the fact that the court believed that Edison Brothers was trying to simulate the Aiken set up probably led to exemption as well.

169. *Id. at 770.*
received by the receiver is the same transmission carried to the speakers, it becomes obvious that a further transmission means something more substantial, such as a rebroadcast of a radio program to the public. 170

IV. TEXTUALISM, LEGISLATIVE HISTORY OR BOTH?

The courts remain split as to which method of statutory interpretation is superior in the §110(5) analysis. Nevertheless, the legislative history approach is much too broad to ensure predictable results. The factors listed in the legislative history can be defined in a variety of ways by the courts, and the courts' analyses appear to depend on what they deem appropriate under the circumstances. This leaves courts with extensive discretionary power, which, in order to obtain predictable results, needs to be curbed.

This is by no means a plea for a bright line rule. The courts' discretion needs to be curbed, not eliminated, or the ensuing consequences will be detrimental. Bright line rules, because they allow little discretion, "[s]ometimes fail to take account of ... competing values ... [or fail] to attempt to find an accommodation that serves conflicting ... interests as well as possible, and at the lowest possible detriment to each." 171 Thus, when attempting to balance a copyright owner's rights against the public's need to utilize the copyrighted work, one interest will be slighted, which will lead to unjust results. Moreover, Congress could have constitutionally drawn such a bright line rule but instead left it to the courts to adjudicate. 172

Notwithstanding this grant of discretion, the courts must adjudicate within the area mandated by Congress. 173 They can accomplish this by adhering to a textualist approach; and the approach taken in Broadcast Music, Inc. v. Claire's Boutiques, Inc. 174 may be the most beneficial beginning, although not an unequivocal answer, to resolving some of the arbitrariness resulting from the ad hoc legislative history approach under §110(5). The Claire's analysis basically requires a court to first look to the plain meaning of the statute; and, if it is not ambiguous, to stop searching for other methods of interpretation. 175 However, if the statute's plain meaning is not adequate for a thorough analysis, the court should then turn to the legislative history behind the statute to help interpret the

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171. Lotus Dev. Corp. v. Paperback Software Int'l., 740 F. Supp. 37, 73 (D. Mass. 1990). In an action brought for infringement of copyright for a computer spreadsheet program, defendant's argued that a bright line rule should be established with regard to the idea-expression dichotomy. The court refused to accept the defendant's position on the issue and stated, "Without a congressional mandate, it would be an abuse of authority for this court, in deciding this case, to use a bright-line test of copyrightability that makes the literal-nonliteral distinction [of the elements of the computer program] decisive. Instead, the court must adjudicate within the area of protection mandated by Congress." Id.

172. Id.

173. Id.


175. Id. at 1333.
meaning of the statute but not to add additional elements or requirements to the statute.\textsuperscript{176}

Such an approach forces the courts to focus on what the statute says it requires prior to considering the legislative history to support the determinations.\textsuperscript{177} A narrow focus will restrict, but not eliminate, the broad discretion allotted to courts applying the legislative history approach. This is partially accomplished by refusing to deal with requirements not provided for in the statute, which limits the areas in which the court can create diverse definitions for various circumstances and reach results on the basis of whim.

A. Single Receiving Apparatus of a Kind Commonly Found in a Private Home

The courts’ most complex task is determining whether a “single receiving apparatus of a kind commonly used in private homes” is or is not being utilized by a public establishment.\textsuperscript{178} The mere fact that the legislative history courts cannot make up their minds as to which factors, e.g., size, physical arrangement, noise levels, and alteration/augmentation,\textsuperscript{179} are most significant to the analysis, and what meanings are appropriate to extract from these factors, leads to the conclusion that the courts should not be allowed excessive discretion to define the parameters of these requirements.

Fortunately, since Hickory Grove Music v. Andrews,\textsuperscript{180} the courts have moved away from a “size” analysis and have examined the key factors involved: the components themselves and their arrangement in the stores. The textualist courts have picked up on this trend, and applying the narrowly defined list of factors provided in Claire’s, e.g., number of speakers accommodated, number of speakers used, manner of speaker installation, distance of speakers from receiver,\textsuperscript{181} may be the most beneficial course of action, since they focus on the components of the system and their arrangement in the establishment. The Claire’s court compiled this list of factors by determining what other courts deemed necessary to the analysis,\textsuperscript{182} even though these courts never clarified

\textsuperscript{176} Id.

\textsuperscript{177} But see, e.g., Greenberger, supra note 18 ("The result [of looking only to the legislative history if the statutory language is unclear] is that the Court ends up limiting the application of statutes in instances where Congress intended they should apply, constricting rather than implementing legislative choices.").


\textsuperscript{180} Claire’s, 754 F. Supp. 1324 (D. Mont. 1990).

the weight or relationship of these factors. However, the court found no one factor to be determinative to their conclusion; and, instead, employed a balancing test to reach the conclusion that a majority of the factors weighed in the proprietor’s favor.

Moreover, these factors emerge easily from the statutory language, since the textualist approach relies on what a “reasonable person” would think the statute entails. A reasonable person would likely find the Claire’s factors pertinent to whether a system belongs in a private home versus a commercial establishment. The factors are also narrowly defined; thus, they are difficult to expand upon, unlike the legislative history factors, which allow a variety of definitions to evolve from the factors provided. This, in turn, would limit the courts’ discretionary powers.

Yet, a problem still exists with regard to drawing the appropriate boundary lines for these narrowly tailored factors. Should the maximum distance between the receiver and speakers be fifteen feet as in Edison Brothers Stores, Inc. v. Broadcast Music, Inc.? Should the proprietor be held liable for utilizing five speakers instead of the four allowed in Aiken if the speakers are in close proximity to the receiving set? Such questions have not been answered definitively, if at all, by the textualist courts; thus, they remain major obstacles to defining the parameters of the §110(5) exemption.

It would also appear that attempting to approximate, as closely as possible, the physical arrangement found in Aiken would serve the underlying purposes of §110(5). Perhaps requiring a policy as simplistic as that found in Edison Brothers should be implemented in any store wishing to be exempt from liability. This could be accomplished by the use of several simple home-type components, rather than the use of a single, more powerful system that might border on a non-home style apparatus. Such a set-up would ensure that proprietors wishing to avoid liability for exceeding the Aiken outer limit would purchase the type of components utilized by private consumers and would install them in a manner that will not thwart the spirit of the exemption. This, too, would curb the courts’ discretion.

Consequently, none of the textualist cases appeared extremely difficult to decide, and it is questionable whether the answers would have come so easily in a more complex case. Yet, if the Claire’s factors or a store policy such as Edison Brothers is implemented and the court fully discusses each factor, instead of picking and choosing what it deems appropriate to emphasize or de-emphasize, textualism appears the less arbitrary of the two available methods.


183. Claire’s, 754 F. Supp. at 1329.

184. Id. at 1331.

185. In the Matter of Sinclair, 870 F.2d at 1343.
B. Of Sufficient Size to Justify Licensing

Under a textualist approach, the background music service test would be eliminated automatically, since the statute nowhere states that an establishment should be examined to determine if it is "of sufficient size to justify licensing." By eliminating this evaluation, the courts are able to escape ascertaining whether Congress meant the physical or financial size of an establishment, or both. The courts should have no qualms about discarding an evaluation they are neither qualified nor required to make under §110(5).

C. Further Transmission to the Public

The fact that a majority of the legislative history courts have failed to even note the existence of the "further transmission" requirement is indicative of their failure to focus on the statutory language. Moreover, the courts that did analyze this factor reached their results by relying on the equipment carrying the transmission. Yet, this distinction is irrelevant for determining whether or not a primary or secondary transmission has taken place, since to further transmit could not possibly mean the use of any device or process receiving the primary transmission. It would be unjust to say that anyone receiving a transmission is automatically further transmitting it to the public merely because the public is within range to hear the initial broadcast.

Fortunately, textualist courts focus on the type of communication taking place and evaluate whether the broadcast at issue is a primary or a secondary transmission. Thus, once it is determined that an original broadcast is being performed, there is no "further transmission." Thus, under this approach, a transmission received by a radio receiver and simultaneously produced on the speakers is the original transmission regardless of where the speakers are located or how much wiring is used.

According to one commentator, a further transmission to the public "[o]ccurs . . . when the use of supplemental radio equipment extends the broadcast to a . . . wider audience than the same radio broadcast would otherwise enjoy." For example, taping a broadcast and rebroadcasting it, via a cassette player, at a later time would extend a transmission to a wider audience than would otherwise be reached. The public is acquiring a second chance to hear what they missed when the original broadcast was played to the public; thus, a further transmission has occurred. Moreover, a tape player is supplemental radio equipment, which is not vital to carrying the radio broadcast; thus, a further transmission has occurred. Such a definition of "to further transmit" would

187. See supra note 117 (if necessary, a court may evaluate the physical size of the establishment under the first statutory factor: A single receiving apparatus of a kind commonly found in private homes). See also supra Section III(B) and accompanying text.
188. 17 U.S.C. §110(5)(B) (1988). See supra note 146. See also Section III(C) and accompanying text.
eliminate the need to determine when a room becomes too far away to place a receiver in or why placing a receiver in a storage closet or back room, inaccessible to the public, creates a further transmission if the speakers are in a publicly accessible area. Speaker wire is not supplemental radio equipment. It is vital to the broadcast, and the transmission has not been altered by the fact that a receiver, speakers and speaker wire comprise the necessary technology to convert an inaudible radio wave into a sound wave capable of being heard by the human ear.

V. CONCLUDING THOUGHTS

No claim has been made here that a final, workable solution exists for this complex issue. Nevertheless, the courts should rely on what Congress provided in the statute itself rather than forcing itself to apply the legislative history, a history that was not enacted into law. By doing so, the courts may disregard the elements that Congress obviously did not feel were indispensable to the law finally enacted and focus on the elements provided in the statute itself; criteria that reasonable people assume are all they are required to abide by in their daily lives.

190. Yet, courts must respect legislative policy/history when enforcing statutory mandates, because they establish the limitations placed on the role of the judiciary. *Lotus*, 740 F. Supp. at 71. If the courts fail to respect such intent, they thwart any meaningful separation of powers that exist between the legislature and the courts. The court is not a co-author of the statute, it is merely an interpreter of Congressional prerogatives. *Greenberger*, *supra* note 18, at 41.