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Copyright - Infringement - Public Performance for Profit - Radio Reception as Performance

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Recent Decisions

COPYRIGHT—INFRINGEMENT—PUBLIC PERFORMANCE FOR PROFIT —RADIO RECEPTION AS PERFORMANCE—The Supreme Court of the United States has held that reception of a licensed radio broadcast of copyrighted musical compositions in a commercial establishment where the compositions are heard by the public does not constitute copyright infringement because it is not a "performance" within the meaning of the copyright law.

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

George Aiken owned and operated a chain of "fast food" establishments which supplied food for take out orders and for consumption in the restaurant. Aiken provided background music for the customers and employees in the restaurant by means of a radio receiver and several loudspeakers placed in various areas of the restaurant ceiling. News, commercial advertising and other normal radio programming were received with the music. On March 11, 1972, radio broadcasts of two musical compositions were received and transmitted through the multiple loudspeakers in the restaurant to members of the public present as patrons of Aiken's establishment. Both compositions were subjects of copyright.[1] The copyright owners were members of the American Society of Composers, Authors and Publishers (ASCAP),[2] an association which licenses the performing rights in the copyrighted compositions of its members.[3] The broadcast received by Aiken originated from a local

1. The United States Constitution gives Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. CONST. art. I, § 8, cl. 8. Congress exercised this power in enacting the Copyright Act, ch. 320, § 1, 35 Stat. 1075 (1909), *as amended* 17 U.S.C. § 1 (1970), providing that the copyright owner shall have the exclusive right to publish, copy and vend the copyrighted work; to translate or make other versions thereof; to present the copyrighted work in public for profit, or make a record thereof by which it may be presented or reproduced; to perform the copyrighted work publicly, if a drama; and "[t]o perform the copyrighted work publicly for profit if it be a musical composition. . . ." *Id.* § 1(e).

2. For a discussion of ASCAP see K-91, Inc. v. Gershwin Publishing Corp., 372 F.2d 1 (9th Cir. 1967) and Columbia Broadcasting Sys., Inc. v. ASCAP, 187 U.S.P.Q. 431 (S.D.N.Y. 1975).

3. A license grants a licensee the copyright owner's permission to perform a copyrighted composition. The licensee's performance, therefore, does not infringe the copyright owner's exclusive right to perform the composition publicly for profit under 17 U.S.C. § 1(e) (1970).

station which was licensed by ASCAP to broadcast these and other musical compositions.[4] Aiken was not licensed by ASCAP and therefore was not authorized to perform the copyrighted works.

The copyright owners brought suit against Aiken in federal district court to recover for copyright infringement.[5] The issue was whether the reception in Aiken's restaurant of a licensed radio broadcast of plaintiffs' copyrighted works infringed plaintiffs' exclusive rights under the Copyright Act of 1909.[6] The district court held that Aiken had infringed plaintiffs' copyrights by unlawfully performing the copyrighted works publicly for profit.[7] The Court of Appeals for the Third Circuit reversed, holding that Aiken's conduct did not constitute copyright infringement because it was not a "performance" within the meaning of the Copyright Act.[8] The United States Supreme Court granted certiorari[9] to consider the question "whether the reception of a radio broadcast of a copyrighted musical composition can constitute copyright infringement, when the copyright owner licensed the broadcaster to perform the composition publicly for profit."[10] The Court held that there was no "performance" within the meaning of the Copyright Act, and hence no infringement, by one who merely received a radio broadcast.[11]

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4. The license agreement gave the licensee no authority to grant any further rights to reproduce or perform the copyrighted works and expressly negated any implication that a broadcast receiver would be authorized to reproduce or perform the copyrighted works publicly for profit. The exact language of the relevant portion of the contract between ACSAP and the radio station is set out in Twentieth Century Music Corp. v. Aiken, 356 F. Supp. 271, 273 n.1 (W.D. Pa. 1973).

5. Twentieth Century Music Corp. v. Aiken, 356 F. Supp. 271 (W.D. Pa. 1973).

6. *Id.* at 272. *See* note 1 *supra*.

7. *Id.* at 274-75.

8. Twentieth Century Music Corp. v. Aiken, 500 F.2d 127 (3d Cir. 1974). The parties did not dispute that the radio reception occurred publicly, nor did Aiken seriously contend that the purpose was not for profit. *Id.* at 130 n.7. The sole issue was whether the reception of the licensed broadcast constituted "performance."

9. Twentieth Century Music Corp. v. Aiken, 419 U.S. 1067 (1974).

10. Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 152 (1975). The fact that the radio reception occurred publicly and for profit was not disputed. *See* note 8 *supra*. The Court discussed the question, however, citing Herbert v. Shanley Co., 242 U.S. 591 (1917), which held that a hotel owner or restauranteur who employed an orchestra which played copyrighted musical compositions for the entertainment of patrons infringed the exclusive right of the copyright owner to perform the work publicly for profit. Although there was no charge for the musical entertainment, it was part of the total for which the public paid. The Court concluded that "the purpose of employing it is profit, and that is enough." *Id.* at 595. The issue in *Aiken* was thus narrowed to the precise question whether radio reception under the facts in the case constituted a "performance" of the copyrighted work within the meaning of the Copyright Act. 422 U.S. at 157.

11. 422 U.S. at 161-62.

The Court in *Aiken* drew an analogy between a live performance, as contemplated by the authors of the Copyright Act,[12] and a radio broadcast performance, as determined by the case law.[13] The Court observed that if a radio station which broadcast the copyrighted works performed by analogy to a singer or an orchestra, then one who received the broadcast, by analogy to a member of a live audience, did not perform.[14] In *Buck v. Jewell-LaSalle Realty Co.*[15] a hotel proprietor was held to have performed by receiving radio broadcasts of copyrighted works. However, the broadcaster in *Jewell-LaSalle* was not licensed[16] by the copyright owners to perform their compositions, and the Court treated *Jewell-LaSalle* as limited to its facts.[17]

The Court based its decision that there was no performance in *Aiken* on the concept of performance as defined in two recent cases, *Fortnightly Corp. v. United Artists*[18] and *Teleprompter Corp. v. CBS*,[19] which the Court interpreted as expressly excluding from the scope of performance under the Copyright Act the reception of an electronic broadcast when the broadcaster is licensed to perform the copyrighted compositions.[20]

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12. The Court observed that the purpose behind the Copyright Act when it was enacted in 1909 was to prohibit unauthorized live performances for profit, such as performances by orchestras and singers in public places like theaters and restaurants. In light of the development of modern methods of mass communication, however, the judiciary has interpreted the Copyright Act broadly in appropriate circumstances to prevent exploitation of copyrighted works by new and different technological means such as radio. *Id.* at 157-58.

13. For example, in Jerome H. Remick & Co. v. American Auto. Accessories Co., 5 F.2d 411 (6th Cir. 1925) the court reasoned that a radio broadcast is no less a public performance because the listeners are not congregated in a public place; nor is it any more a private performance because the listeners are entertained in the privacy of their homes. *Id.* at 412. *See* Associated Music Publishers, Inc. v. Debs Memorial Radio Fund, 141 F.2d 852 (2d Cir. 1944); M. Witmark & Sons v. L. Bamberger & Co., 291 F. 776 (D.N.J. 1923).

14. 422 U.S. at 158-60, *citing* Buck v. Debaum, 40 F.2d 734, 735 (S.D. Cal. 1929) (one who merely actuates electrical instrumentalities whereby inaudible elements in the air are made audible does not "perform"); Jerome H. Remick & Co. v. General Elec. Co., 16 F.2d 829 (S.D.N.Y. 1926) (those who listen do not perform, and therefore do not infringe).

15. 283 U.S. 191 (1931).

16. *See* note 3 *supra*.

17. 422 U.S. at 160. Presumably the Court considered dispositive the fact that the broadcast intercepted by the hotel receiver in *Jewell-LaSalle* was not authorized by the copyright owner. In the *Jewell-LaSalle* opinion, Justice Brandeis noted that a license for commercial reception and distribution might possibly have been implied if the original broadcast had been licensed. 283 U.S. at 199 n.5.

18. 392 U.S. 390 (1968).

19. 415 U.S. 394 (1974).

20. 422 U.S. at 160-61. Both cases involved television as the medium and literary or

The issue in *Fortnightly* was whether the owner and operator of a community antenna television system (CATV)[21] infringed the performing rights of the copyright owner by intercepting and transmitting broadcast signals of copyrighted motion pictures which the broadcaster was licensed to perform.[22] The Court held that there was no infringement because the owner of the CATV system did not perform the copyrighted works within the meaning of the Copyright Act.[23] The Court compared the functions of broadcasters and viewers and drew a line[24] between broadcasters who performed the active functions of selecting, procuring, and editing programs and propagating them to the public, and viewers who were passive beneficiaries of the performance. The *Fortnightly* Court concluded that under this functional analysis CATV fell on the viewer's side of the line and therefore did not perform within the meaning of the Copyright Act.[25] In *Teleprompter*, the CATV system not only transmitted broadcast signals beyond the range of the original broadcaster, but also independently originated some programs, sold advertising time and interconnected with other CATV systems. The Court held that neither the distance over which intercepted signals were transmitted nor the development of new functions, historically considered to be broadcasters' functions, changed the non-performer status of a CATV system with respect to retransmission of intercepted broadcast signals.[26] In view of these decisions, the *Aiken* Court applied the functional test and held that if the elaborate and sophisticated tech-

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dramatic works as the copyrighted subject matter; however, the Court in *Aiken* concluded that the concept of performance defined therein applied equally to radio and musical compositions. *Id.* at 161-62.

21. The CATV system operated by intercepting television broadcast signals from the air and transmitting them by coaxial cables to television sets in the homes of its subscribers. For a more detailed discussion of CATV see United States v. Southwestern Cable Co., 392 U.S. 157 (1968) (upholding authority of FCC to regulate CATV); M. SEIDEN, AN ECONOMIC ANALYSIS OF COMMUNITY ANTENNA TELEVISION SYSTEMS AND THE TELEVISION BROADCASTING INDUSTRY (1965). Regulation of CATV is discussed in Note, *Regulation of Community Antenna Television*, 70 COLUM. L. REV. 837 (1970); Note, *The Wire Mire: The FCC and CATV*, 79 HARV. L. REV. 366 (1965).

22. 392 U.S. at 395-96. Regarding CATV and copyright liability see Comment, *CATV and Copyright Liability*, 80 HARV. L. REV. 1514 (1967); Comment, *CATV and Copyright Liability: On A Clear Day You Can See Forever*, 52 VA. L. REV. 1505 (1966); Comment, *Cable TV and Copyright Royalties*, 83 YALE L.J. 554 (1974).

23. 392 U.S. at 401-02. The Court in *Fortnightly* found that for purposes of copyright liability broadcasters perform and viewers do not. *Id.* at 398.

24. *Id.* at 398-99.

25. *Id.* at 402.

26. 415 U.S. at 405.

nological functions of *Fortnightly* and *Teleprompter* did not constitute performance, then "logic dictates that no 'performance' resulted when [Aiken] merely activated his restaurant radio."[27] The Court observed that a contrary result would have offended the principle of stare decisis by overruling *Fortnightly* and *Teleprompter*[28] and would have created "wholly unenforceable and highly inequitable"[29] copyright law.[30]

The decision in *Aiken* completed the reversal of a judicial trend to expand protection of the copyright owner's performance rights which had developed from the enactment of the Copyright Act in 1909 to the *Fortnightly* decision in 1968. During that period, courts consistently expressed the view that the Copyright Act, enacted when radio was new and television not yet in existence, should be revised by the legislature to deal expressly with modern communi-

27. 422 U.S. at 161-62, *citing* Twentieth Century Music Corp. v. Aiken, 500 F.2d 127, 137 (3d Cir. 1974).

28. 422 U.S. at 162.

29. *Id.* at 162-63. The Court felt that any effort by copyright holders to obtain and enforce licensing agreements with a substantial percentage of the countless business establishments which operate radio or television sets on their premises would be futile. Holding that reception of a radio broadcast constituted performance was considered inequitable because the receiver could never be fully protected from copyright infringement; even if he secured a license from ASCAP, he might receive a broadcast of a composition copyrighted by a nonmember of ASCAP. Further, including broadcast reception within the scope of performance would have authorized the sale of multiple licenses for what the Court considered a single public performance of the copyrighted work.

30. Justice Blackmun accepted the authority of *Fortnightly* and *Teleprompter* and concurred in the result, but expressed threefold discomfort with the majority's decision. Factual discomfort arose from the majority's characterization of Aiken as an innocent listener in view of the several loudspeakers which he had installed to make the broadcasts available for the entertainment of his customers. Precedential discomfort resulted from the extension of the CATV cases to a radio case; this disrupted business practices established while *Jewell-LaSalle* was a benchmark in copyright law and the foundation for much of the licensing structure by which ASCAP grants, and commercial establishments pay for, licenses to use a radio with multiple loudspeakers. Finally, tactical discomfort stemmed from the majority's reluctance to expressly overrule *Jewell-LaSalle*, which was viable and strong opposing precedent to the holding of the majority. *Id.* at 164-67 (Blackmun, J., concurring). In a dissenting opinion joined by Justice Douglas, Chief Justice Burger emphasized the need for legislative action to update the Copyright Act. Until such action was taken, however, he felt the Court should strive to preserve traditional copyright concepts and business relationships such as those founded upon the *Jewell-LaSalle* decision. The result reached by the majority was not compelled by the language of the Copyright Act, which did not define performance; nor was it dicated by the *Fortnightly* and *Teleprompter* decisions, which could properly have been limited to CATV. Moreover, the decision of the majority was contrary to controlling case law, *i.e.*, the unanimous and unequivocal holding of the Court in *Jewell-LaSalle* that when one receives a radio braodcast for his own commercial purposes, he necessarily assumes the risk that he may infringe the performing rights of another. *Id.* at 167-70 (Burger, C.J., dissenting).

cation and reproduction technology.[31] However, the courts did not forbear legislative inaction at the expense of copyright protection;[32] rather, they considered each new technological achievement in light of the purpose of the Copyright Act[33] to determine if it represented a new means for performing the copyrighted work. Courts expanded the concept of performance under the Copyright Act to include the playing of a phonograph record,[34] the playing of a piano roll,[35] and radio broadcasting.[36] The last significant expansion of the concept of performance was the Supreme Court's decision in *Jewell-LaSalle*, where a hotel proprietor's reception of a radio broadcast was held to constitute a performance of a copyrighted work. This expansion was halted by the holding of the Supreme Court that there was no performance in the CATV cases. Whatever policy considerations might have existed to warrant a CATV exception[37] to the rule of performance established by *Jewell-LaSalle*, the hope that *Fortnightly* and *Teleprompter* would be limited to CATV was extinguished by the Court's decision in *Aiken*, which limits copyright protection to the performance by a broadcaster and does not appear to recognize any subsequent acts as performance.

The facts in *Aiken* are nearly identical to the facts in *Jewell-LaSalle*.[38] The *Jewell-LaSalle* decision that radio reception constituted a performance[39] would dictate a finding that the radio recep-

31. The Supreme Court itself expressed the need for copyright revision legislation in *Teleprompter*, 415 U.S. at 414; *Fortnightly*, 392 U.S. at 396 n.17, 401; *Jewell-LaSalle*, 283 U.S. at 199 n.6.

32. *E.g.*, Jerome H. Remick & Co. v. American Auto. Accessories Co., 5 F.2d 411 (6th Cir. 1925) (until the copyright law is revised by Congress to define the rights of composers, producers, performers and the public, the court can decide how, fairly construed, the current law applies to new technological situations).

33. H.R. REP. No. 2222, 60th Cong., 2d Sess. 7 (1909). Congress intended to frame the Copyright Act so that it would secure to the composer an adequate return for the value of his composition and at the same time prevent the formation of oppressive monopolies. However, the main object in expanding copyright protection for music was to give the composer an adequate return for all use of his composition. *Id.*

34. Irving Berlin, Inc. v. Daigle, 31 F.2d 832 (5th Cir. 1929); Buck v. Heretis, 24 F.2d 876 (E.D.S.C. 1928).

35. Buck v. Lester, 24 F.2d 877 (E.D.S.C. 1928).

36. Jerome H. Remick & Co. v. American Auto. Accessories Co., 5 F.2d 411 (6th Cir. 1925).

37. 422 U.S. at 166 (Blackmun, J., concurring) (arguably desirable effect of protecting infant CATV industry from premature death).

38. As in *Jewell-LaSalle*, Aiken received radio broadcasts and converted them into audible sounds for the entertainment of members of the public in his commercial establishment.

39. 283 U.S. at 198.

tion by Aiken constituted a performance which, being unlicensed, violated the copyright owners' exclusive right to perform the work publicly for profit. The only significant distinction between the two cases is that the broadcaster in *Jewell-LaSalle* was not licensed to perform the copyrighted works. However, this difference does not justify a finding that Aiken did not perform.[40] Since *Jewell-LaSalle* has not been overruled, the Court in *Aiken* should have acknowledged that *Jewell-LaSalle* expanded the scope of performance to include the reception of radio broadcasts, at least for commercial purposes,[41] and found, therefore, that Aiken's reception of the broadcast was a performance. Instead, the *Aiken* Court emphasized that the ultimate result in *Jewell-LaSalle* might have been different had the broadcaster been licensed.[42] This conclusion ignored the reasoning of *Jewell-LaSalle*, where the Court unanimously held that the hotel proprietor's acts constituted "performance."[43] Comments on the licensing status of the broadcaster bore on the question of infringement, not performance.[44] Since the broadcaster in *Jewell-LaSalle* was not authorized to perform, however, the decision that the hotel proprietor's acts constituted performance was tantamount to finding infringement. The Court's observations on licensing[45] left open the question whether the copyright owner, by authorizing a

40. Dictum in *Jewell-LaSalle* indicated that if the broadcaster had been licensed by the copyright owners to perform their compositions a license might have been implied for the reception of the broadcast, and the hotel receiver might therefore have been excepted from copyright liability. *Id.* at 199 n.5. However, it is clear if the Court in *Jewell-LaSalle* had reached a different result in a case where the broadcaster was licensed, it would have done so on the theory that an implied license authorized the performance by the receiver rather than because there was no performance. Although the broadcaster in *Aiken* was licensed, the licensing agreement expressly negated the implication of a license to any broadcast receiver. *See* Society of European Stage Authors & Composers, Inc. v. New York Hotel Statler Co., 19 F. Supp. 1 (S.D.N.Y. 1937) (copyright infringement depends on receiver's acts, not broadcaster's rights).

41. While the Court in *Jewell-LaSalle* did not expressly hold that radio reception in a private home constituted performance, it noted that the owner of a private radio who received broadcasts in his home would not be liable for infringement because his reception was neither public nor for profit. 283 U.S. at 196. This dictum indicates that reception in general constitutes performance, while reception for commercial purposes amounts to infringement.

42. 422 U.S. at 160 n.10.

43. 283 U.S. at 198.

44. A performance authorized by the copyright owner does not infringe his exclusive right to perform the copyrighted work publicly for profit.

45. The *Jewell-LaSalle* Court's comments on licensing strengthened its holding regarding performance, because the issue of implied license is relevant only after performance has been established.

broadcaster to perform, impliedly licensed a performance by anyone who received the broadcast. The remarks in *Jewell-LaSalle*[46] regarding the possibility of noninfringement by reception of a licensed broadcast do not diminish its weight as opposing precedent to the decision in *Aiken*, for although the broadcast received by *Aiken* was licensed, the license agreement expressly negated any implication of a license for a broadcast receiver.

The Court's application of the functional analysis of *Fortnightly* in *Aiken* has two weaknesses. The first is that there is no justification for applying to radio a test developed for CATV.[47] The factual differences between CATV and radio argue against equating the two operations for the purpose of determining performance. Were the *Jewell-LaSalle* concept of performance applied in each case, it would be reasonable to find no performance in a CATV case and still find performance in *Aiken*. In the opinion of the *Jewell-LaSalle* Court, the translation of a radio broadcast reception into audible sound was a reproduction, not a mere audition, of the original program[48] and amounted to a separate performance.[49] Applying this reasoning to the CATV cases, the Court could have found there was no performance on the grounds that the CATV system did not render the copyrighted works visible or audible. If exemption of CATV from copyright liability was the desired result, this application of *Jewell-LaSalle* would have obtained that result while satisfying the principle of stare decisis.

The second weakness is inherent in the *Fortnightly* functional analysis. The major premise that viewers do not perform[50] is plainly contrary to the rule of performance established by *Jewell-LaSalle*.[51] Even accepting the Court's limitation of *Jewell-LaSalle*, the *Fortnightly* functional test is clearly inadequate to determine the issue of performance in *Aiken*. The *Fortnightly* test dealt with the categories of broadcasters and viewers; the Court disposed of the

46. 283 U.S. at 198, 199 n.5.

47. Exemption from copyright liability for the intercepting and relaying of television broadcasts by CATV systems does not require exemption of similar acts by radio receivers. *See* M. NIMMER, COPYRIGHT § 107.44 (1976). *Cf.* Flood v. Kuhn, 407 U.S. 258 (1972) (upholding exemption of professional baseball from antitrust laws although no other professional sport is exempt).

48. 283 U.S. at 199-200.

49. *Id.* at 201.

50. 392 U.S. at 398.

51. 283 U.S. at 198.

CATV issue of performance by determining that CATV, which was neither a broadcaster nor a viewer, was like a viewer in the functional sense.[52] The *Fortnightly* test does not provide any criteria for determining whether there is a performance by one who, like Aiken, was obviously a "viewer" in the ordinary sense that he heard the broadcast, but who was also responsible for making an audible reproduction of the broadcast available to the public for his own profit. The *Fortnightly* functional analysis would evaluate the acts of an alleged infringer to determine whether, viewed in their entirety, these acts resemble more the functions of broadcasters or the functions of viewers. If the latter, there would be no performance because "viewers do not perform."[53] Such an analysis begs the essential question: whether any specific act or sequence of acts constitutes a performance. Assuming arguendo that *Aiken*, like CATV, "falls on the viewer's side of the line"[54] dividing broadcasters from viewers does not answer the question whether Aiken's act of receiving a radio broadcast and making it audible to members of the public in his commercial establishment constituted a performance.

Acceptance of the Court's finding in *Fortnightly* does not require the abandonment of *Jewell-LaSalle*. Aside from the technological differences between CATV and radio, the facts of the two cases are distinguishable.[55] The Court in *Fortnightly* did not express or imply an intent to overrule *Jewell-LaSalle*. Indeed, the two decisions may be harmonized by observing that *Jewell-LaSalle* did not impose copyright liability upon the hotel guests, the "viewers" in that case, but only upon the hotel which rendered an unauthorized performance of the copyrighted works. Since *Fortnightly* holds that CATV does not perform the broadcasts it transmits, without defining performance or proposing an adequate test for determining whether or not specific acts constitute a performance, *Fortnightly* should be limited to its facts.[56] Certainly it should not be applied to a case

52. 392 U.S. at 398-401.

53. *Id.* at 398.

54. *Id.* at 399.

55. In *Fortnightly*, the CATV system was a commercial operation which enhanced the reception ability of its subscribers, who were the ultimate and intended broadcast receivers. In *Jewell-LaSalle*, the hotel was the broadcast receiver, which appropriated the broadcast to its own commercial purposes.

56. By employing the *Fortnightly* test in *Aiken*, the Court extended the concept of performance established by *Fortnightly* for a particular factual situation, 392 U.S. at 399 n.25, and expanded by *Teleprompter* to cover the entire field of CATV operations, 415 U.S. at 412-13, into the area of radio operations already occupied by *Jewell-LaSalle*.

such as *Aiken* which is obviously within the bounds of *Jewell-LaSalle*.

The Court in *Aiken* feared that a scope of performance which included the acts of those who merely operated a broadcast receiving set in their commercial establishments would result in unenforceable copyright law. The Court felt any effort to license the countless business establishments which operate television and radio sets on their premises would be futile. However, difficulty in enforcing a right is hardly justification for abrogating it.[57] Moreover, the efforts of ASCAP to license such establishments have not been futile.[58] The Court also feared that finding a radio listener performed the broadcasts he received would be inequitable because a listener could not assure himself of freedom from copyright liability. The Court was concerned that even if a listener obtained a license from ASCAP, he might receive a broadcast of a musical composition the copyright owner of which was not a member of ASCAP, and thereby inadvertently infringe. This same risk, however, is taken by a broadcaster who obtains a license from ASCAP and is held liable if he inadvertently infringes by broadcasting the copyrighted work of a nonmember. More importantly, an ordinary radio *listener* is free from copyright liability, even though his reception would constitute performance under *Jewell-LaSalle*, because the performance is neither public nor for profit.[59] Thus it is only the entrepreneur who appropriates the broadcast reception for his own commercial use who must assure freedom from copyright liability by acquiring a license to perform.[60] Finally, the Court reasoned that a finding of

57. One should not be required to enforce a right perfectly or else suffer the loss of the right. The difficulty of enforcing the performance right defined by *Jewell-LaSalle* was recognized by the court in Society of European Stage Authors & Composers, Inc. v. New York Hotel Statler Co., 19 F. Supp. 1, 6 (S.D.N.Y. 1937). But not until *Aiken* was the ease of enforcing the resulting performance right considered relevant to determining the scope of performance.

58. The court of appeals in *Aiken* noted that ASCAP had licensed some 5150 business establishments through the country. These licensees paid $246,000 annually in royalty payments. 500 F.2d at 129. Whether these figures represent a substantial percentage of the potential licensing market and whether the effort to license is evenhanded are not relevant to the issue of performance.

59. *See* 283 U.S. at 196.

60. The Court in *Aiken* acknowledged that an entrepreneur infringed by sponsoring a public performance for profit, but noted that members of the audience who heard the composition did not perform and therefore did not infringe. 422 U.S. at 157. However, the Court decided that Aiken was not such an entrepreneur, but rather was in the same position as a member of the audience. *Id.* at 159.

performance under the circumstances in *Aiken* would authorize the sale of multiple licenses for a single rendition of a copyrighted work. But multiple licensing is authorized under the multiple performance theory of *Jewell-LaSalle*.[61] Such multiple tribute is not "at odds"[62] with the balanced congressional purpose behind the copyright protection of the exclusive right to perform, since one aspect of that purpose is "securing to the composer an adequate return for *all use* made of his compositon."[63]

Neither statute nor precedent dictated the result in *Aiken*. Furthermore, the Court's decision to limit copyright protection by contracting the scope of performance conflicts with the legislative trend regarding revision of the copyright law.[64] The copyright revision legislation recently passed by Congress[65] substantially expands copyright protection of the exclusive right to perform copyrighted works.[66] The revised copyright law includes a broad definition of performance[67] and provides a licensing fee schedule for CATV,[68] extends copyright protection to sound recordings,[69] and eliminates the "jukebox exemption."[70] It is difficult to understand why the

61. 283 U.S. at 197-98. The *Jewell-LaSalle* "multiple performance" theory, simply stated, is that the language of the Copyright Act does not prohibit finding that a single rendition of a copyrighted work results in more than one public performance for profit. *See* Comment, *Copyrights and TV—A New Use For the Multiple Performance Theory*, 18 U. CHI. L. REV. 757 (1951).

62. 422 U.S. at 163.

63. H.R. REP. No. 2222, 60th Cong., 2d Sess. 7 (1909) (emphasis added).

64. Proposed copyright revision bills noted in *Teleprompter* and *Fortnightly* dealt specifically with CATV. 415 U.S. at 414 n.16; 392 U.S. at 396 n.17. By the time of the Court's decision in *Aiken*, an attempt had been made to distinguish the use of an ordinary radio from the transmission of broadcasts by means of loudspeakers to a substantial audience. 422 U.S. at 169 nn.2 & 3.

65. Act of Oct. 19, 1976, Pub. L. No. 94-553, 90 Stat. 2541.

66. *Id.* § 106(4) grants to the copyright owner the exclusive right to perform a copyrighted musical work publicly.

67. *Id.* § 101. Although not dealt with expressly in the copyright revision legislation, radio reception appears to fall within the definition of "perform." By controlling the radio set, the broadcast receiver may "render" or "play" the composition to an audience. Alternatively, the broadcast receiver may "transmit or otherwise communicate a performance" of a copyrighted work "by means of a device or process" to "a place open to the public." Such acts constitute a public performance according to the copyright revision legislation. *Id.* Although certain performances are exempt from the copyright owner's exclusive rights, Aiken's multiple loudspeaker system would disqualify him from the most nearly appropriate exemption for communication by public reception of a transmission on a "single receiving apparatus of a kind commonly used in private homes." *Id.* § 110(5).

68. *Id.* § 111.

69. *Id.* § 114.

70. *Id.* § 116. Predicting that the "jukebox" would be a commercially insignificant, short-

Court in *Aiken* relied on precedents which legislation would effectively overrule[71] to reach a decision contrary to the traditional policy of expansive copyright protection of the performance right.

Donna L. Seidel

CONSTITUTIONAL LAW—LOCAL GOVERNMENT ACTION—STANDING TO CHALLENGE RESTRICTIVE ZONING ORDINANCES—The Supreme Court of the United States has held that minority nonresidents lack standing to attack a town zoning ordinance where they cannot show that but for the ordinance they could have obtained affordable housing, or that if granted relief they would benefit.

Warth v. Seldin, 422 U.S. 490 (1975).

The zoning ordinance of the town of Penfield, a suburb of Rochester, New York, allocated ninety-eight percent of its vacant land to single-family detached dwellings and contained minimum lot size, set back, floor area and habitable space requirements which were allegedly unreasonable. Petitioners sought declaratory and injunctive relief and damages, maintaining that this ordinance, coupled with the refusals of Penfield's Zoning, Planning and Town Boards to grant variances, resulted in an almost total absence of affordable housing for low and moderate income minority persons.

The original plaintiffs were nonresident minority persons with low or moderate incomes, individual taxpayers of Rochester, and Metro-Act, a nonprofit association promoting improved low and moderate income housing in the Rochester area whose membership included Penfield residents. Rochester Home Builders (Home Builders), representing area construction firms, and the Housing Council in the Monroe County Area, Inc. (Housing Council) unsuccessfully at-

lived novelty, Congress amended the Copyright Act in 1947 so that the reproduction or rendition of a copyrighted musical composition on a coin-operated machine would not constitute a public performance for profit unless a fee were charged for admission to the place where the performance occurred. Under the revised copyright law, the proprietor of an establishment who operates such a phonorecord player is liable for infringement unless he obtains a license to perform the work publicly.

71. Passage of the copyright revision legislation, which expressly treats CATV as public performance, effectively overrules *Fortnightly* and *Teleprompter* and certainly undermines *Aiken*.