

NOTES

WHEN IN DOUBT, DO WITHOUT: LICENSING PUBLIC PERFORMANCES BY NONPROFIT CAMPING OR VOLUNTEER SERVICE ORGANIZATIONS UNDER FEDERAL COPYRIGHT LAW

I. INTRODUCTION

A group of fifteen girls sits around a campfire. These girls, ages eleven through thirteen, stare blankly into the smoldering fire. The only sounds that can be heard are the crackling of the twigs as the flame devours more fuel. To liven up the mood, the leader of the troop suggests that the girls take out their songbooks and turn to the song, "This Land Is Your Land." One girl quickly catches the leader's attention and cries, "it's all scribbled out, I can't read anything." The leader responds, "oh, I'm sorry girls, I forgot, we can't sing that song anymore." Another girl asks, "why not?" The leader then replies, "because we would be breaking the law if we sing this song." The same is true for such campfire favorites as "God Bless America" and "Puff The Magic Dragon."¹ The resulting questions are: how can nonprofit organizations like the Girl Scouts be prohibited from singing the songs that made such gatherings an important part of the participants' lives and does federal copyright law mandate payment for use by such organizations? While this scenario might be a slight exaggeration of the current situation facing campfire sing-alongs nationwide, if the current copyright law is enforced to its narrowest confines, it is likely that nonprofit service or camping organizations may be subject to copyright infringement suits. While public relations concerns prohibit certain groups from being subject to licensing fees, other similar groups are still presumably subject to such fees.

This Note will focus on the feasibility of licensing public performances by nonprofit camping or service organizations such as the Girl Scouts, Boy

1. According to the American Society of Composers, Authors, and Publishers' ("ASCAP") electronic search database, ACE, ASCAP owns the copyrights to "God Bless America," written by Irving Berlin and "Puff The Magic Dragon," written by Peter Yarrow. *ASCAP's Ace on the Web* (visited Mar. 10, 1997) <<http://www.ascap.com/ace/ACE.html>>. In order to allow access to information on copyrighted songs, ASCAP has designed a searchable database, called ACE on the Web, located at <http://www.ascap.com/ace/ACE.html>. Other popular and commonly performed compositions like "Happy Birthday," "Kumbaya" and "On Top of Old Smokey" are also listed in this database.

Scouts, Campfire Girls, camps sponsored by religious organizations, the YMCA/YWCA camps and 4-H Clubs.² The activities of these organizations

2. This Note was inspired by an article in the Wall Street Journal discussing a recent licensing conflict. Lisa Bannon, *The Birds May Sing, But Campers Can't Unless They Pay Up*, WALL ST. J., Aug. 21, 1996, at A1. The article reported that during the summer of 1996, ASCAP had informed camps nationwide that they must pay fees to use any of the four million copyrighted songs written or published by ASCAP's 68,000 members. As the article indicated, those who sing or play the copyrighted material without a licensing agreement may be violating the law by their actions. One of the groups affected by the licensing fee arrangement was the Girl Scouts of America. The article further noted that, earlier in the year, ASCAP had already entered into an agreement with the American Camping Association ("ACA") for payment of licensing fees. However, this agreement did not specifically articulate which camps were subject to or exempt from liability. After this article was published, copyright issues and music licensing matters became a nationwide concern, judging from the editorial pages and talk shows across America. See generally L. Gerald Carter, *Editorial: If Music Be The Food of Small Business—Pay Up*, ROANOKE TIMES & WORLD NEWS, Sept. 23, 1996, at A4, available in 1996 WL 6057342; Peter Huber, *Tangled Wires: The Intellectual Confusion and Hypocrisy of the Wired Crowd* (visited Oct. 18, 1996) <<http://www.slate.com/Features/TangledWires/TangledWires.asp>>; Al Martinez, *No More Singing the Blues*, L.A. TIMES, Aug. 30, 1996, at B5, available in 1996 WL 11639533; Ken Ringle, *ASCAP is Singing A Different Tune in Pitch to Collect Song Fees from Camps*, STAR-TRIB. NEWSPAPER OF THE TWIN CITIES, Sept. 7, 1996, at 5E, available in 1996 WL 6927582; *WSJ Readers Respond to Recent ASCAP/Girl Scouts Flap Over Song Royalties*, Sept. 24, 1996, available in WESTLAW, News Library, Intellectual Property, 1996 WL 536204.

Within weeks following the Wall Street Journal article, ASCAP attempted to retract its statements. ASCAP issued a clarification, claiming that, "ASCAP has never sought nor was it ever its intention, to license Girl Scouts singing around a campfire." *ASCAP In The News: ASCAP Clarifies Position on Music in Girl Scout Camps* (last modified Aug. 29, 1996) <<http://www.ascap.com:80/press/ascap-082696.html>>. Further, the statement addressed ASCAP's agreement with the ACA and stated that the ACA "represents many commercial and non-commercial camps with dining facilities and recreational centers which use music in socials, dances, etc." *Id.* Shortly thereafter, the Girl Scouts issued their own statement claiming that "the Girl Scouts have always abided by the copyright laws and, on those rare occasions when it is necessary, we pay applicable licensing fees. Camp sing-alongs and similar activities are strictly non-commercial and therefore not subject to licensing fees." *Id.*

ASCAP claimed that it sought to license camps that "bring in bands for square dances, have music by the pool . . . and are like sending your kid to a resort." *WSJ Readers Respond, supra*. In another article, an ASCAP representative was quoted as saying that the camps they are interested in are those "high buck resorts with recorded music throughout the spa, dining rooms and aerobics studios." *Change of Tune—ASCAP Should Start Over on Camps*, STAR-TRIB. NEWSPAPER OF THE TWIN CITIES, Aug. 29, 1996, at 24A, available in WESTLAW, 8/29/96 STTRMSP 24A. John Miller, the executive vice president of the ACA questioned the "resort-style camp" definition given by ASCAP representatives, stating that although a few of his camps are pricey, two-thirds are nonprofits run by churches, YMCA or YWCA, the Campfire Council, or the Scouts. *Id.*

One newspaper editorial called on ASCAP to devise:

a sensible policy that distinguishes between the posh hotel serenading its dinner guests, and the nonprofit Y-camp counselor teaching little kids to do the Macarena or leading a party in 'Happy Birthday To You.' And in the certainty that no such rule can be perfect, it also needs to learn that with certain violations, ASCAP's best response is to look the other way.

Id.

In conclusion, the ultimate issue to be addressed is not merely whether the Girl Scout organization will have to pay licensing fees, rather whether all other camping and/or service organizations are subject to licensing fees. The issue is unclear because Congress failed to specifically spell out who

may fall within specific exemptions under federal copyright law,³ however Congress has not specifically spoken about such actions.⁴ This Note will address the “gray areas” created by the current federal copyright law and provide an understanding of what organizations like the Girl Scouts would face if litigation arose in federal court over attempts by licensing organizations⁵ (such as ASCAP,⁶ BMI⁷ and SESAC⁸) to license the activities

would be exempt. The facts suggest that ASCAP and other licensing organizations are able to choose which organizations they, not Congress, believe should be exposed to liability for infringement. Unfortunately, Congress afforded only minimal guidance, suggesting only that “summer camps . . . are . . . subject to copyright control.” See *infra* note 59 and accompanying text. An amendment to the current copyright act would clarify the ambiguity and provide all nonprofit camping or volunteer organizations with the same protection from licensing organizations that apparently only the Girl Scouts presently enjoy.

3. The applicable exemptions are contained in § 110 of the current copyright statute. See 17 U.S.C. § 110 (1996).

4. See generally Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857 (1987). The 1976 Copyright Act (“1976 Act” or the “Act”) is filled with ambiguity, as the legislative history of the Act “contains little evidence of Congress’s specific intent on any substantive issue.” *Id.* at 863. Thus, congressional silence and lack of clear intent has led to the current conflict over how far performing rights organizations may go in their attempts to license the use of copyrighted materials.

5. Although performing rights organizations were not explicitly mentioned in the 1976 Act, § 116 of the Act implies the legitimacy of such an organization. See *infra* note 48 and accompanying text. Performing rights organizations are businesses designed to represent songwriters and publishers and their right to be compensated for having their music performed in public. *Who is SESAC?* (visited Mar. 10, 1997) <<http://www.sesac.com/whois.htm>>. These organizations secure performance rights licenses from various music users, including television and radio stations, auditoriums, restaurants, hotels, theme parks, malls, and funeral homes. *Id.*

The reason for the existence of performing rights organizations is that any individual or entity that uses copyrighted music is legally required to secure permission to use the music, whether by live performance or by mechanical means. *Id.* A music user can do this by securing licenses from one of the three performing rights organizations. *Id.*

Ultimately, these organizations pay royalties to songwriters and publishers based on how often their songs are played. According to one source, factors include music trade publication chart activity, broadcast logs, computer database information and monitoring. *Id.*

6. ASCAP’s World Wide Web page indicates that:

ASCAP [created in 1914] is the American Society of Composers, Authors and Publishers, a membership association of over 68,000 composers, songwriters, lyricists and music publishers ASCAP’s repertoire includes pop, rock, rap, hip hop, alternative, film and television music, gospel, Latin, country, folk, jazz, R&B, new age, theater, cabaret, symphonic and concert—the entire spectrum of music.

About ASCAP (visited Mar. 10, 1997) <<http://ascap.com:80/about/what-is-ascap.html>>.

7. Broadcast Music Incorporated (“BMI”) is a “not-for-profit organization representing more than 180,000 songwriters, composers, and music publishers with a repertoire of more than 3,000,000 works in all areas of music.” *Welcome to bmi.com!* (visited Mar. 10, 1997) <<http://rep.edge.net/>>. BMI’s Music Repertory database is located at <http://rep.edge.net/repertoire/>.

8. SESAC’s World Wide Web page indicates that:

SESAC, Inc., [formerly known as the Society of European Stage Authors and Composers, founded in 1930] is a performing rights organization . . . [whose] repertoire, once limited to European and gospel music, has diversified to include today’s most popular music, including dance hits, rock classics, the best of Latina music, the hottest jazz, the hippest country and the

of such groups.⁹

Section II traces the history of copyright law and provides the framework for the modern debate over licensability. Section III analyzes the meaning of "public performance" under the current copyright act, the 1976 Copyright Act. Section IV examines the statutory exemptions under section 110 of federal copyright law. Section V proposes amending the 1976 Copyright Act to allow an exemption for certain public performances by organizations like the Girl Scouts. Section VI concludes that a new exemption is the only solution to clarifying the licensing problems which will remain unresolved if not addressed.

II. SOURCE OF COPYRIGHT: THE LAWS AND HISTORY

The debate over copyright issues has been frequent and contentious throughout the history of United States. The dispute is largely the result of the attempt to balance competing claims within the public's interest: creative work should be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting the broad public availability of literature, music, and other art forms.¹⁰ Lord Mansfield recognized the significance of the competing claims, asserting that:

We must take care to guard against two extremes equally prejudicial; the one, that men of ability, who have employed their time for service of the community, may not be deprived of their just merits, and the reward of their ingenuity and labor; the other, that the world may not be deprived of improvements, nor the progress of the arts be retarded.¹¹

The reason for copyright laws is to motivate the creativity of authors and inventors by providing rewards and to allow the public access to creative works after the limited period of exclusive control has expired.¹²

coolest contemporary Christian music.

Who is SESAC? (visited Mar. 10, 1997) <<http://www.sesac.com/whois.htm>>. SESAC's searchable database, SRO or SESAC's Repertory On-line, is located at <http://www.sector3.com/sesac/data.html>.

9. As previously mentioned, the Girl Scouts appear to be exempt from licensing attempts by ASCAP, while other groups remain exposed to possible liability. *See supra* note 2 and accompanying text.

10. *See Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

11. *See id.* (citing *Sayre v. Moore*, *quoted in* a footnote to *Cary v. Longman*, 1 East *358, 362 n.(b), 102 Eng. Rep. 138, 140 n. (b)(1801)).

12. *See Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984). Exclusive control refers to the interests of authors and inventors in the control of their writings and discoveries. *Id.* The interest in exclusive control is explicitly protected by the Constitution in Article One, Section Eight.

Throughout United States history, Congress has recognized the importance of protecting and promoting science and the arts through the mechanism of copyright protection.¹³ While there were several copyright acts operating in the United States before the Constitutional Convention of 1789, the framers of the Constitution explicitly afforded Congress the authority to define the scope of copyright protection.¹⁴ The Constitution sought to fuse the various statutes together by providing Congress with the “power to promote the progress of science and useful arts,” by furnishing authors and inventors exclusive rights to their creative works.¹⁵ However, Congress’ privileges are neither unlimited nor primarily designed to provide a special private benefit.¹⁶ The limited grant of Congress is a means by which the important public purpose of allowing public exposure to an author’s creations may be achieved.¹⁷ Thus, as new works are created and as technology advances, Congress’ role of providing guidelines for copyright

13. See generally H.R. REP. NO. 60-2222, at 6-7 (1909).

14. See U.S. CONST. art. I, § 8, cl. 8. The Connecticut legislature passed the first American copyright statute in 1783, largely the result of Noah Webster’s desire to seek copyright protection for a spelling book that he authored. H.R. REP. NO. 60-2222, at 2. Apparently, Webster convinced twelve of the thirteen states, except Delaware, to adopt similar copyright statutes. *Id.* These state statutes provided the background for the framers, who sought to combine the various statutes into one law which would be effective in all of the states. *Id.*

15. U.S. CONST. art. I, § 8, cl. 8. “The Congress shall have power . . . to Promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” *Id.* Because the clause is a limitation, as well as a grant of congressional power, it states both the purpose of and the basic conditions for copyright. L. RAY PATTERSON & STANLEY W. LINDBERG, *THE NATURE OF COPYRIGHT: A LAW OF USER’S RIGHTS* 48-50 (1991).

In the 1909 House Report, Congress stated that, “[t]he Constitution does not establish copyrights, but provides that Congress shall have the power to grant such rights if it thinks best.” H.R. REP. NO. 60-2222, at 7.

16. *Sony*, 464 U.S. at 429. In addition, the 1909 House Report stated that:

Not primarily for the benefit of the author, but primarily for the benefit of the public, such rights are given. Not that any particular class of citizens, however worthy, may benefit, but because the policy is believed to be for the benefit of the great body of the people, in that it will stimulate writing an invention, to give authors and investors some bonus.

H.R. REP. NO. 60-2222, at 7.

17. See *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948). This case held that “copyright law . . . makes reward to the owner a secondary consideration.” But, the reward given “serves to induce release to the public of the products of [the author’s] creative genius.” *Id.* In the 1909 House Report, Congress explained its role when enacting a law:

Congress must consider . . . two questions: First, how much will the legislation stimulate the producer and so benefit the public; and, second, how much will the monopoly granted be detrimental to the public? The granting of such exclusive rights, under the proper terms and conditions, confers a benefit upon the public that outweighs the evils of the temporary monopoly.

H.R. REP. NO. 60-2222, at 7.

protection is as vital as ever.¹⁸

The first United States copyright statute was the Copyright Act of 1790,¹⁹ which limited copyright protection to newly created books, maps and charts. The Act specified that the owner's rights included the ability to print, reprint, publish and vend for a limited time.²⁰ An author's public performance rights, including the presentation of live and recorded performances, were first protected with respect to dramatic works by the Act of August 18, 1856.²¹ Public performance rights with respect to musical works were first recognized by the Act of January 6, 1897.²² However, neither act contained specific limitations of new rights, except that the substance related only to "public" performances.²³

The consideration of rights to public performance emerges from this framework of copyright protection. In the area of public performance rights, the basic principles are how best to compensate the copyright holder for the performance and who should provide that compensation.²⁴

A. *The Act of 1897*

The latter part of the nineteenth century was an extremely prolific period for copyright legislation.²⁵ Because no single act governed the entire copyright area, copyright law was derived from a combination of several acts. One of the most important copyright acts of this period was the Act of January 6, 1897 (the "1897 Act"), which recognized the exclusive right of public performance in musical compositions.²⁶ The 1897 Act was the first to

18. As *Sony* indicates:

From its beginning, the law of copyright has developed in response to significant changes in technology Repeatedly as new developments have occurred in this country, it has been the Congress that has fashioned the new rules that new technology made necessary. Thus, long before the enactment of the Copyright Act of 1909, . . . it was settled that the protection given to copyrights is wholly statutory.

Sony, 464 U.S. at 430-31.

19. See Act of May 31, 1790, ch. 15, 1 Stat. 124, *repealed by* Act of April 29, 1802, ch. 36, 2 Stat. 171 (1802).

20. See PATTERSON & LINDBERG, *supra* note 15, at 60.

21. See Borge Varmer, *Study No.16: Limitations on Performing Rights*, in 2 STUDIES ON COPYRIGHT 835, 837 (Copyright Society of the U.S.A. ed., 1963) (citing Act of Aug. 18, 1856, ch. 169, 11 Stat. 138 (1859)).

22. See Act of Jan. 6, 1897, ch. 4, 29 Stat. 481 (1897).

23. See Varmer, *supra* note 21, at 837.

24. See William H. Sudell, Jr. & Matthew B. Lehr, *Performance Rights: Licensing Copyrighted Musical Compositions*, 7 DEL. LAW. 34, Mar. 1989.

25. Throughout the nineteenth century, rather than passing a comprehensive copyright statute, Congress passed several limited copyright acts aimed at specific areas. For example, Congress passed fourteen copyright acts alone from 1873 to the time of the 1909 Act. H.R. REP. NO. 60-2222, at 2.

26. See Bernard Korman, *Performance Rights in Music Under Sections 110 and 118 of The 1976*

distinguish between dramatic and musical compositions. Further, the 1897 Act was the first to include the “for profit” limitation, a crucial aspect of the 1909 Copyright Act.²⁷ While the 1897 Act was important for the future of copyright law, the 1897 Act was limited in scope and failed to significantly effect the market that it sought to protect.²⁸

During the early twentieth century, the need for general revision of American copyright law was felt by many.²⁹ Several leading scholars,³⁰ and

Copyright Act, 22 N.Y.L. SCH. L. REV. 521, 522-23 (1977).

27. See Act of Jan. 6, 1897, ch. 4, 29 Stat. 481 (1897) (the “1897 Act”). The 1897 Act states that: Any person publicly performing or representing any dramatic or musical composition for which a copyright has been obtained, without the consent of the proprietor of said dramatic or musical composition, or his heirs or assigns, shall be liable for damages therefor, such damages in all cases to be assessed at such sum, . . . as to the court shall appear to be just. If the unlawful performance and representation be willful and for profit, such person or persons shall be guilty of a misdemeanor. . . .

Id.

Of particular importance to the resulting protection for musical compositions was an amendment which sought to include the word “musical” rather than “operatic” compositions as the subject matter of copyright. See H.R. REP. NO. 54-741, at 1 (1896). One of the main purposes of the proposed measure was:

To secure to musical compositions the same measure of protection under the copyright law as is now afforded to productions of a strictly dramatic character. There can be no reason why the same protection should not be extended to one species of literary property of this general character as to the other, and the omission to include protective provisions for musical compositions in the law sought to be amended was doubtless the result of oversight. The committee is of the opinion that the existing law should be so amended as to provide adequate protection to this species of literary production.

Id.

28. See Korman, *supra* note 26, at 523.

29. See *id.*

30. Samuel J. Elder, a member of the Boston Bar, in an address to the Maine State Bar Association on “our archaic copyright laws,” said:

The whole system, in the light of an interpretation by the courts, calls for a revision. The courts are more and more called upon to consider these questions. And besides this, the reproduction of various things which are the subject of copyright has enormously increased. The wealth and business of the country and the methods and means of duplication have increased immeasurably. The law requires adaptation to these modern conditions. It is no longer possible to summarize it in a few sections covering everything copyrightable. It should be revised so that protection to the honest literary worker, artist, or designer shall be simple and certain.

H.R. REP. NO. 60-2222, at 1.

Thorvald Solberg, the register of copyrights, also called for congressional action on copyright. In an introduction to a book on copyright law, he gave the following reasons for a revision of the copyright laws:

It is doubtful if the enactment of further merely partial or temporizing legislation will afford satisfactory remedies for the insufficiencies and inconsistencies of the present laws. The subject should be dealt with as a whole, and the insufficient and antiquated laws now in force be replaced by one consistent, liberal, and adequate statute.

The laws as they stand fail to give the protection required, are difficult of interpretation, application, and administration, leading to misapprehension and misunderstanding, and in some directions are open to abuses.

even President Roosevelt in his 1905 message to Congress,³¹ urged a substantial overhaul and comprehensive revision of the laws. Thus, Congress began the process of trying to revise the copyright statute, largely because there had been only minimal enforcement of the public performance provisions of the 1897 Act.³² The primary reason behind such lax enforcement was that copyright owners believed that public performances of their songs were the best stimuli to sales of sheet music.³³ The sole performance right derived from the sheet music itself, which often included a printed notice granting the purchaser the right to perform the composition in

Id. at 2.

In addition, Solberg emphasized the importance of copyright protection, asserting that “[d]uring more than a century of legislation upon this subject, a highly technical copyright system has been developed, under which valuable literary and artistic property rights . . . may be rendered nugatory by reason of failure to fully comply with purely arbitrary requirements.” Copyright Office Bulletin No. 8, in *COPYRIGHT IN CONGRESS, 1789-1904*, 7 (Thorvald Solberg, ed., 1905), *quoted in* PATTERSON & LINDBERG, *supra* note 15, at 74.

31. President Roosevelt recognized the pressing need of a revision of the copyright laws, and in his message to Congress during December of 1905, said:

Our copyright laws urgently need revision. They are imperfect in definition, confused and inconsistent in expression; they omit provision for many articles which, under modern reproductive processes, are entitled to protection; they impose hardships upon the copyright proprietor which are not essential to the fair protection of the public; they are difficult for the courts to interpret and impossible for the Copyright Office to administer with satisfaction to the public. Attempts to improve them by amendment have been frequent, no less than 12 acts for the purpose having been passed since the Revised Statutes. To perfect them by further amendment seems impracticable. A complete revision of them is essential. Such a revision, to meet modern conditions, has been found necessary in Germany, Austria, Sweden, and other foreign countries, and bills embodying it are pending in England and the Australian colonies. It has been urged here, and proposals for a commission to undertake it have, from time to time, been pressed upon the Congress.

The inconveniences of the present conditions being so great, an attempt to frame appropriate legislation has been made by the Copyright Office, which has called conferences of the various interests especially and practically concerned with the operation of the copyright laws. It has secured from them suggestions as to the changes necessary; it has added from its own experience and investigation, and it has drafted a bill which embodies such of these changes and additions as, after full discussion and expert criticism, appeared to be sound and safe. In form this bill would replace the existing insufficient and inconsistent laws by one general copyright statute. It will be presented to the Congress at the coming session. It deserves prompt consideration.

H.R. REP. NO. 60-2222, at 1-2.

32. Mr. Herbert Putnam, Librarian of Congress, organized several conferences, two in 1905 and one or two in 1906, for the purposes of formulating an extensive copyright bill. *Id.* at 3. These meetings produced a bill that was introduced in both the House and Senate. *Id.* The Senate and House Committees on Patents held public hearings in the summer and winter of 1906, but no action was taken by either body. *Id.* These bills were eventually introduced and it was suggested that the goal was to “produce a consistent, logical, and satisfactory statute which would meet the demands of all people interested in copyright property.” *Id.*

33. See Korman, *supra* note 26, at 523. At this time, licenses for public performances were not available, as performing rights societies like ASCAP had not yet come into existence and further, public performances did not provide composers with large royalty payments.

public.³⁴ However, this performance right was applicable only to the purchaser, and did not extend to those who rented or borrowed the sheet music.³⁵

While Congress was cognizant of the importance of public performance rights as understood by this statute, it was concerned about the grant of an unlimited right of public performance.³⁶ Congress feared that the penal provisions of the 1897 Act would subject school children, church-goers, and other “innocents” to liability for civil damages, and even criminal penalties.³⁷ This concern provided the foundation for the Copyright Act of 1909, which specifically included a “for profit” limitation to solve the possible liability problems.³⁸

B. The 1909 Copyright Act

The 1909 Copyright Act (the “1909 Act”) was the first comprehensive federal copyright statute that provided a copyright holder with exclusive rights to his copyrighted works.³⁹ Although earlier state and federal law was

34. *See id.* at 523-24.

35. *See id.*

36. *See id.*

37. *See id.* The inclusion of such strong language caused critics of certain sections of the Senate Bill, providing for public performing rights in music with no limitation, to fear that the provision would unduly restrict the free enjoyment of music and thus interfere with legitimate public interests. *See Varmer, supra* note 21, at 838. As a compromise to the various positions, Mr. Arthur Stewart, an American Bar Association representative, proposed to limit the author’s public performing rights in musical works to public performances for profit:

So far as the introduction of the word “profit” is concerned, in the first line of that section, there has been a very great protest on the part of many people against the drastic nature of this bill, proposing to punish the public performance of copyrighted music. Now, that is the present law. The present law is just as drastic as the present bill in the prohibition of the use of copyrighted music. I have conferred with many of the music publishers, and I find that none of them have any objection to the introduction of the words “for profit” . . . so that the introduction of the words “for profit” in that clause will, I think, relieve the clause of all of the objections which have been made against it by those who think it is too drastic a restraint upon the free enjoyment of music.

Hearings Before the House and Senate Committees on Patents on S. 6330 and H.R. 19853, 59th Cong., 1st Sess. 161-62 (1906), quoted in Varmer supra note 21, at 838.

38. This “for profit” limitation served to differentiate between “innocents” like school children and entities that publicly performed copyrighted works in order to secure a profit.

39. *See Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 154-56 (1975)*. The 1909 Copyright Act states that:

Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:

(a) To print, reprint, publish, copy, and vend the copyrighted work;

(b) To translate the copyrighted work into other languages or dialects, or make any other version thereof, if it be a literary work; to convert it into a novel or other nondramatic work if it be a drama; to arrange or adapt it if it be a musical work; to complete, execute, and finish it if it be a model or design for a work of art;

aimed primarily at the protection of the written word, the 1909 Act explicitly authorized the protection of musical works and granted exclusive performance rights to the composer.⁴⁰ Further, the unauthorized public performance of musical or nondramatic literary work would be considered an infringement only if such performance were “for profit” and resulted in a cause of action against those who infringed.⁴¹ Thus, the 1909 Act limited the copyright owner’s exclusive right of public performance in nondramatic works to “for profit” performances.

After the enactment of the “for profit” requirement for public

(c) To deliver, authorize the delivery of, read, or present the copyrighted work in public for profit if it be a lecture, sermon, address or similar production or other nondramatic literary work; to make or procure the making of any transcription or record thereof by or from which in whole or in part, it may in any manner or by any method be exhibited, delivered, presented, produced, or reproduced; and to play or perform it in public for profit, and to exhibit, represent, produce or reproduce it in any manner or by any method whatsoever . . . ;

....

(e) To perform the copyrighted work publicly for profit if it be a musical composition; and for the purpose of public performance for profit, and for the purposes set forth in subsection (a) hereof, to make any arrangement or setting of it or of the melody of it in any system of notation or any form of record in which the thought of an author may be recorded and from which it may be read or reproduced: *Provided*, That the provisions of this title, so far as they secure copyright controlling the parts of instruments serving to reproduce mechanically the musical work, shall include only the compositions published and copyrighted after [date] . . .

17 U.S.C. § 1 (1970).

40. See Sudell & Lehr, *supra* note 24, at 34. The 1909 Act was a significant change from the nineteenth century view that copyright was “more regulatory than proprietary to the contemporary consensus . . . that copyright was more proprietary than regulatory.” PATTERSON & LINDBERG, *supra* note 15, at 77. “The three most important changes that the act made were the creation of the compulsory license for musical recordings, the expansion of the . . . copyright owner’s rights to include the right to copy the work and the enactment of the work for hire doctrine.” *Id.* at 77-78. The work for hire doctrine allows either a corporate employer or an employer for whom such work was made for hire to renew a copyright. *Id.* Although discussion of this doctrine is beyond the scope of this Note, an excellent overview of the doctrine is provided in PATTERSON & LINDBERG, *supra* note 15, at 85-89. See also Russ VerSteeg, *Copyright and the Educational Process: The Right of Teacher Inception*, 75 IOWA L. REV. 381, 388-92 (1990).

41. See 2 MELVILLE B. NIMMER, NIMMER ON COPYRIGHT: A TREATISE ON THE LAW OF LITERARY, MUSICAL AND ARTISTIC PROPERTY, AND THE PROTECTION OF IDEAS § 8.15[A] (1996). A performance of a dramatic work, even if for a nonprofit use, would be an infringement, while a musical performance would not. *Id.* The reason for the distinction was that:

[t]he law considers that persons attending a performance of a dramatic work will not ordinarily attend a second performance of the same work and therefore an unauthorized performance, though gratuitous, will cause the author a monetary loss, by depriving him of a potential audience.

2 STEPHEN P. LADAS, THE INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY 783 (1938).

The argument is that “one who attends a nonprofit performance of such a work, rather than being satiated with it, is more likely to wish to see a professional (*i.e.*, for profit) performance.” 2 NIMMER at § 8.15[A]. Further, it was thought that preventing unlicensed nonprofit performances of musical works in such public places would be an “undue restriction on benefits that should be available to the public.” *Id.*

performances of musical compositions, a great deal of judicial energy was expended to define exactly what Congress meant by its “for profit” language. In the first important decision concerning the 1909 Act, the Supreme Court held that the “for profit” requirement meant that the musical performance had to have some connection to a profit-making activity.⁴² As Justice Oliver Wendell Holmes asserted, performances in a restaurant or hotel dining room by persons employed by the proprietor were an infringement of the 1909 Act, regardless of whether there was an admissions charge.⁴³ Several other courts also dealt with similar issues of how to balance the rights of the composer with the public use.⁴⁴ Thus, while the 1909 Act was an important step in the history of copyright law, the 1909 Act’s ambiguities, and further advances in technology, caused Congress and various scholars to call for its clarification and revision.⁴⁵ That final revision, however, did not occur until sixty-seven years later.

42. See *Herbert v. Shanley Co.*, 242 U.S. 591 (1917).

43. Justice Holmes asserted that:

If the rights under the copyright are infringed only by a performance where money is taken at the door, they are very imperfectly protected. Performances not different in kind from those of the defendants could be given that might compete with and even destroy the success of the monopoly that the law intends the plaintiffs to have. It is enough to say that there is no need to construe the statute so narrowly. The defendants’ performances are not eleemosynary [i.e., contributed as an act of charity]. They are part of a total for which the public pays, and the fact that the price of the whole is attributed to a particular item which those present are expected to order is not important. It is true that the music is not the sole object, but neither is the food, which probably could be got cheaper elsewhere. The object is a repast in surroundings that to people having limited powers of conversation, or disliking the rival noise, give a luxurious pleasure not to be had from eating a silent meal. If music did not pay, it would be given up. If it pays, it pays out of the public’s pocket. Whether it pays or not, the purpose of employing it is profit, and that is enough.

Id. at 594-95.

44. After the 1909 Act was passed, the courts were in effect asked to choose which interest was more important: the cultural life of the nation through broad dissemination of musical compositions or the authors’ rights to control the use of their works. See H.R. REP. NO. 94-1476, at 62 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5675. See generally *Associated Music Publishers, Inc. v. Debs Mem’l Radio Fund, Inc.*, 141 F.2d 852, 855 (2d Cir. 1944) (“it is unimportant whether a profit went to charitable or educational causes, the performance was for profit”); *Jerome H. Remick & Co. v. American Auto. Accessories Co.*, 5 F.2d 411, 412 (6th Cir. 1925) (“a public performance may be for profit, though no admission fee is taken or no profit is made”); *M. Whitmark & Sons v. L. Bamberger & Co.*, 291 F. 776 (D.N.J. 1923) (music performed by organization in film theater was “for profit”); *Harms v. Cohen*, 279 F. 276 (E.D. Pa. 1922) (music performed in motion picture theater was not incidental, but “for profit”).

45. Commencing in the 1920’s, there were successive bills in Congress to further define the “for profit” language and create additional exemptions. The exemptions sought included public performances by churches, public schools, and charitable and fraternal organizations. See generally Varner, *supra* note 21, at 852-59.

C. The 1976 Copyright Act

Enacted largely in response to immense technological advances, the 1976 Copyright Act ("1976 Act" or the "Act") comprehensively revised the 1909 Act.⁴⁶ Perhaps the most important change was the explicit enumeration that a copyright owner has *exclusive rights* in his or her copyrighted work, which includes the "right to . . . perform the copyrighted work publicly."⁴⁷ The "for

46. See Sudell & Lehr, *supra* note 24, at 34. "While the 1909 Act was in force . . . the rapid growth of motion pictures, phonorecords, radio, television, photocopying machines, and computers combined to produce a revolution in communication." PATTERSON & LINDBERG, *supra* note 15, at 90. In 1909, the principal source of distribution of musical compositions was through the sale of sheet music. However, in 1976, the principal source of distribution was through the radio, television, and recording industry.

The 1976 Act was very different from that of its predecessors, as Barbara Ringer, the Register of Copyrights noted at the time of the Act:

The revisions contained in the New Act are certainly 'general' in scope; they substantially revise the provisions of that antiquated law under which we have been struggling to operate for sixty years. . . . But the New Act is not a 'general revision' in the same sense that the 1909 Act was, *i.e.*, a bringing together of scattered statutory provisions with relatively few changes or innovations. The New Act is rather a completely new copyright statute, intended to deal with a whole range of problems undreamed of by the drafters of the 1909 Act. Even more important, the new statute makes a number of fundamental changes in the American copyright system, including some so profound that they may mark a shift in direction for the very philosophy of copyright itself. Properly designated, the New Act is not a 'general revision,' but is as radical a departure as was our first copyright statute, in 1790.

Barbara Ringer, *First Thoughts on the Copyright Act of 1976*, 22 N.Y.L. SCH. L. REV. 477, 479 (1977).

The continuing advances of technology constantly produce new medium by which copyrighted works may be disseminated. For example, in 1997, the most significant of these technological breakthroughs is the use of copyrighted material on the internet. Now that copyrighted images, information and even sound can be accessed on this medium, Congress is faced with a new challenge on how best to balance the competing claims of the authors and recipients of copyrighted material.

47. 17 U.S.C. § 106(4) (1996). This section reads in pertinent part:

[T]he owner of copyright under this title has the exclusive rights to do and authorize any of the following: . . .

(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly.

Id. The act specifically "sets forth the 'bundle of rights' given to copyright holders." *LaSalle Music Publishers, Inc. v. Highfill*, 622 F. Supp. 168, 169 (W.D. Mo. 1985). Congress further indicated that:

The right of public performances under § 106(4) extends to "literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works and sound recordings" and, unlike the equivalent provisions now in effect, is not limited by any "for profit" requirement. The approach of the bill, as in many foreign laws, is first to state the public performance right in broad terms, and then to provide specific exemptions for educational and other nonprofit uses.

LaSalle, 622 F. Supp. at 169 (citing H.R. REP. NO. 94-1476, at 62).

A major goal of this statutory provision was to protect the author against public performances without his or her consent. See *generally* H.R. REP. NO. 94-1476, at 62-63. Further, this language is qualified by the provision of limited and particular nonprofit exemptions, like educational uses. *Id.*

Some of the other major changes of this Act also included the statutory recognition of fair use

profit" requirement was thus removed from the section granting the bundle of rights and placed among the exemptions. In addition, the 1976 Act legitimized and authorized performing rights societies, entitling such entities like ASCAP, BMI and SESAC to charge fees for public performances of songs for which they own the copyright.⁴⁸ Thus, while the 1976 Act radically reformed the nature of copyright law in the United States, it created a new set of issues for the courts, and even Congress itself to address.

III. DEFINITIONS OF "PERFORMANCE" AND "PUBLICLY" UNDER THE COPYRIGHT ACT OF 1976

The area of performance is perhaps the most frequently litigated area of copyright law.⁴⁹ Typically, a conflict will arise when a musical composition is performed publicly, without the copyright owner's permission, by a performer or group other than the copyright owner.⁵⁰ If such a performance occurs, the owner or performing rights society will either demand payment or bring suit against the alleged copyright infringer. When an individual makes an unauthorized use of a musical composition, infringement actions are

(§ 107), extension of the maximum duration of copyright to 56 years (§ 302(a)), establishment of compulsory licensing for cable television (§ 111), and establishment of the Copyright Royalty Tribunal (§§ 801-810). See Alan J. Hartnick, *Performances at Schools and Colleges Under the 1976 Copyright Act*, 8 SETON HALL L. REV. 667 (1977).

48. See 17 U.S.C. § 116 (1996). The 1976 Act did not specifically articulate the nature of performing rights societies, however, the statute explicitly authorized the owners, through such performing rights societies, to charge fees for public performances of their works. In § 116, the source of the legitimacy of performing rights societies, the statute defined a performing rights society as "an association or corporation that licenses the public performance of nondramatic musical works on behalf of the copyright owners, such as the American Society of Composers, Authors and Publishers, Broadcast Music, Inc., and SESAC, Inc." 17 U.S.C. § 116(e)(3) (1976).

Under the current version of the 1976 Act, § 116 reads in pertinent part:

(a) Applicability of section.—This section applies to any nondramatic musical work embodied in a phonorecord.

(b) Negotiated licenses.—

(1) Authority for Negotiations.—Any owners of copyright in works to which this section applies and any operators of coin-operated phonorecord players may negotiate and agree upon the terms and rates of royalty payments for the performance of such works and the proportionate division of fees paid among copyright owners, and may designate common agents to negotiate, agree to, pay, or receive such royalty payments.

...

(c) License agreements superior to copyright arbitration royalty panel determinations.—License agreements between one or more copyright owners and one or more operators of coin-operated phonorecord players, which are negotiated in accordance with subsection (b), shall be given effect in lieu of any otherwise applicable determination by a copyright arbitration royalty.

17 U.S.C. § 116 (1996).

49. See Sudell & Lehr, *supra* note 24, at 34-35.

50. See 17 U.S.C. §§ 106, 110 (1996).

subject to a judicially-created five part test.⁵¹ In order to be exempt from such infringement actions, a performance must either not meet the statutory definitions under section 101, or fall within the specifically articulated exemptions of section 110.⁵²

51. In order to establish liability for infringement of copyright in musical compositions, a plaintiff must prove the following elements:

- (1) the originality and authorship of the compositions involved;
- (2) compliance with all formalities required to secure a copyright under Title 17, United States Code;
- (3) that plaintiffs are the proprietors of the copyrights of the compositions involved in this action;
- (4) that the compositions were performed publicly [by the defendant] and for profit; and
- (5) that the defendant had not received permission from any of the plaintiffs or their representatives for such performance.

Major Bob Music v. Stubbs, 851 F. Supp. 475, 478 (S.D. Ga. 1994) (citing *Van Halen Music v. Palmer*, 626 F. Supp. 1163, 1165 (W.D. Ark. 1986)); *Fourth Floor Music, Inc. v. Der Place, Inc.*, 572 F. Supp. 41, 43 (D. Neb. 1983); *Boz Scaggs Music v. KND Corp.*, 491 F. Supp. 908, 912 (D. Conn. 1980).

In an infringement action, plaintiffs can make out a prima facie case as to the first three elements by submitting certified copies of copyright registration certificates. See *Van Halen Music*, 626 F. Supp. at 1165. Under 17 U.S.C. § 410(c), registration certificates and subsequent assignments constitute prima facie evidence of the validity of the copyright and of the facts stated in the certificates. See *Fourth Floor Music*, 572 F. Supp. at 43.

Further, despite the omission of the "for profit" language in the federal statutes, federal courts still require that in order to constitute infringement, the compositions must be performed "for profit." Although the test for infringement was originally formulated before the 1976 Act was in force, it is still valid today. Several courts have even addressed the "for profit" requirement as the "no profit" defense. See generally *Major Bob Music*, 851 F. Supp. at 479-80 (performance "for own gratification and not for the entertainment of Defendant's patrons . . . do not absolve the Defendant of liability"); *Bourne Co. v. Speeks*, 670 F. Supp. 777, 779 (E.D. Tenn. 1987) (a profit making enterprise is considered as such even if it never actually yields a profit); *Fourth Floor Music*, 572 F. Supp. at 43 ("the fact that the [copyrighted] compositions were performed by independent contractors is of no import").

52. Section 110(4) states:

(4) performance of a nondramatic literary or musical work otherwise than in a transmission to the public, without any purpose of direct or indirect commercial advantage and without payment of any fee or other compensation for the performance to any of its performers, promoters, or organizers, if—

(A) there is no direct or indirect admissions charge; or

(B) the proceeds, after deducting the reasonable costs of producing the performance, are used exclusively for educational, religious, or charitable purposes and not for private financial gain, except where the copyright owner has served notice of objection to the performance under the following conditions;

(i) the notice shall be in writing and signed by the copyright owner or such owner's duly authorized agent; and

(ii) the notice shall be served on the person responsible for the performance at least seven days before the date of the performance, and shall state the reasons for the objection; and

(iii) the notice shall comply, in form, content, and manner of service, with requirements that the Register of Copyrights shall prescribe by regulation;

17 U.S.C. § 110(4) (1996).

A. The Definition of "Performance"

Under the 1976 Act, to perform a work means to "recite, render, play, dance or act it, either directly or by means of any device or process."⁵³ As Congress explicitly stated, "a singer is performing when he or she sings a song."⁵⁴ Whether an activity constitutes a "performance" and indeed, how many performances are occurring, depends on who is playing, who is listening, and how the listener receives the music.⁵⁵

However, a performance under the 1976 Act is not an infringement unless it is performed publicly.⁵⁶ Even though an initial performance or display may be a "performance" under the 1976 Act, it would be not be actionable as an infringement unless it were performed "publicly."⁵⁷ Thus, there is no infringement unless the statutory definitions of both terms are satisfied.

53. 17 U.S.C. § 101 (1996). Performing a work under § 101 includes "reading a literary work aloud, singing or playing music, dancing a ballet or other choreographic work, and acting out a dramatic work or pantomime." H.R. REP. NO. 94-1476, at 63. In addition, Congress also articulated how a performance might be accomplished either directly to a listener or by dance or process, which included equipment for reproducing or amplifying sounds or visual images, any sort of transmitting appliances, any type of electric retrieval system and any other techniques and systems not yet in use or invented. *See id.*

54. H.R. REP. NO. 94-1476, at 63. One newspaper article indicated that the American Camping Association had analyzed the issue and specifically concluded that "merely singing songs around a campfire is enough to make a group liable for royalty payments." Kyle Niederpruem, *Music Royalty Fees Become Part of Camping Experience*, THE INDIANAPOLIS STAR, AUG. 23, 1996, available in 1996 WL 3154949.

55. *See* Sudell & Lehr, *supra* note 24, at 34.

56. "Although any act by which the initial performance or display is transmitted, repeated, or made to recur would itself be a 'performance' or 'display' under the bill, it would not be actionable as an infringement unless it were done 'publicly,' as defined in section 101." H.R. REP. NO. 94-1476, at 63. However, "other performances and displays, in addition to those that are 'private,' are exempted or given qualified copyright control under sections 107 through 118." *Id.*

The language included in the House Report indicates that Congress contemplated that there could be situations where copyrighted materials are used but do not qualify as public performances under § 101. Examples include reading a book aloud to a friend, reading a newspaper article over the phone to one's mother, or perhaps even serenading a loved one. Further, an individual is not required to obtain a license to sing a copyrighted lyric in the shower. *See* Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 155 (1975). In a footnote from the same decision, the *Aiken* court cited an English case, *Wall v. Taylor*, 11 Q.B.D. 102, 106-107 (1883)(Brett, M.R.), which held that:

Singing for one's own gratification without intending thereby to represent anything, or to amuse any one else, would not, I think, be either a representation or performance, according to the ordinary meaning of those terms, nor would the fact of some other person being in the room at the same time of such singing make it so

Aiken, 422 U.S. at 155; *see also* NIMMER, *supra* note 41, at § 8.14[C] (performance must be publicly, because it would be "unthinkable for an infringement to arise every time someone for his own amusement, or that of his friends, were to read a book aloud, or sing a song").

57. *See* H. R. REP. NO. 94-1476, at 63.

B. Definition of "Publicly"

While the definition of performance is easier to determine—one either sings or is silent—considerable debate has focused on the precise definition of “publicly.” Under the 1976 Act, to perform or display a work “publicly” means to “perform or display [a work] at a place open to the public or at any place where a substantial number of persons outside of the normal circle of a family and its social acquaintances is gathered.”⁵⁸ Congress specifically noted that one of the primary reasons it was defined in this manner is to clarify that performances delivered in “‘semipublic places’ such as clubs, lodges, factories, summer camps, and schools are ‘public performances’ subject to copyright control.”⁵⁹

A significant problem arises when a substantial number of persons outside a normal family circle and their social acquaintances gather.⁶⁰ Under

58. 17 U.S.C. § 101. First, with respect to “a substantial number of persons,” Congress indicated that routines of businesses and governmental personnel would be excluded because they do not represent the gathering of a “substantial number of persons.” See H. R. REP. NO. 94-1476, at 64. Other decisions have attempted to clarify the meaning of this language outside the context of governmental and business meetings, as mentioned in the House Report. In a Louisiana Attorney General opinion, the language was understood to mean that a business meeting of twenty to thirty people is expressly excluded from the ambit of “public performances” because it is not a gathering of a substantial number of persons outside the normal circle of a family and its social acquaintances. See Op. La. Att’y Gen. 84-436 (1985), reprinted in 1985-1986 Copyright Law Decisions, Copyright L. Rep. (CCH) ¶ 25,833 (1986); but cf. Op. Ca. Att’y Gen. 81-503 (1982), reprinted in 1981-1983 Copyright Law Decisions, Copyright L. Rep. (CCH) ¶ 25,368 (1983) (“although a prison is certainly not open to the general public . . . it is however still a place where unhappily a ‘substantial number of persons . . . is gathered’”). In addition, one court found that a private club playing copyrighted musical compositions fell within “public performance” because even though classified as a private club, it was deemed a place where “a substantial number of persons” may gather. *Ackee Music, Inc. v. Williams*, 650 F. Supp. 653, 655-56 (D. Kan. 1986).

Second, Congress indicated that the term “family” in this context will include an individual living alone, so that a gathering confined to the individual’s social acquaintances would normally be regarded as private. See H. R. REP. NO. 94-1476, at 64. Thus, under this scenario, the performance of the copyrighted musical composition would be exempt from liability.

59. H. R. REP. NO. 94-1476, at 64. Congress explicitly indicated that it was overruling the line of cases following *Metro-Goldwyn-Meyer Distribution Corp v. Wyatt*, 21 C.O. Bull. 203 (D. Md. 1952), which held that a performance in a club where only members and invited guests were present was not a public performance. See generally H. R. REP. NO. 94-1476, at 64. Note the parallel to the type of language used during the discussions surrounding the fraternal organizations exemption, § 110(10), enacted in 1982 as an amendment to the 1976 Act. See *infra* notes 106-109 and accompanying text.

See also *Ackee Music*, 650 F. Supp. at 656 (“private club” under state law no defense to infringement suit); *Hinton v. Mainlands of Tamarac*, 611 F. Supp. 494 (S.D. Fla. 1985) (condominium association held liable for musical performance at clubhouse dance).

60. The “substantial number of persons” language has been treated very differently by the courts in the face of the ambiguity within the statute and House Report. For example, in *Aiken*, the Court stated that an orchestra or an individual instrumentalist or singer who performs a copyrighted musical composition in such a public place (concert halls, theaters, restaurants, and cabarets) without a license is clearly an infringer under the statute. See 422 U.S. at 157. Further, in *Red Baron-Franklin Park, Inc.*

the statute, the performance is considered public even if the performance does not occur in a public place, because the act imposes restrictions on who may attend.⁶¹ Further, even if an insignificant number of persons actually attend a performance, this fact will not take away from its character as a public performance if a substantial number of persons outside of a normal family circle and its social acquaintances *could* have attended.⁶² However, if under the restrictions imposed, a number of persons outside of the family circle and its social acquaintances did or could attend, the performance is still not rendered "public" unless the number of such other persons who could attend is substantial.⁶³

C. Hypothetical Analysis: Girl Scouts and Other Organizations

A literal reading of the 1976 Act indicates that singing a copyrighted song at a summer camp would likely constitute a "public performance." First, the singing would constitute a "performance" because "a singer is performing when he or she sings a song."⁶⁴ Second, the singing is in public because it occurs at a place "where a substantial number of persons outside the normal

v. Taito Corp., 883 F.2d 275 (4th Cir. 1989), the court held that a video game was a "public performance" because it could be viewed by the player, any persons accompanying him, and any other interested patrons of the video arcade. *See id.* at 279. Congress later addressed this result in its adoption of the Computer Software Rental Amendments Act of 1990, which overturned this decision. In addition, in *Jerome H. Remick & Co. v. American Automobile Accessories Co.*, 5 F.2d 411 (6th Cir. 1925), the court noted that "a performance in our judgment is no less public because listeners are unable to communicate with one another, or are not assembled within an enclosure, or gathered together in some open stadium or park or other public place." *Id.* at 412.

Note that while Congress specifically mentioned that it sought to have summer camps amenable to liability, it failed to distinguish between the different types of summer camps. As summer camps continue to diversify, Congress needs to address the use of copyrighted works, as licensing issues are certain to continue to arise.

61. *See* H.R. REP. NO. 94-1476, at 63. Performance areas include semi-public places like summer camps. Even if the Girl Scouts are considered a "semi-elite" group because members have to meet certain requirements, like age or sex, the performance is still a public one for statutory purposes. *See also* *Columbia Pictures Indus., Inc. v. Aveco, Inc.*, 800 F.2d 59, 63 (3d Cir. 1986) ("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."); *Op. La. Att'y Gen.* 84-436, *supra* note 57 (showing of rented videocassettes is not a public performance under the 1976 Act and a correctional facility is not a quasi-public place similar to a club because the viewers are in prison involuntarily).

62. The definition refers alternatively to a performance "open to the public," and one where a substantial number of persons is gathered. *See generally* 2 NIMMER, *supra* note 41, at § 8.14 [C]. If the statute is read strictly, it might be argued that if a performance is not open to the public without any restrictions imposed, then even if the restrictions are such as to permit a substantial number of persons to attend, this will not be regarded as a public performance unless they do in fact attend. Perhaps a strict construction is not intended, so that such a narrow reading is not justified. *Id.*

63. *See supra* note 58 and 60 and accompanying text.

64. *See supra* notes 54 and 60 and accompanying text.

family and its social acquaintances is gathered.”⁶⁵ Because a group of girls around the campfire constitutes a “substantial number of persons” who are unrelated, it would establish an actionable infringement. Further, if the performance of the copyrighted song occurs at a summer camp, Congress has explicitly indicated that summer camps are subject to copyright control.⁶⁶ However, if the singing takes place around a campfire during a winter weekend retreat, the use might be more questionable because the House Report only addresses “summer camps.”

Several problems surface when analyzing the express statutory language relating to whether the performance is rendered “publicly.” The major issues involve the composition of the audience and the status of its invitees. A campfire sing-along is usually not open to the general public, but rather is comprised of a small number of individuals joined together by their membership in a group or organization. Further, the performance is not usually open to the public because, in order to be invited, there are criteria for membership. In addition, the sing-along does not involve a “substantial number of persons” because the size of the group at issue is usually twenty or fewer in number.⁶⁷ If the gathering consists of over twenty people, the assembled group is closer to the statutory definition of a “substantial number” of people. However, given this situation, the issues surrounding the “open to the public” problem will still remain.

Perhaps the single greatest obstacle in the current debate over the licensing of the Girl Scouts is the existence of the express language in the House Report relating to the liability of summer camps. Congress’ failure to make a distinction between the different types of summer camps shows that it did not understand or contemplate the very substantial difference between those camps that operate for profit and those that do not. Under the current debate, it is crucial to resolve exactly what is meant by the “summer camps” language in the House Report. The resolution of this of this issue is vital for outlining the limits of copyright protection. It is likely that the only way to resolve this issue is to have Congress speak directly on point by adopting a new exemption under the existing copyright law. An exemption specifically addressing performances by nonprofit camping or service organizations would eliminate the current friction over licensing of such organizations.

65. See *supra* note 58 and accompanying text.

66. See *supra* note 59 and accompanying text.

67. This is assuming that the group around the campfire is a small troop. As the number of troop members increases, the amount of protection for nonprofit camping or service organizations would probably decrease under the current act.

IV. PERFORMANCE RIGHTS EXEMPTIONS UNDER 17 U.S.C. § 110⁶⁸

68. Note that while the exemptions of § 110 of the 1976 Act are the most applicable to the hypothetical imposed by nonprofit groups singing around a campfire, the doctrine of fair use is an interesting possibility should a court decide to interpret the statutes and decisions broadly. The judicial doctrine of fair use, one of the most important and well-established limitations on the exclusive rights of copyright owners, was given express statutory recognition for the first time in the 1976 Act. The doctrine was codified in § 107, which lists the following factors for consideration:

1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.

17 U.S.C. § 107 (1996).

Even though this doctrine was first codified by the 1976 Act, it continues to be called the most troublesome and ambiguous doctrine in the whole law of copyright. *See Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661 (2d Cir. 1939). It is a difficult concept because no complete definition has ever been given for the doctrine. *See Sarah Deutsch, Fair Use in Copyright Law and The Nonprofit Organization: A Proposal For Reform*, 34 AM. U. L. REV. 1327, 1328 (1985). Further, Congress has exacerbated the situation by providing an incomplete list of examples offered for guidance. These factors are not an exhaustive list, but merely a framework for possible uses. This list includes:

Quotation of excerpts in a review or criticism for purposes of illustration or comment; quotation of short passages in a scholarly or technical work, for illustration or clarification of the author's observations; use in a parody of some of the content of the work parodied; summary of an address or article, with brief quotations, in a news report; reproduction by a library of a portion of the work to replace part of the damaged copy; reproduction by a teacher or student of a small part of a work to illustrate a lesson; reproduction of a work in legislative or judicial proceedings or reports; incidental and fortuitous reproduction, in a newsreel or broadcast, of a work located in the scene of an event being reported.

H.R. REP. NO. 94-1476, at 65 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5675.

Although Congress provided this list, it expressly indicated that while the courts have repeatedly considered and ruled upon the fair use doctrine, no real definition of the concept has ever emerged. *See generally Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994). Thus, while Congress mentioned what it thought might be examples of fair use, this list was not considered complete, thereby allowing the courts great deference in determining what use will be deemed "fair." *See generally* 3 MELVILLE B. NIMMER, NIMMER ON COPYRIGHT: A TREATISE ON THE LAW OF LITERARY, MUSICAL AND ARTISTIC PROPERTY, AND THE PROTECTION OF IDEAS § 13.05 (1996).

The fair use doctrine is an equitable doctrine, requiring the courts to balance arguments and undertake a fact-specific inquiry without definite rules. *See Campbell*, 510 U.S. at 577. Fair use is said to constitute a mixed issue of law and fact, but what facts will be sufficient to raise this defense in any given case is not easily answered. *See* 3 NIMMER at § 13.05. As a result, courts are given minimal guidance when deciding these complex and important issues. *See id.* Accordingly, this process often leads to inefficient results and a lack of clear direction. *See generally* Deutsch at 1328-29.

The fair use doctrine is relevant to this Note because it may be possible that a nonprofit camping or service organization will be able to induce a tribunal to expand the traditional notions of fair use, especially in terms of its effect on the commercial value of the copyrighted work.

Several courts have indicated that when the user uses the copyrighted work in its entirety, that entity is precluded from using the fair use defense. *See generally Bourne Co. v. Speeks*, 670 F. Supp. 777 (E.D. Tenn. 1987). The same is true for "almost total use" of the copyrighted material. *See generally Leon v. Pacific Telephone & Telegraph Co.*, 91 F.2d 484, 486 (9th Cir. 1937); *Robert Stigwood Group Ltd. v. O'Reilly*, 346 F. Supp. 376 (D. Conn. 1972). As *O'Reilly* noted:

no case or recognized scholar in the field of copyright law [. . .] supports [a] defendant's position

A. Generally

The 1976 Act was a significant departure from previous copyright laws because it created an exclusive right in an author to license public performances of his or her compositions, regardless of any profit motive.⁶⁹ This broad right, designed to protect the author against any public performances without his or her consent, is qualified by the provision of limited and particular nonprofit exemptions.⁷⁰ Congress adopted an approach similar to the laws of other countries by first stating the public performance right in broad terms, and then providing exemptions for educational and other nonprofit uses.⁷¹ Under the 1909 Act, the unauthorized public performance of a musical or nondramatic⁷² literary work would infringe only if such performance were for profit.⁷³ While the 1909 Act exempted all nonprofit performances of musical and nondramatic works, the 1976 Act does not contain similar limiting language, but subjects these performances

[that fair use is applicable when the total work is copied]. A careful review of the pertinent authorities discloses no suggestion that the doctrine of fair use protects a defendant who copies practically verbatim [a] plaintiff's work, but adds a few variations in order to make plaintiff's [work] a "better" one.

O'Reilly, 346 F. Supp. at 385. This authority alone would perhaps be the largest obstacle to organizations using copyrighted songs in their totality.

69. See *supra* note 47 and accompanying text.

70. See Hartnick, *supra* note 47, at 669. Notwithstanding the provisions of § 106, § 110 specifically exempts the following from infringement: face to face teaching activities; instructional broadcasting; performances during religious services; special nonprofit performances given directly in the presence of an audience; performance or display by public reception of transmission on apparatus commonly used in private homes; performances at agricultural fairs; retail sales of records and tapes; performances designed for and primarily directed to handicapped persons; transmissions designed for and primarily directed to blind or other handicapped persons through radio subcarrier; and performances by veterans or fraternal organizations. See 17 U.S.C. § 110 (1996).

71. See *supra* note 47 and accompanying text. The 1976 Act appears to have been motivated by a congressional desire to act in the interest of reasonableness and fairness during the formulation stages. While a fair approach to copyright law might have been sought, the 1976 Act ultimately contained ambiguities that gave rise to problems in the area of licensing musical performances.

72. "The requirement of a nondramatic use is meant to exclude performances of opera, musical comedy and the like from this exemption." Hartnick, *supra* note 47, at 672. In *Robert Stigwood Group, Ltd. v. Sperber*, 457 F.2d 50 (2d Cir. 1972), the court held that with reference to a series of individual musical compositions excerpted from a musical play, it is a dramatic use when the performers: a) evoke the original work by performing more than a few songs in the sequence of the original work and, b) maintain specific roles from the original work so that the story line is preserved. See *id.*; see also *Rice v. American Program Bureau, modified*, 446 F.2d 685 (2d Cir. 1971) (mere singing of songs from *Jesus Christ Superstar*, along with an entire program of other works, not a dramatic use); *April Productions v. Strand Enterprises, Inc.*, 221 F.2d 292 (2d Cir. 1955) (singing of a medley of songs in a small part of a scene of a ten scene show not a dramatic performance).

Further, one commentator has suggested that a use is dramatic if the story line of any individual musical compositions is interpreted in a dramatic fashion, such as when scenery, props or character action are used to depict the lyrics of a song. See Hartnick, *supra* note 47, at 673.

73. See *supra* note 37 and accompanying text.

to certain exceptions.⁷⁴

The subject matter of the first four exemptions of § 110 were those performances that were previously covered by the “for profit” limitation of the 1909 Act.⁷⁵ While Congress understood that the nonprofit/profit distinction was important, it specifically indicated that it was aware that not all nonprofit groups were similar. Since the 1909 Act was passed, the economic means, number, and strength of nonprofit organizations have increased dramatically.⁷⁶ Congress discarded the “for profit” requirement, indicating that the reason for discarding the “for profit” exemption was that “the line between commercial and ‘nonprofit’ organizations is increasingly difficult to draw.”⁷⁷ Congress further indicated that “[m]any non-profit organizations are highly subsidized and capable of paying royalties, and the widespread public exploitation of copyrighted works by public broadcasters and other noncommercial organizations is likely to grow.”⁷⁸ Thus, Congress eliminated the “for profit” language in order to combat the possible abuse of the copyright law by such organizations. Although Congress indicated that some organizations, specifically those operating for educational, religious, or charitable purposes, would be exempt, it did not clarify exemptions for other groups, which theoretically could have similar viable reasons for desiring exempt status.⁷⁹

B. Section 110(4)

Section 110(4) is the most important exemption relating to performances

74. See *supra* note 47 and accompanying text. Congress was concerned not only with the size and changing attributes of nonprofit organizations, but also with royalties for songwriters and composers. Congress indicated its awareness that performances and displays were the primary means by which a composer or author would have his work disseminated to the public, rather than through the more traditional market for “printed” copies. See *supra* note 46. The concern was that if a broad not-for-profit exemption was included in the 1976 Act, it would not only hurt such authors financially, but it could even be a disincentive to creating works at all. See H.R. REP. NO. 94-1476, at 62-63 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5675.

75. See H.R. REP. NO. 94-1476, at 81. Congress stated that, “[c]lauses (1) through (4) of section 110 deal with performances and exhibitions that are now [1909 Act] generally exempt under the ‘for profit’ limitation or other provisions of the copyright law, and that are specifically exempted from copyright liability under this legislation.” *Id.*

76. See generally H.R. REP. NO. 94-1476, at 62-63; Deutsch, *supra* note 68.

77. H.R. REP. NO. 94-1476, at 62-63.

78. *Id.*

79. From the language of the House Report, it seems clear that Congress was concerned with the exploitation of copyrighted works by public broadcasters and other non-commercial organizations, whose use they feared might reduce the author’s incentive to write and create. See generally H.R. REP. NO. 94-1475, at 62-63.

by nonprofit service and camping organizations.⁸⁰ Although the general exemption for nonprofit performances of musical and nondramatic literary works previously recognized under the 1909 Act was greatly modified, it still exists in some measure under this section.⁸¹ In order to be exempt from liability for infringement of an author's exclusive rights, a user of the copyrighted work must satisfy all elements of section 110(4).⁸² Assuming that there is a public performance of a nondramatic literary or musical work as defined by the statute, first, the use of the work must not be for a direct or indirect commercial advantage to the user.⁸³ Second, there must not be any payment of any fee to performers, promoters or organizers.⁸⁴ Third, those attending the performance of the work must not be subject to a direct or indirect admissions charge.⁸⁵ Conversely, if there is an admissions charge, the proceeds from the performance must be used for educational, religious or charitable purposes, rather than for private financial gain.⁸⁶ This, however, must be further qualified by the opportunity for the copyright owner to serve a notice of objection to the performance of his or her work.⁸⁷

*1. Without Purpose of Direct or Indirect Commercial Advantage:
Profit Motive*

The inclusion of the profit motive clause in section 110(4) directly adopts the principle established by the various court interpretations given to the "for profit" language of the 1909 Act.⁸⁸ As previously mentioned, this limitation

80. When analyzing the other possible exceptions, it does not appear that organizations like the Girl Scouts would be amenable to statutory protection. For example, the first exemption, § 110(1), requires "face-to-face teaching activities of a nonprofit educational institution." 17 U.S.C. § 110(1) (1996). The House Report indicates that the "teaching activities" exempted by the clause encompasses "systematic instruction of a very wide variety of subjects, but they do not include performances or displays, whatever their cultural value or intellectual appeal, that are given for the recreation or entertainment of any part of the audience." H.R. REP. NO. 94-1476, at 81.

81. Section 110(4) contains a general exemption to the exclusive right of public performances that would cover some, though not all, of the same ground as the "for profit" limitation. Further, the clause applies to the same general activities and subject matter as those covered by the "for profit" limitation of the 1909 Act. *Id.* However, the exemption would be limited to public performances given directly in the presence of an audience, whether by means of living performers, the playing of phonorecords, or the operation of a receiving apparatus and would not include a "transmission to the public." *See* 17 U.S.C. § 110 (1996).

82. *See supra* note 70 and accompanying text.

83. 17 U.S.C. § 110(4) (1996).

84. *See id.*

85. *See id.* § 110(4)(A).

86. *See id.* § 110(4)(B).

87. *See id.* § 110(4)(B)(i)-(iii).

88. *See* H.R. REP. NO. 94-1476, at 85 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5675. The report states the principle is "that public performances given or sponsored in connection with any

is now deleted from the act. In order to understand the meaning of the phrase "direct or indirect commercial advantage," close attention must be given to the cases⁸⁹ that discuss the meaning of the "for profit" language.⁹⁰ Under the 1909 Act, in order to be a performance "for profit," it was not necessary that a direct payment be made, as an admission charge or otherwise.⁹¹ A performance was to be considered "for profit" if the person executing such performance expected to gain a direct or indirect commercial advantage from it.⁹²

2. *Prohibition of Payments to Performers, Promoters and Organizers*

Once the commercial advantage element is satisfied, then it must be determined whether compensation was paid to the performers, promoters or organizers.⁹³ Congress indicated that the "basic purpose of this requirement is to prevent the free use of copyrighted material under the guise of charity where fees or percentages are paid to performers, promoters or producers."⁹⁴ However, Congress indicated that the exemption would still apply if such individuals were indirectly paid, for example, as part of their contractual duties or obligations.⁹⁵ Therefore, a performance is not exempt if it is for the

commercial or profit-making enterprises are subject to the exclusive rights of the copyright owner even though the public is not charged for seeing or hearing the performance." *Id.*

89. *See, e.g.,* *Herbert v. Shanley Co.*, 242 U.S. 591 (1917); *Buck v. Jewell LaSalle Realty Co.*, 51 F.2d 726 (8th Cir. 1931); *Buck v. Coe*, 32 F. Supp. 829 (M.D. Pa. 1940); *Harns v. Cohen*, 279 F. 276 (E.D. Pa. 1922).

90. *See generally* 2 NIMMER, *supra* note 41, at § 8.15 [E].

91. For example, in *Associated Music Publishers Inc. v. Debs Memorial Radio Fund, Inc.*, 141 F.2d 853, 855 (2d Cir. 1944), the court held that it did not matter that the ultimate purposes of a corporate defendant were charitable or educational, but that money was ultimately earned through advertising revenues. In this case, the defendant was a business corporation, formed in order to establish a permanent memorial to Eugene Debs, an important labor leader. *See id.* at 853. The corporation's mission was also to promote civic, educational and cultural purposes generally. *See id.* The station was set up as a nonprofit sharing corporation and that all profits and surplus arising from the operation of the station should be used for enlarging and extending the facilities of the station and for improving the educational and cultural activities thereof. *See id.* However, the court held that the station was amenable to a suit for copyright infringement even though the station had charitable goals, on account of the advertising revenues which brought a profit to advertisers and money to the station to pay its operating costs. *See id.* at 855.

See also *F.E.L. Publications, Ltd. v. Catholic Bishop of Chicago*, 506 F. Supp. 1127 (N.D. Ill. 1981) ("for profit" requirement does not necessarily mean that money has to be collected at the door of the place where the copyrighted music is performed).

92. *See* 17 U.S.C. § 110(4) (1996).

93. *See id.*

94. H. R. REP. NO. 94-1476, at 85 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5675.

95. *Id.* The House Report lists the following examples:

performances by a school orchestra conducted by a music teacher who receives an annual salary, or by a service band whose members and conductors perform as part of their assigned duties and who receive military pay. The committee believes that performances of this type should be

purpose of commercial advantage to any of the performers, promoters, or organizers, even if the entity sponsoring the performance neither seeks nor derives such commercial advantage.⁹⁶

3. *Admissions Charge*

Assuming that the use of copyrighted material satisfies the profit motive and payment provisions, the user must prove that it did not receive a direct or indirect admissions charge or that the net proceeds were used exclusively for educational, religious, or charitable purposes and not for private financial gain.⁹⁷ While what constitutes a direct admissions charge is rather obvious, Congress did not provide express guidance for what constitutes an indirect charge. From the language used by Congress in another section of the 1976 Act, cover and minimum charges would be regarded as indirect admissions charges, as well as “membership fees” required for admission to clubs where a performance occurs.⁹⁸ Another example of an indirect admissions charge might be where one is required to purchase a given product or service as a condition to “free” admission to a performance.⁹⁹ As one commentator has suggested, this requirement serves to confirm that a “commercial” advantage is not to be equated with any pecuniary advantage, since if it were, the admission charge prohibition would constitute a meaningless redundancy.¹⁰⁰

4. *The Copyright Owner’s Veto*

Although the copyright owner’s veto¹⁰¹ is beyond the scope of this Note and is included to indicate procedural requirements, the notice provision allows a copyright owner additional protection against infringement. This power to veto a performance is given to a copyright owner to provide him with the opportunity to control the use of their work.¹⁰² The purpose of this

exempt, assuming that the other conditions in clause (8) are met, and has not adopted the suggestion that the word “salary” be added to the phrase referring to the “payment of any fee or other compensation.”

Id.

96. See generally 2 NIMMER, *supra* note 41, at § 8.15[E][3].

97. See 17 U.S.C. § 110(4)(B) (1996).

98. Congress has implicitly indicated an example of an indirect admissions charge in § 116(e)(1). This section states that, similar to the definition of § 1(e) of the 1909 Act, an indirect admissions charge would “exclude establishments making cover or minimum charges, and clubs open to the public but requiring ‘membership fees’ for admission.” 17 U.S.C. § 116(e)(1) (1996).

99. See generally 2 NIMMER, *supra* note 41, at § 8.15[E].

100. See *id.*

101. See 17 U.S.C. § 110(4)(B)(i)-(iii) (1996).

102. See H.R. REP. NO. 94-1476, at 86 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5675.

provision was to provide the copyright owner with an opportunity to decide whether and under what conditions the copyrighted work should be performed.¹⁰³

C. Applicability of the Exemptions to the Girl Scouts and Other Camping Organizations

Assuming that the Girl Scouts or other similar organizations are engaged in a "public performance" under the 1976 Act, they might be exempt from an infringement suit under section 110(4). For this conclusion, one must assume that the performance of the copyrighted material, for example, singing "On Top of Old Smokey" at a campground during a weekend retreat, constitutes a "public performance" under the statute.

The first factor to consider is whether there is a direct or indirect commercial advantage to the Girl Scouts through their performance of the copyrighted material. Barring the fact that members of the Girl Scouts pay membership fees constituting a direct advantage, there may be other ways in which the Girl Scouts might obtain a commercial advantage. Singing might constitute a direct commercial advantage because the opportunity to engage in recreational activities, including singing, has a commercial use in the organization by its members. For example, singing encourages the organization's members to be enthusiastically involved in the organization. Assuming the overall positive effect of the performance on its existing members and the community, the organization will probably be able to recruit new members. Further, the increased reputation of the Girl Scouts may provide the organization with increased finances due to community support. The result is that the Girl Scout organization receives a benefit and thus should not be exempt from an infringement suit.

On the other hand, the Girl Scouts generally do not sing in order to secure any form of indirect or direct commercial advantage. The advantage afforded by singing around the campfire with an individual's peers strictly serves non-monetary goals like friendship, increased self-esteem, encouragement of values, and strengthening of moral foundation. Further, even when the Girl Scouts or other organizations perform at schools or places like church community rooms, no commercial advantage is sought, but rather the goal is to bring the community together at an event which all can enjoy. Thus, because the use is not commercial, and serves an important public benefit, such organizations' use of copyrighted works are within the boundaries of

103. *See id.* This power was given to the copyright owner because "otherwise, owners could be compelled to make involuntary donations to the fund-raising activities to which they are opposed." *Id.*

federal copyright exemptions.

The second factor to consider is whether there is a direct or indirect admissions charge. One possible argument is that the payment of membership fees constitutes a "direct admissions charge" under the statute. Although a fee is not paid specifically to gain admittance to the campfire, the inherent expectation is that the scouting experience will include singing either during a camp-out, while at a summer camp, or during regular meetings. Further, the members of these organizations would not be able to attend such a gathering if they were not eligible members. Unless the individuals have paid the requisite membership fee to the organization, they would probably be excluded. In addition, if such performances take place at community centers, the donations, whether generally to the organization or to attend the performance, might constitute an admissions charge. A possible argument is that because the Girl Scouts are a national organization with nationwide funding, they probably could afford to pay fees for the use of the copyrighted compositions.

However, there is a distinction between the payment of a membership fee to cover administrative costs and paying to be at a campfire. Campers do not pay a fee to attend activities including campfires. Further, they might point out that not all organizations that are national are able to afford licensing fees. The geographical reaches of an organization should not be the sole criterion for the who should pay fees. In addition, there is a significant difference in the type of organization that a plaintiff might want to collect fees from in this scenario. Groups like the Girl Scouts or church-sponsored summer camps operate without profit, which is a significant difference from those organizations that are listed under federal tax laws as nonprofit which still have large budgetary surpluses.

A nonprofit camping or service organization like the Girl Scouts will probably be unable to afford general licensing fees. Rather than subject themselves to licensing fees or risk the chance of being sued after performing a copyrighted work, these groups will likely cease the use of such copyrighted works altogether.

V. PROPOSAL

Current United States copyright law is deficient in providing protection to nonprofit service and camping organizations from suits for copyright infringement. Organizations like the Girl Scouts, the YMCA and the Campfire Girls use songs and readings not only for recreational purposes, but also as a tool for learning valuable lessons. While the recent public debates might have resulted in a virtual exemption for the Girl Scouts of America,

other organizations are still subject to possible legal action or licensing fees.¹⁰⁴ If the current statute is read narrowly, the aforementioned organizations will be subject to liability.¹⁰⁵ The law fails to recognize the significant differences in the goals and means of certain organizations and even specifically states that summer camps are not exempt.¹⁰⁶ Although to date no suit has been litigated in a federal court to resolve this issue, it is a possibility that a suit of this nature could very well evolve in the near future.¹⁰⁷ The only obstacle to these kinds of suits appears to be based on public relations issues, rather than legal issues.

Under the current law, one of the most troubling results of the statute is that the courts are being asked to weigh the user's and the composer's interests in order to decide which is more valuable and worthy of protection. While it is understandable that a fact-finder will weigh the facts and balance the interests, this type of activity is dangerous in terms of the copyright statute in that Congress's lack of action and the statute's ambiguity will cause judges to make the ultimate decisions, rather than the statute itself. This is an issue that should be resolved by Congress. In order to reduce the chance of judicial activism, Congress should amend section 110 of the Copyright Act to provide for a new exemption for camping and service organizations.

In 1982, Congress added section 110(10) to the 1976 Act, which provides an exemption for certain fraternal organizations in connection with performance of nondramatic literary and musical works.¹⁰⁸ The reason for

104. See *supra* note 2 and accompanying text. During the summer of 1997, ASCAP and the American Camping Association reached an agreement calling for the camping association to pay \$1 per camp per year to use copyrighted songs. See *ASCAP and Camping Group Reach Agreement on Songs*, WALL ST. J., July 15, 1997, available in 1997 WL-WSJ 2427703. This news brief specifically addressed the crux of this Note, stating that ASCAP asserted that "camps that don't belong to the camping association may be subject to fees. But they won't have to pay 'if there is no direct or indirect economic gain from the performance of music.'" Thus, the debate continues to be unresolved for non-American Camping Association camps and organizations.

105. One newspaper article reported that John Miller, the executive vice president of the American Camping Association, concluded that all camps are "subject to licensing fees." See Kyle Niederpruem, *Music Royalty Fees Become Part of Camping Experience*, THE INDIANAPOLIS STAR, Aug. 23, 1996, available in 1996 WL 3154949. The article indicated that Miller originally dismissed ASCAP's demands, but after legal research, he found that ASCAP [and other organizations] were within their right to demand fees from the camping organization. See *id.*; see also *supra* notes 2 and 53 and accompanying text.

106. See *supra* note 60 and accompanying text.

107. When this issue first came to the public's attention, judging from the reactions by the press, people were most outraged by the comments of an ASCAP representative who among other things, said, "'they buy paper and glue for their crafts—they can pay for the music too' . . . If offenders keep singing without paying, 'we will sue them if necessary.'" Bannon, *supra* note 2, at A1; see also *supra* note 2 and accompanying text.

108. See 17 U.S.C. § 110(10) (1996). The statute reads:

(10) notwithstanding paragraph 4 above, the following is not an infringement of copyright:

this amendment was that Congress recognized the ambiguity within section 110(4) and sought to promote nonprofit activities and community service without unduly depriving composers and other artists of their rewards.¹⁰⁹ Congress specifically adopted this exemption to provide relief from copyright liability to organizations like the American Legion, Veterans of Foreign Wars, Elks, Kiwanis, Shriners and other nonprofit, fraternal organizations.¹¹⁰ They also indicated that this exemption is to apply to organizations whose primary function is to provide charitable service to the community and not whose primary function may be financial gain, social recreation, or political education.¹¹¹ Citing this language, it is clear that organizations like the Girl Scouts, whose primary functions are to provide service to the community and to offer opportunities for personal growth, should be made exempt from copyright infringement.

A new amendment should be modeled after section 110(10) and should address the ambiguities of the 110(4) exemptions. As mentioned, by enacting section 110(10), Congress recognized that ambiguities in the statute did exist and that some organizations did qualify for relief from infringement liability. The new amendment should read as follows:

(11) Notwithstanding paragraph four above, the following is not an infringement of copyright: performance of a nondramatic literary or musical work in the course of an activity which is organized and undertaken by a nonprofit camping or service organization to which the general public is not invited, provided the use is not for the purpose of financial gain. For purposes of this section, membership fees or incidental fees provided by members of such organizations would not constitute an admission charge.

Most importantly, the House Report concerning this new amendment should articulate the significant differences in the types of camps which

performance of a nondramatic literary or musical work in the course of a social function which is organized and promoted by a nonprofit veterans' organization or a nonprofit fraternal organization to which the general public is not invited, but not including the invitees of the organization, if the proceeds from the performance, after deducting the reasonable costs of producing the performance, are used exclusively for charitable purposes and not for financial gain. For purposes of this section the social functions of any college or university fraternity or sorority shall not be included unless the social function is held solely to raise funds for a specific charitable purpose.

Id.

109. See 128 CONG. REC. S13155 (daily ed. Oct. 1, 1982) (remarks of Sen. Thurmond).

110. See *id.* (remarks of Sen. Thurmond).

111. See *id.* (remarks of Sen. Zorinsky). By including this language, Congress is indicating that it recognizes that there are differences in nonprofit or charitable organizations. Further, Congress is stating that it recognizes that there are differences in the activities of fraternities and sororities, whose primary purpose is to provide social recreation. See *id.*

individuals attend. Such language would not exempt "for profit" camps that charge tuition or substantial attendance fees and whose primary goal is social recreation. Finally, the "open to the public" language of the new amendment would indicate that if these organizations were to perform a concert or recital they would still be subject to infringement suits. Because most campfires and weekend sing-alongs are not usually open to the general public, but are a part of the camping experience for a small number of individuals for the promotion of learning, recreation, and personal growth, these activities could now be protected.

VI. CONCLUSION

Currently, licensing organizations continue to expand the coverage of the copyright statutes in order to seek licenses from entities which historically have not been subject to licensing agreements. Most recently, this includes hotels, funeral parlors and local drinking establishments.¹¹² In its attempt to license almost every use of copyrighted material, it has now sought to control singing at campgrounds and summer camps throughout the nation. At present, there are many bills and laws both in Congress and in the state legislatures that are directed at curbing the power of licensing and performing rights societies.¹¹³ In the wake of such calls for reform, it is an appropriate time for Congress to address the exemption provisions and to articulate specific federal exemptions for nonprofit, recreational, and volunteer groups. If the current copyright laws are amended to reflect protection for nonprofit camping or service organizations, the legislation could clarify the issues and avoid the prospect of judicial activism in cases arising under federal copyright exemptions.

Even if legislation is not adopted to clarify the exemptions for nonprofit camping organizations, there is a strong possibility that the Girl Scouts and other organizations would be exempt from infringement actions. However, there is always the fear that issues could be misconstrued or left unresolved for future court attempts at resolution. Further, nonprofit camping and service

112. See *Change of Tune*, *supra* note 2.

113. For recent updates on licensing legislation, ASCAP has developed a page dedicated to reporting the status of various state and federal legislation. The page, *Legislative Matters*, is located at <http://www.ascap.com/legislative/legislative.html>. See also Mark Lowery, *Business Licensing Groups to Face Music in N.J.*, THE RECORD, NORTHERN NEW JERSEY, Oct. 3, 1996, available in 1996 WESTLAW 6110648; Robert Schwaneberg, *Music's Net Worth Seals Licensing Deal Copyright Confusion Solved by Web Sites*, THE STAR-LEDGER, NEWARK, N.J., Sept. 27, 1996, available in 1996 WL 11878972; Cam Simpson, *Committee Ok's Bill to Regulate 'Music Cops' Despite the Testimony of Songwriters, Agents Against House Bill 1018*, THE INDIANAPOLIS STAR, Jan. 24, 1996, available in 1996 WL 3118986.

organizations lack sufficient funds to pay for licensing fees. The result is that these organizations probably would have to discontinue their use of the material in order to avoid litigation or a judgment that they most likely could not afford. Thus, in order to resolve the current licensing debate, Congress must act now, for otherwise, the ambiguity will remain and the courts could one day be forced to act in Congress' place.

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