

NOT IN PUBLIC! THE NINTH CIRCUIT DEVICES A TWO-STEP TEST  
FOR PUBLIC PERFORMANCES UNDER THE COPYRIGHT ACT

*Columbia Pictures Industries v. Professional Real Estate Investors, Inc.*,  
866 F.2d 278 (9th Cir. 1989).

In *Columbia Pictures Industries v. Professional Real Estate Investors, Inc.*,<sup>1</sup> the United States Court of Appeals for the Ninth Circuit decided that hotel guest rooms are not “public” under the Copyright Act (the Act)<sup>2</sup> in determining whether a hotel infringes on the copyright holders’ right of public performance by renting videodiscs and authorizing their use on hotel equipment.<sup>3</sup>

Professional Real Estate Investors, Inc., through its hotel resort La Mancha Private Club & Villas (La Mancha), rented movie videodiscs to its hotel guests.<sup>4</sup> La Mancha equipped each room with a videodisc player and large screen projection television.<sup>5</sup> Columbia Pictures, Inc. and six other motion picture studios<sup>6</sup> (Columbia) brought suit under the Act to prevent La Mancha from renting videodiscs to its guests,<sup>7</sup> alleging infringement of their exclusive right to control the public performance of their copyrighted motion pictures.<sup>8</sup>

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1. 866 F.2d 278 (9th Cir. 1989).

2. Pub. L. No. 94-553, 90 Stat. 2541 (1976) (codified as amended at 17 U.S.C. §§ 101-914 (1988)).

3. 866 F.2d at 280-82.

4. *Id.* at 279.

5. *Id.* La Mancha rented videodiscs from its lobby gift shop for a daily fee of \$5.00 to \$7.50 per disc. La Mancha employees also were available to help explain to guests the operation of the in-room equipment. *Id.*

6. The other six motion picture companies were Paramount Pictures Corp., Twentieth Century-Fox Film Corp., Universal City Studios, Inc., Walt Disney Productions, Warner Bros., Inc., and Embassy Pictures. CBS, Inc. was another plaintiff to the action. *Id.* at 278.

7. The Copyright Act authorizes a court to “grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain infringement of a copyright.” 17 U.S.C. § 502(a) (1988). *See also id.* §§ 503-505 (other remedies for infringement); *id.* § 506 (criminal offenses).

8. 866 F.2d at 280. Columbia argued that La Mancha violated § 106(4) of the Copyright Act, which grants the copyright holder the exclusive right “to perform the copyrighted work *publicly*.” *Id.* *See* 17 U.S.C. § 106(4) (1988) (emphasis added). Two clauses of § 101 of the Act define the term “publicly within the phrase “[t]o perform or display a work publicly.” A performance takes place “publicly” under clause (1) (the “public place” clause) if it occurs “at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered,” and under clause (2) (the “transmit” clause) if someone “transmit[s] or otherwise communicate[s] a performance or display of the work to a place specified by clause (1) or to the public . . . .” 17 U.S.C. § 101 (1988). *See* 866 F.2d at 280.

Columbia argued that La Mancha publicly performed the videodisc movies under both clauses.

The district court granted La Mancha's motion for summary judgment, concluding as a matter of law that the movies on videodisc were not performed "publicly" within the meaning of the Act.<sup>9</sup> On appeal, the Ninth Circuit affirmed the decision and *held*: a hotel does not violate a copyright holder's exclusive right of public performance when it permits guests to rent videodiscs for viewing in their own rooms on hotel-provided equipment.<sup>10</sup>

Section 106(4) of the Copyright Act provides that a copyright owner has the exclusive right to perform publicly certain types<sup>11</sup> of copyrighted works or to authorize public performance of such works.<sup>12</sup> Elsewhere, the Act defines as public a performance that occurs "at a place open to

*Id.* at 280-81. While the scope of this Comment is limited to the Ninth Circuit's interpretation of the public place clause, the *Professional Real Estate* court also applied the transmit clause. *Id.* at 281-82. The court considered the words "transmit or otherwise communicate" crucial to the issue of whether La Mancha performed publicly under the latter clause. *Id.* at 281. The court held that La Mancha did not "communicate" the videodisc performances because the performances did not involve a "'process whereby images or sounds are received beyond the place from which they are sent.'" *Id.* at 282 (quoting 17 U.S.C. § 101, which defines "transmit"). The court refused to read the transmit clause broadly, stating that "[i]f any transmission and reception occurs, it does so entirely within the guest room; it is certainly not received beyond the place from which it is sent." *Id.*

9. *Id.* at 279. See *Columbia Pictures Indus. v. Professional Real Estate Investors, Inc.*, 228 U.S.P.Q. (BNA) 743 (C.D. Calif. 1986).

10. 866 F.2d at 282.

11. Besides motion pictures and audiovisual works, 17 U.S.C. § 106(4) applies to "literary, musical, dramatic, and choreographic works, [and] pantomimes . . . ."

12. 17 U.S.C. § 106(4) (1988). See *supra* note 8. See also 2 M. NIMMER, NIMMER ON COPYRIGHT § 8.14[A], at 8-135 (1989). Section 106(4) provides for one of the five fundamental rights the Act grants to copyright holders: reproduction, adaptation, distribution, performance, and display. See 17 U.S.C. § 106(1)-(5).

A corollary of the public performance issue is whether a work actually has been "performed." See 17 U.S.C. § 101 (1988); 2 M. NIMMER, *supra*, §§ 8.03, 8.12, 8.14[B]; N. BOORSTYN, COPYRIGHT LAW §§ 5.1-13, .16-18 (1981). The definition of "perform" under the Act is very broad:

To "perform" a work means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible.

17 U.S.C. § 101 (1988). Turning on a television set at home or singing in the shower may be "performances." See Shipley, *Copyright Law and Your Neighborhood Bar and Grill: Recent Developments in Performance Rights and the Section 110(5) Exemption*, ARIZ. L. REV. 475, 484, 489 (1987). These performances, however, are not actionable under copyright law because they are not "public" performances. *Id.* at 484. The statutory definition of "perform" makes it clear that playing a videodisc or video cassette constitutes a performance of the recorded movie. See H.R. REP. NO. 1476, 94th Cong., 2d Sess. 1, 64 [hereinafter HOUSE REPORT], reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS 5659, 5677. See also 2 M. NIMMER, *supra*, § 8.14[A], [B]; N. BOORSTYN, *supra*, § 4.5.

In *Professional Real Estate*, neither party disagreed that the movies had been "performed" within the meaning of the Act. 866 F.2d at 279-80. The narrow issue in *Professional Real Estate* was whether La Mancha had performed the copyrighted works "publicly." *Id.* at 280.

the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered."<sup>13</sup> Courts interpreting the Act's public performance right must decide, among other things, whether the setting for the performance meets this abstract definition.

The Third Circuit, in *Columbia Pictures Industries v. Redd Horne, Inc.*,<sup>14</sup> considered what constituted a "public" performance of a videodisc or video cassette. In *Redd Horne*, a video cassette shop rented video cassette tapes<sup>15</sup> to its patrons and also provided them private booths in which to view the tapes.<sup>16</sup> Copyright holders claimed that the showings of their copyrighted motion pictures were unauthorized public performances in violation of their exclusive rights.<sup>17</sup> Using the definition of "publicly,"<sup>18</sup> the court posed the question whether the performance occurred in "a place open to the public."<sup>19</sup>

13. 17 U.S.C. § 101 (1988) (the "public place" clause). Section 101 also defines "publicly" under its "transmit" clause. See *supra* note 8.

14. 749 F.2d 154 (3d Cir. 1984).

15. *Id.* at 158-59. Video cassette rental for home viewing has not been challenged in the courts. Indeed, the plaintiffs in *Redd Horne* conceded that rental for home viewing was not at issue. 749 F.2d at 156. Similar copyright questions often focus on exceptions to a copyright holder's exclusive rights, such as the exception of the "first-sale" doctrine. The first-sale doctrine dictates that once tangible copies of a copyrighted work are sold, the copyright holder no longer has exclusive distribution rights as to those particular copies. See generally 2 M. NIMMER, *supra* note 12, § 8.12 [B], at 8-132.

The first-sale doctrine has been codified in the Copyright Act at 17 U.S.C. § 109(a) (1988). Professor Nimmer maintains that the first-sale doctrine includes the right to rent the copyrighted work without the copyright holder's consent. 2 M. NIMMER, *supra* note 12, § 8.12, at 8-131. *But see* Colby, *The First Sale Doctrine, The Defense That Never Was?*, 32 J. COPYRIGHT SOC'Y 77, 81, 83 (1984) (arguing that the language of § 109(a) undermines the inclusion of rentals within the first-sale doctrine). One should therefore distinguish this right to distribution from the right of public performance at issue in *Redd Horne* and *Professional Real Estate*.

16. 749 F.2d at 156-57. The video store played the movies for each booth from a central location. *Id.* at 155-56. The court noted that any member of the public could view a video cassette by paying a fee. *Id.* at 159.

17. *Id.* at 157. The plaintiffs in *Redd Horne* were the same seven filmmakers that sued in *Professional Real Estate*. See 866 F.2d at 278; *supra* note 6.

18. See *supra* note 8.

19. 749 F.2d at 159. The *Redd Horne* court concluded that Congress intended the public place clause's first phrase, "a place open to the public," to operate independently of the second phrase, "a substantial number of persons." *Id.* at 158. See *supra* note 8. According to the court, while the first simply refers to "a place open to the public," the second describes what the court referred to as a semi-public place, depending on the size and composition of the audience. 749 F.2d at 158.

The *Redd Horne* court noted that Congress added the second phrase "to expand the concept of public performance by including those places that, although not open to the public at large, are accessible to a significant number of people." *Id.* (citing House Report). Congress intended to clar-

In answering that question, the *Redd Horne* court found the entire store, and not the individual booth, to be the relevant unit of analysis.<sup>20</sup> Notwithstanding that the booths, once rented, were private,<sup>21</sup> the court considered the video store essentially a movie theater with the added feature of privacy.<sup>22</sup> Concluding that the video store was a public place, the court held that the video store publicly performed copyrighted videotapes in violation of the Copyright Act.<sup>23</sup>

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ify that, contrary to prior law, performances of copyrighted works at "semi-public" places infringed on the rights of the copyright holder. HOUSE REPORT, *supra* note 12, at 64, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS at 5677-78. Such semi-public places included "clubs, lodges, factories, summer camps and schools." *Id.* Congress considered routine meetings of government or business personnel not to be "public" for copyright purposes. *Id.* at 64, reprinted in U.S. CODE CONG. & ADMIN. NEWS at 5678. For a thorough discussion of public performances in otherwise private places, see Shipley, *supra* note 12, at 495-99.

20. 749 F.2d at 159. The *Redd Horne* court stated that "[s]imply because the cassettes can be viewed in private does not mitigate the essential fact that [the store] is unquestionably open to the public." *Id.* The court, thus, found it unnecessary to determine whether the video store was a "place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered." *Id.* (refusing to apply the second part of the "public place" clause of § 101). See *supra* notes 8, 19.

21. 749 F.2d at 159.

22. *Id.* at 159.

23. *Id.* The Third Circuit found that the transmit clause of § 101 further supported its conclusion that the video store had performed the video cassettes "publicly." *Id.* See *supra* note 8. Citing the legislative history, the court stated that "a performance made available to the public at large is 'public' even though the recipients are not gathered in a single place . . . . The same principles apply whenever the potential recipients or the transmission represent a limited segment of the public, such as the occupants of hotel rooms . . . ." *Id.* (citing HOUSE REPORT, *supra* note 12, at 64-65, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS at 5678). Thus, the court noted that the transmission of a performance to the public, even in private settings such as homes or hotel rooms, constitutes a public performance. *Id.* The *Redd Horne* court also recognized that "'if the same copy . . . of a given work is repeatedly played (i.e. 'performed') by different members of the public, albeit at different times, this constitutes a 'public' performance.'" *Id.* (quoting 2 M. NIMMER, *supra* note 12, § 8.14[C][3], at 8-142) (emphasis in original).

Professor Nimmer apparently anticipated a *Redd Horne*-type situation. The court, quoting Professor Nimmer, stated:

[O]ne may anticipate the possibility of theaters in which patrons occupy separate screening rooms, for greater privacy, and in order not to have to await a given hour for commencement of a film. These too should obviously be regarded as public performances within the underlying rationale of the Copyright Act.

*Id.* The *Redd Horne* court explained that, although the video store owns a single copy of each video, it repeatedly rents the copy to many members of the public. The court concluded that such a practice constitutes a "public" performance. *Id.*

Under Professor Nimmer and the Third Circuit's reasoning, the repeated and aggregate rental of a video yields a public performance of the video, and private, individual viewing of the video does not detract from such a conclusion. Nimmer himself has explained that home viewing of rented video cassettes logically should constitute copyright infringement. 2 M. NIMMER, *supra* note 12, § 8.14[C] at 8-145 to -146. See also Comment, *Columbia Pictures Industries, Inc. v. Professional Real Estate*

In *Columbia Pictures Industries v. Aveco, Inc.*,<sup>24</sup> the Third Circuit extended *Redd Horne*'s definition of "publicly" to situations involving only the authorization of a performance.<sup>25</sup> Similar to the circumstances in *Redd Horne*,<sup>26</sup> the defendant Aveco rented video cassettes and also provided rooms for viewing them.<sup>27</sup> As in *Redd Horne*, the in-store rooms, once rented, were private—allegedly only family members and social acquaintances could join customers.<sup>28</sup>

In its attempt to distinguish *Redd Horne* factually, Aveco pointed to two factors.<sup>29</sup> First, the video cassette players in Aveco were under the customer's control in each room, rather than under employees' control in the public lobby.<sup>30</sup> Aveco also maintained that it charged for the rental of the video cassette viewing room and the rental of the video cassettes separately,<sup>31</sup> and, unlike in *Redd Horne*, its employees did not perform anything.<sup>32</sup>

In Aveco, however, the Third Circuit found *Redd Horne* indistinguishable.<sup>33</sup> The court stated that "[its] opinion in *Redd Horne* turned not on the precise whereabouts of the video cassette players, but on the nature of [the defendant's] stores."<sup>34</sup> According to the court, the fact that custom-

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*Investors, Inc.*, 228 U.S.P.Q. 743 (C.D. Calif. 1986), 2 COPYRIGHT L.J. 102, 103 (1986). However, video cassette rental does not infringe, according to Nimmer, because of the first-sale doctrine. See *supra* note 15. Home viewing of rental cassettes has not been challenged successfully in the courts; indeed, the plaintiffs in *Redd Horne* conceded that rental for home viewing was not at issue. 749 F.2d at 157.

24. 800 F.2d 59 (3d Cir. 1986).

25. *Id.* at 63.

26. See 749 F.2d at 156-57.

27. 800 F.2d at 61.

28. *Id.* .

29. *Id.* at 62-63.

30. *Id.* at 63. In *Redd Horne*, an employee "performed" the video cassette by playing it on a centrally located video cassette recorder, which carried the movie over cables to the booths. 749 F.2d at 155-56. In Aveco, however, the customer took physical custody of the video cassette and played it on a video cassette player in one of the rooms provided. 800 F.2d at 63.

31. *Id.* at 61.

32. *Id.* at 63. The Third Circuit explained that although Aveco employees did not play the tapes, they authorized customers to do so. *Id.* at 62. Section 106(4) prohibits such an authorization. 17 U.S.C. § 106(4) (1988). The court refused to limit its holding in *Redd Horne* to situations in which the performance occurs in a public lobby. 800 F.2d at 63. See *supra* note 12 (the Act's definition of "perform"). See also 2 M. NIMMER, *supra* note 12, § 8.14[C], n.48.1 (discussion of lower court opinion).

33. 800 F.2d at 63.

34. *Id.* (emphasis added). The court stated that the availability of a viewing room and video cassette to the public, and "not the coincidence that the video cassette players were situated in the lobby," made the video store in *Redd Horne* a public place. *Id.*

ers operated the video cassette players meant only that the video store infringed the copyright by authorizing public performances, rather than by actually performing the copyrighted material.<sup>35</sup> Because authorizing public performances is an equally exclusive right of copyright holders,<sup>36</sup> the *Aveco* court refused to distinguish *Redd Horne*.<sup>37</sup>

In *Red Baron-Franklin Park, Inc. v. Taito Corp.*,<sup>38</sup> the Fourth Circuit addressed the public performance question in a different context. Red Baron, a video arcade company, had obtained electronic video game boards on the "gray market" without the permission of Taito, the manufacturer and copyright holder.<sup>39</sup> Red Baron installed Taito's circuit boards in its video game machines and charged the general public twenty-five cents per game.<sup>40</sup>

The court in *Taito* addressed the issue whether a video arcade owner's

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35. *Id.* at 62. Furthermore, a customer's individual control over a booth does not necessarily make it private. The court noted that "[a] telephone booth, a taxi cab, and even a pay toilet are commonly regarded as 'open to the public,' even though they are usually occupied only by one party at a time." *Id.*

36. 17 U.S.C. § 106(4) (1988).

37. 800 F.2d at 63.

38. 883 F.2d 275 (4th Cir. 1989).

39. *Id.* at 277. Taito had manufactured the video boards in Japan, and had valid Japanese and U.S. copyrights on the boards. *Id.* It sold several boards outright, along with a license to "perform" them in Japan—that is, put them in video machines for use in arcades—to another Japanese company. *Id.* Red Baron somehow obtained these boards on the "gray market"—either from the second Japanese company or through a middleman—and imported them to the U.S., installing them in video machines and placing them in their arcades. *Id.*

Taito maintained that Red Baron's mere possession and use of the boards violated Taito's valid U.S. copyright. *Id.* at 276. The district court applied the first-sale doctrine and held that Red Baron was not infringing. *Id.* at 277-78. *See supra* note 15.

On appeal, Taito conceded that Red Baron could buy and import the boards, but maintained that Red Baron's public performance of the video game constituted an infringement of Taito's rights under § 106 of the Act. 883 F.2d at 277. The *Taito* court explained that § 109(a) of the Act, codifying the first-sale doctrine, refers only to the § 106(3) right of distribution. *Id.* at 280. *See* 17 U.S.C. §§ 106(3), 109(a) (1988); *supra* notes 12, 15. All other § 106 rights, including the right of public performance, still belong exclusively to the copyright holder. 883 F.2d at 280. *See supra* notes 8, 12.

40. 883 F.2d at 280. The court first established that a video game is a copyrightable audiovisual work. *Id.* at 278. Next, the court concluded that each activation of the game led to a "performance." *Id.* at 279 (quoting *Williams Elec., Inc. v. Arctic Int'l, Inc.*, 685 F.2d 870, 874 (3d Cir. 1982)). The court then analyzed whether Red Baron's performances of the video game were "public" under § 106(4) of the Copyright Act. *Id.*

A consensus is emerging that computer ROMs are copyrightable works (as opposed to non-copyrightable mechanical devices). *See Williams Elec., Inc. v. Arctic Int'l, Inc.* 685 F.2d 870 (3d Cir. 1982); A. MILLER, SOFTWARE PROTECTION: THE U.S. COPYRIGHT OFFICE SPEAKS ON THE COMPUTER/COPYRIGHT INTERFACE 367-70 (1984). Video games for use in arcades generally are encoded in ROM, and the video game industry has successfully relied on copyright law to combat unauthorized duplication, distribution, and importation. For a discussion of copyright law in the

use of copyrighted circuit boards constitutes a public performance.<sup>41</sup> Similar to the Third Circuit's decisions in *Redd Horne*<sup>42</sup> and *Aveco*,<sup>43</sup> the Fourth Circuit's opinion emphasized the public nature of the video arcade enterprise as a whole, despite the fact that only one person at a time could play the game.<sup>44</sup> The court in *Taito* concluded that because the arcade was open to the general public, the video games were publicly performed.<sup>45</sup>

In *Columbia Pictures Industries v. Professional Real Estate Investors, Inc.*,<sup>46</sup> the Ninth Circuit considered whether a hotel authorized public performances of copyrighted videodiscs when the hotel rented them to its guests to view on videodisc players installed in the hotel rooms.<sup>47</sup> The court applied section 101 of the Act<sup>48</sup> to determine whether the videodiscs were performed in a "public place."<sup>49</sup> The court held that in-room viewing of a videodisc was a private performance,<sup>50</sup> distinguishing it from the private booth viewings involved in the Third Circuit's *Redd Horne* and *Aveco* decisions.<sup>51</sup>

The Ninth Circuit, in *Professional Real Estate*, recognized that in both *Redd Horne* and *Aveco*, the relevant place of performance was the entire video store, which was open to the public, rather than the individual booths, which were not.<sup>52</sup> However, the *Professional Real Estate* court distinguished *Redd Horne* and *Aveco* on the basis that, in those cases, video cassette rental was central to the defendants' businesses. In *Professional Real Estate*, however, the "nature" of La Mancha's business was the provision of hotel accommodations and services, to which the rental

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video game context, see Baumgarten, *Copyright and Computer Software (Including Data Bases & Chip Technology)*, in A. MILLER, *supra*, at 171, 209.

41. 883 F.2d at 278.

42. See 749 F.2d 154 (3d Cir. 1984); *supra* notes 14-23 and accompanying text.

43. See 800 F.2d 59 (3d Cir. 1986); *supra* notes 24-37 and accompanying text.

44. 883 F.2d at 278-79.

45. *Id.* at 279. Indeed, Red Baron intended to attract as many members of the general public as possible. *Id.*

46. 866 F.2d 278 (9th Cir. 1989).

47. *Id.* at 279-80.

48. See 17 U.S.C. § 101 (1988); *supra* note 8.

49. 866 F.2d at 280-81 (construing the "public place" clause of § 101). Also essential to the court's ultimate holding was an application of the "transmit" clause. See *supra* note 8.

50. 866 F.2d at 281-82.

51. *Id.* at 281. See *supra* notes 14-37 and accompanying text (discussing Third Circuit's treatment of the term "public").

52. 866 F.2d at 280-81.

of videodiscs was only incidental.<sup>53</sup>

The court further reasoned that a hotel room is, in many ways, private: once rented, the room is no longer open to the general public;<sup>54</sup> fourth amendment protections from unreasonable search and seizure apply to rented rooms;<sup>55</sup> and, finally, "common experience" showed that hotel guests enjoy a substantial amount of privacy not unlike the privacy in the patrons' own homes.<sup>56</sup>

Although the Ninth Circuit arrived at an intuitively correct decision, it failed to explain its result in a way that withstands close scrutiny. The principal logical difficulty with the Ninth Circuit's analysis is that hotel rooms *are* open to the public. Admittedly, the individual hotel guest who "performs" a videodisc in a reserved hotel room is performing it privately, a situation analogous to home viewing.<sup>57</sup> From the perspective of the hotel enterprise, however, the hotel rooms are open to the public in much the same way that the viewing booths or video games were open to the public in *Redd Horne*, *Aveco*, and *Taito*.<sup>58</sup> Under this earlier analysis—implicitly adopted by the *Professional Real Estate* court<sup>59</sup>—the videodisc performances in the hotel guest rooms would be public even though each individual performance is viewed only by an individual and perhaps

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53. *Id.* at 281. The court asserted that the defendant's hotel operation "may incidentally include the rental of videodiscs to interested guests for viewing in guest rooms." *Id.* The court referred to the nature of the business in two ways. First, it referred to "the nature of [the] stores," meaning that the video store in *Redd Horne* was open to the general public. *Id.* Second, the court referred to the "nature" of *La Mancha's* business, meaning the hotel business rather than the video business. *Id.* The court's use of the term "nature" to describe the hotel's business distinguishes *Professional Real Estate* from the earlier cases and from *Taito*. See *supra* notes 14-45 and accompanying text.

54. 866 F.2d at 281.

55. *Id.* (citing *Stoner v. California*, 376 U.S. 483 (1964)). See Shipley, *supra* note 12, at 490 (fourth amendment decisions traditionally regard hotel rooms as private). *But cf.* Comment, *supra* note 23 (individual's fourth amendment rights irrelevant to the issue of public performance rights under copyright law). See also *infra* note 60.

56. 866 F.2d at 281. The court proffered an additional argument based on the legislative history behind the first clause in the statutory definition of "publicly." *Id.* at 281 (quoting HOUSE REPORT, *supra* note 12, at 64, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS at 5677-78). The court concluded from its survey of congressional comments that neither the number of persons attending the performance nor the exact location determines whether a performance is public for copyright purposes. *Id.* The court then stated simply that, because in-room videodisc performances would normally be regarded as private, the performances were not at a "place open to the public" for purposes of the Copyright Act. *Id.*

57. See *supra* note 23; notes 54-56 and accompanying text. See also M. NIMMER, *supra* note 12, § 8.14 [C][3]; Shipley, *supra* note 12, at 491; *infra* note 60.

58. See *supra* notes 14-45 and accompanying text.

59. See 866 F.2d at 281.



a few friends or family members.<sup>60</sup> The determination of whether a performance has occurred in a public facility cannot alone justify the different outcomes between the Third and Fourth Circuit decisions and that in *Professional Real Estate*.

To reach its intuited result, the Ninth Circuit implicitly must have added a second step to the analysis. Beyond whether the facility as a whole was public, the court looked at the relationship of the performance with the "nature" of the enterprise.<sup>61</sup> Because the performance of copyrighted works in *Professional Real Estate* was only incidental to the "nature" of the enterprise, the performance was not public within the meaning of the Copyright Act.<sup>62</sup>

The Ninth Circuit's result is analytically sound from an economic standpoint as well. By inquiring whether the copyright holder is losing proceeds from market expenditures for its product, one can easily distinguish *Professional Real Estate* from *Redd Horne* and *Aveco*. The consumer who considers leaving home to watch a movie chooses between video stores with booths—as in *Redd Horne* and *Aveco*—and a public theater, which pays a public performance royalty. Conversely, the consumer who decides to rent a movie on a supplied videodisc player chooses between the hotel's selection and that of a local video store, which pays no public performance royalty.<sup>63</sup> The copyright holder

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60. The court failed to distinguish between arguments demonstrating that a hotel room is private from a guest's point of view and arguments exonerating from infringement the hotel enterprise as a whole. The invocation of the hotel guest's fourth amendment rights, for example, shows only that the right to be free from unreasonable search and seizure is the same in the hotel room as in the individual's home. Likewise, the fact that a hotel guest's room, once rented, is not open to anyone else evidences only the private nature of the hotel room from the guest's perspective.

Furthermore, fourth amendment protection extends to any place reasonably regarded as private. *Florida v. Riley*, 109 S. Ct. 693, 699, *reh'g denied*, 109 S. Ct. 1659 (1989). See also *New York v. Burger*, 482 U.S. 691 (1987); *O'Connor v. Ortega*, 480 U.S. 709 (1987); *California v. Ciraolo*, 476 U.S. 207 (1986). Thus, the fourth amendment arguably protects a patron in a video booth similar to that in *Redd Horne* or *Aveco*. See *supra* notes 14-37 and accompanying text. The Ninth Circuit in *Professional Real Estate*, however, failed to distinguish the hotel rooms from the video booths in the earlier cases. See 866 F.2d at 280-81. See also Comment, *supra* note 23, at 103.

61. 866 F.2d at 281.

62. *Id.* at 281-82. The Ninth Circuit explained that "La Mancha's operation differs from those in *Aveco* and *Redd Horne* because its 'nature' is the providing of living accommodations and general hotel services, which may incidentally include the rental of videodiscs to interested guests for viewing in guest rooms." *Id.* at 281. This is an intuitively valid distinction.

63. See *supra* note 15. One cannot argue that the home video system differs from a hotel-installed system. Congress stated that "no special exception is needed to make clear that the mere placing of an ordinary radio or television set in a private hotel room does not constitute an infringement." HOUSE REPORT, *supra* note 12, at 91-92, *reprinted in* 1976 U.S. CODE CONG. & ADMIN.

therefore loses money if video stores with booths do not pay the public performance royalty that public theaters pay.<sup>64</sup>

Thus, the Ninth Circuit correctly held that La Mancha is not liable for copyright infringement. The court implicitly created a two-step test to determine the meaning of "publicly" under the 1976 Copyright Act.<sup>65</sup> First, a court must apply the statute's language to the entire enterprise rather than the individual performances.<sup>66</sup> Second, if the entire enterprise is open to the public, the court must inquire further whether the apparently private performances comprise the principal business of the enterprise.<sup>67</sup> If they do, then the performances infringe on the copyright,<sup>68</sup> if they do not, then there is no infringement.<sup>69</sup> This two-step test allows courts to distinguish consistently between infringing public performances and noninfringing private performances of copyrighted works.

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NEWS at 5706. Likewise, no express exception should be required to establish the right of a hotel to put a videodisc player in its rooms as well. Section 110(5) of the Copyright Act specifically does not consider as an infringement "the public reception or the transmission on a single receiving apparatus of a kind commonly used in private homes . . ." 17 U.S.C. § 110(5) (1988). Congress has explained that the purpose of § 110(5) "is to exempt from copyright liability anyone who merely turns on, in a public place, an ordinary radio or television receiving apparatus of a kind commonly sold to members of the public for private use." HOUSE REPORT, *supra* note 12, at 86, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS at 5700. See Shipley, *supra* note 12, at 487-88, 491 n.116.

64. Note that both the hotel and the local video store have paid the purchase price for their videodiscs. Thus, the copyright holder captures the same market expenditure from the consumer who rents a videodisc from the hotel and one who rents from the local video store. The copyright holder loses nothing if the hotel does not pay a public performance royalty.

65. See *supra* notes 61-62 and accompanying text.

66. 866 F.2d at 281.

67. *Id.*

68. See *supra* notes 14-45 and accompanying text.

69. *Professional Real Estate*, 866 F.2d at 282.