

## The Evolving Role of “For Profit” Use in Copyright Law: Lessons from the 1909 Act

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Copyright law in the United States has always involved a struggle for balance; a balance between granting rights to “authors” in their “writings” sufficient to provide the incentive to create and ensuring that those rights do not stifle the progress copyright law is designed to achieve. Whether described as designing “leaky rules” or designing rules that permit a certain amount of “free-riding,”<sup>2</sup> the copyright law must build in a balance in order to achieve its underlying purpose of progress in knowledge and learning. The “free-riding” permitted by the Copyright Act is not an accident,<sup>3</sup> but rather is integral to the design of an effective system meant to promote progress. The rights granted to copyright owners come at a cost borne the public in reduced access, use, and enjoyment of copyrighted works.

How the legal rules define that balance has transformed over time. At first the rights granted were narrow, and the hurdles necessary to achieve those rights significant.<sup>4</sup> Slowly, at first, the rights became greater and lasted for longer. A doctrine of “fair use” developed in the 1800s,<sup>5</sup> pushing back on the expansion of rights and making sure that the rights remained limited so that progress could be achieved. Today the rights granted to copyright owners have expanded to a point beyond the wildest dreams of the founding fathers and fair use is called upon to do more and more to achieve the desperately needed balance in copyright

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<sup>2</sup> See e.g., Brett M. Frischmann & Mark A. Lemley, Spillovers, 107 Colum. L. Rev. 257 (2007).

<sup>3</sup> See, e.g. Feist Publications, Inc. v. Rural Tel. Servs. Co., 499 U.S. 340 (1991) (the ability of others to use certain aspects of a work is “not some unforeseen by-product of a statutory scheme.”).

<sup>4</sup> The first copyright statute in the U.S. granted only “sole right and liberty of printing, reprinting, publishing and vending” and lasted for only 14 years with a possible additional 14-year renewal term. Copyright Act of May 31, 1790, ch. 15 § 1, 1 Stat. 124. To obtain these rights copyright owners had to comply with significant formalities of publication and registration. *Id.* at § 3.

<sup>5</sup> Folsom v. Marsh, 9 F. Case 342 (C.C.D. Mass. 1841) (No. 4,901).

law. Many have begun to talk openly and persuasively of the need for fundamental reform of the copyright system.<sup>6</sup>

As history shows us, there are many different ways to strike the proper balance between the rights granted to copyright owners and the limits on those rights that permit uses of copyrighted work. As we consider potential reforms, it is healthy to revisit how the Copyright Acts of the past attempted to achieve that balance and evaluate the success or failure of those attempts. This symposium, celebrating the 100th anniversary of the 1909 Act is the perfect opportunity to examine one such balance and its consequences: The requirement that public performances of certain works be “for profit” in order to infringe.

The 1909 Act differed from the copyright law we have today in many respects. One fundamental difference involves the role of the commercial nature of a defendant’s exploitation of a work. The transformation of copyright law from a law that regulated only commercial actors to one that regulates everyone, happened not only as a result of changes in technological developments, but also because of a fundamental shift in the definition of the rights granted to copyright owners. The 1909 Act stands in the middle of this change, with some rights granted to the copyright owner defined by the “for profit” nature of the use and others not so restricted.

Under the current statute, the commercial status of the defendant’s use is irrelevant to a determination of the prima facie case of infringement. Section 106 of the 1976 Copyright Act defines the rights granted to a copyright owner without reference to commercial exploitation. Instead, commerciality, or more accurately the non-commercial nature of a particular defendant’s use, plays a factor in a variety of limitations on the rights of a copyright owner, codified in sections 107 through 122.<sup>7</sup> These limitations are generally treated by courts as affirmative defenses with the burden placed on the defendant to prove the defense in order to prevail.<sup>8</sup> As an affirmative defense, non-commercial use might help “save” a defendant from liability for infringement. Commercial use is not part of the plaintiff’s prima facie

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<sup>6</sup> See, e.g., Utah Law Review *Symposium: Fixing Copyright*, Volume 27, issue 3 (2007). As others have observed, the Copyright Act undergoes complete revision every 50 years or so. By that calculation, the 1976 Act is due for reform in 2026. Many believe the technological advances experienced over the past two decades means we can’t wait that long. Reform is in the air.

<sup>7</sup> 17 U.S.C. 106 makes the rights granted to copyright owners expressly “[s]ubject to sections 107 to 122.”

<sup>8</sup> See, e.g. *Campbell v. Acuff-Rose Music, Inc.*, 519 U.S. 572, 590 (1994) (noting fair use is an affirmative defense and observing that a defendant would be unlikely to prevail without presenting “favorable evidence on relevant markets”).

case of infringement under the 1976 Copyright Act. It has not always been that way.

The 1909 Act expressly confined some aspects of the rights granted to a copyright owner to only for-profit uses. The 1909 Act provided the copyright owner of certain types of works the exclusive right to perform the work publicly *for profit*.<sup>9</sup> The types of works that obtained these limited public performance rights were musical works,<sup>10</sup> and lectures, sermons, addresses or similar productions.<sup>11</sup> For copyright owners of these types of works to prevail on a claim for invasion of the public performance right, they had to prove that the defendant’s public performance was “for profit.” Demonstrating the for-profit nature of defendant’s use was expressly a component of the plaintiff’s prima facie case of infringement. Under the 1909 Act other categories of copyrighted works were not granted a performance right at all, and one category of works, dramatic works, were granted a public performance right that was not restricted to only “for profit” performances. This varying treatment of the performance right is worth considering as we contemplate potential reforms of the current Copyright Act.

Part I of this article explores the 1909 Act and the legislative history, seeking to understand the purpose of the “for profit” limitation. The legislative history of that Act reveals three important related decisions with which those involved in shaping the Act were struggling. First was the raging debate concerning whether mechanical copies of musical works should be within the scope of the rights of a musical work copyright owner. Related to the question of mechanical copies was an understanding of the implied rights that a purchaser of sheet music obtained to perform a work. Finally, the legislative history demonstrates the drafters were concerned with the role of appropriate limitations on a copyright owner’s rights, particularly as those rights were being expanded beyond the core rights of reproducing and selling the work. The “for profit” limitation to public performance rights was meant to preserve a space for the free enjoyment of music by the public. These concerns were intertwined with Congress’ decision to limit certain performance rights to only those that were engaged in “for profit.” In the end, Congress was trying to shape the rights to ensure that what would constitute infringement were only those uses that interfered with commercial exploitation of the work by the copyright owner and thereby

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<sup>9</sup> Act of March 4, 1909, chap. 320, § 1 (e), 35 Stat. at L. 1075, Comp. Stat. 1913 § 9517.

<sup>10</sup> Act of March 4, 1909, chap. 320, § 1 (e), 35 Stat. at L. 1075, Comp. Stat. 1913 § 9517.

<sup>11</sup> Act of March 4, 1909, chap. 320, § 1 (c), 35 Stat. at L. 1075, Comp. Stat. 1913 § 9517.

affected the incentive to create new works. Defendant's "for profit" use was a proxy for those uses that would cause commercial harm to the plaintiff.

Part II explores the consequences of the congressional choice to grant rights to copyright owners that were limited to "for profit" uses. This part examines the judicial decisions that followed the enactment of the 1909 Act and the determination of what, exactly, it meant for a work to be "for profit" as technology changed. The decisions reflect that defendant's "for profit" use was considered as evidence of "free riding" by the defendant and thus worthy of an infringement determination. The subsequent attempts at legislative reform of the performance right are described at the end of Part II.

Recognizing and understanding the historical development of the significance of commercial or "for profit" use of a work should assist those seeking to rethink the role of copyright in a fully digitized world. Would it be best in the technological reality we face today to limit the rights of a copyright owner to only those activities that are "for profit"? Part III offers some observation for those considering potential reformulation of the rights granted to copyright owners. It suggests that one lesson the 1909 Act teaches is that a limitation to only "for profit" uses may quickly be broadened by the courts to encompass uses that only indirectly benefit the user and may cause no harm to the copyright owner. Such a limitation on the rights of a copyright owner invite courts to focus on the "free riding" qualities of the defendant's behavior. Instead, requiring copyright owners to show commercial harm for rights outside of the core copyright right may be a better approach.

## **I. The 1909 Act's Introduction of a "for profit" Limitation on The Rights of a Copyright Owner.**

The first copyright laws provided copyright owners with a single right: the right to print, publish, and vend the copyrighted work.<sup>12</sup> These rights were generally not divisible. The right to copy, in fact, was "merely a function of the right to vend the copyrighted work."<sup>13</sup> This set of exclusive privileges to control the printing and vending of a work was the core of copyright protection.

Copyright owners sought to expand their rights to include the reproduction and sale of modifications and abridgements. To ensure that the copyright owner's rights remained confined to only those activities

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<sup>12</sup> An Act for the Encouragement of Learning, 1710, 8 Anne, ch. 19 (Eng.); Copyright Act of May 31, 1790, ch. 15 § 1, 1 Stat. 124.

<sup>13</sup> L. Ray Patterson & Stanley W. Lindberg, *THE NATURE OF COPYRIGHT: A LAW OF USERS' RIGHTS* 147 (1991).

that would harm the marketable right, judges created a doctrine of fair use. As articulated in the mid 1800s by Justice Story, a fair use was one that did not “supersede the objects” of the copyrighted work. In other words, a fair use was one that did not interfere with the commercial exploitation of the copyrighted work.<sup>14</sup> As such, fair uses were not within the rights granted to a copyright owner. Copyright owners largely confined their lawsuits to those engaged in activities that would harm their commercial interests, knowing that fair use would prevent successful suits against others. This was the state of the copyright law when Congress took up the task of a general revision at the turn of the Twentieth Century.

The “for profit” limitation that eventually became a part of the 1909 Act involves the public performance right, thus some background on that specific right is necessary. Congress first added a right to control the public performance of a work fifty years before the first general revision bill was introduced. In 1856 Congress provided a federal public performance right, but only for “dramatic works.”<sup>15</sup> Recognizing the nature of dramatic works as ones that were not sold in copies but rather provided remuneration to their creators through performance, Congress thought a public performance right was appropriate.<sup>16</sup> In 1897, Congress extended the public performance right to musical works.<sup>17</sup> Congress did not limit the public performance rights added in 1856 or in 1897 to “for profit” public performance rights. Rather, these were general public performance rights.<sup>18</sup>

In the 1909 Act, however, Congress limited two separate rights recognized to “for profit” uses. Section 1 of the act provided:

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<sup>14</sup> *Folsom v. Marsh*, 9 F. Case 342 (C.C.D. Mass. 1841) (No. 4,901). This is, of course, a vastly over-simplified statement of the fair use doctrine of the 1800s. For a review of the contours of fair use during that time period, see L. Ray Patterson, *Free Speech, Copyright, and Fair Use*, 40 VAND. L. REV. 1, 38-40 (1987).

<sup>15</sup> 11 Stat. 138 (1859).

<sup>16</sup> H.R. Rep. 2222, Feb. 22, 1909, at 4; S. Rep. 1108 March 1, 1901. Reprinted in R. Fulton Brylawski, 6 LEGISLATIVE HISTORY COPYRIGHT ACT 1909 (1976).

<sup>17</sup> 29 Stat. 481 (1897).

<sup>18</sup> The distinction here is between “general” public performance rights and public performance rights that are limited by an additional requirement in the prima facie case, such as a “for profit” requirement. The distinction remains relevant today, although not as the result of a “for profit” limitation. Today, sound recordings are not granted a “general” public performance right. Instead the copyright owner of a sound recording is granted an exclusive right in public performances “by means of a digital audio transmission.” 17 U.S.C. §106(6). The distinction between general and limited public performance rights should not be confused with “grand” and “small” performance rights which concerns dramatic versus nondramatic performances. See Perrone, *Small and Grand Performing Rights? (Who Cared Before ‘Jesus Christ Superstar’)*, 20 J. Copyright Soc’y 19 (1972).

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

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(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;

....

(e) To perform the copyrighted work publicly for profit if it be a musical composition and for the purpose of public performance for profit . . . .<sup>19</sup>

The Copyright Act had not previously provided any public performance right for lectures, addresses, sermons and similar productions, often referred to as “works prepared for oral delivery.”<sup>20</sup> Thus, section 1(c) represented an expansion of the rights of copyright owners in those works. On the other hand, copyright owners of musical works, granted a public performance right less than ten years earlier, in 1897, now found that right limited to only public performances engaged in “for profit.”

A. “For profit” performances of musical works.

The initial draft memorandum bill had proposed a public performance right for musical works that was not limited to “for profit” performances.<sup>21</sup> This right, after all, had already been added to the Copyright Act in 1897.<sup>22</sup> However, the inclusion of the general public performance right for musical works in the memorandum draft bill was criticized by individuals that feared such an unrestricted right “would

<sup>19</sup> Act of March 4, 1909, chap. 320, § 1, 35 Stat. at L. 1075, Comp. Stat. 1913 § 9517.

<sup>20</sup> See, e.g., 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).

<sup>21</sup> U.S. Copyright Office Bull No. 10 (1905), reprinted in R. Fulton Brylawski, 2 Legislative History Copyright Act 1909 XXXII sec. 37(g) (1976).

<sup>22</sup> The House Report identified the purpose of the 1897 amendment:

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.

See H.R. Rep. No. 54-741, at 1 (1896).

unduly restrict the free enjoyment of music and thus interfere with legitimate public interests.”<sup>23</sup> The idea for a restriction to “for profit” public performances for musical works<sup>24</sup> appears to have first been suggested by a representative of the American Bar Association.<sup>25</sup> Mr. Arthur Steuart, testified before Congress that he had conferred with “many of the music publishers” and that “none of them have any objection to the introduction of the words ‘for profit.’”<sup>26</sup> He asserted that this clause would address the objections which had been made against the public performance right “by those who think it is too drastic a restraint upon the free enjoyment of music.”<sup>27</sup> He stated: “The thing to be protected is the business of the music publishers and not to cut off the public from the enjoyment of music which can be received or enjoyed by any mode in which it is publicly performed.”<sup>28</sup>

In part, the “for profit” limitation in the 1909 Act for public performances of musical works was wrapped up with battle raging for control of mechanical copying related to player piano rolls. The House Report explaining the pending bill demonstrates how the two issues were linked. After noting that “reproduction of a musical composition by any mechanical means for the purpose of giving a public performance is a question upon which light will probably be thrown by the decision of the Supreme Court,”<sup>29</sup> the committee report turned to the text of the bill. The committee “felt that the public performance of a musical composition without first obtaining the consent of the copyright proprietor should not be prohibited in all cases, but only when the public performance is for profit.” The committee did not indicate what, exactly, was meant by “for profit” but noted that this provision would “simply

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<sup>23</sup>Borge Varmer, Study No.16: Limitations on Performing Rights, in 2 Studies on Copyright 835, 838 (Copyright Society of the U.S.A. ed., 1963) (citing Hearings Before the House and Senate Committees on Patents on S. 6330 and H.R. 19853, 59th Cong., 1st Sess. (June 1906)).

<sup>24</sup> The “for profit” limitation itself was included in the draft bill, but applied only to works prepared for oral delivery category, lectures, sermons, addresses and similar productions. See section I.B. *infra*.

<sup>25</sup> Mr. Arthur Steuart was Chairman of the Copyright Committee of the American Bar Association. Richard Rogers Bowker, COPYRIGHT, ITS HISTORY AND ITS LAWS 371 (1912).

<sup>26</sup> Hearings Before the (Joint) Committees on Patents concerning S. 6330 and H.R. 19853, 59th Cong., 1st Sess. (Dec. 1906) at 162 (testimony of Mr. Arthur Steuart), reprinted in R. Fulton Brylawski, 4 LEGISLATIVE HISTORY COPYRIGHT ACT 1909 (1976).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> H.Rep. 59th Congress 2d session rep no. 7083 1/30/1907 p. 10. The report was referencing the then pending case of *White Smith Music Publ'g v. Apollo*, 209 U.S. 1 (1908).

prohibit the public performance for profit of copyrighted music without the consent of the proprietor by any means whatever, *whether mechanical or otherwise.*<sup>30</sup>

The connection between the mechanical copy issue and the public performance right was even more explicit in the Senate Report on the pending legislation. In exploring the rights proposed to be granted to musical work copyright owners, the Senate Report first takes up the issue of mechanical copies. The report justifies the expansion of copyright protection for musical work copyright owners to include mechanical copies:

The musical composer's work is meant to be uttered in sound, and if science has discovered a method of reproducing that sound, thus taking possession of the very soul and essence of a musical composer's work without the medium of actual printing, the musical composer is entitled to protection against this new and more complete form of appropriation quite as much as he is entitled to protection from a stage performance of his opera or orchestral performance of his symphony.<sup>31</sup>

The very next paragraph goes on to note that “[i]n another respect . . . the bill narrows the protection . . . accorded to musical compositions.” The Report points out that the prohibition against public performance was limited to public performances for profit and that musical composition copyright owners would need to expressly reserve that public performance right by a notice printed on published copies.<sup>32</sup> Thus, the “for profit” limitation was presented as a balance: some new rights were being granted, but some previous rights were being limited.

The requirement for reserving the public performance right through a required notice did not survive to final enactment. Its initial inclusion in the bill, however, is evidence that at the time of the debates leading to the 1909 Act there was a sense of an “implied right” to publicly perform a musical work when one purchased a copy of the work, for example in sheet music form.<sup>33</sup> In one of the two cases that eventually led to the Supreme Court’s decision in *Herbert v. Shanley*,<sup>34</sup>

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<sup>30</sup> *Id.* (emphasis added).

<sup>31</sup> S. Rep. 6187, 59th Cong. 2d Session at 4. Feb 5 1907. s. 8190

<sup>32</sup> *Id.*

<sup>33</sup> Jessica Litman, *War Stories*, 20 *Cardozo Arts & Entertainment Law Journal* 337, n. 70 and accompanying text (2002). Many copies of sheet music expressly stated that the purchaser of the sheet music had a license to publicly perform the musical work. See Bernard Korman, *Performance Rights in Music Under Sections 110 and 118 of The 1976 Copyright Act*, 22 *N.Y.L. SCH. L. REV.* 521, 523-24 (1977).

<sup>34</sup> 242 U.S. 591 (1917). See *infra* Section II.A.



the Second Circuit noted that “[w]hen the copyright proprietor of a musical composition sells printed copies of it to the public, the performing right goes with them.”<sup>35</sup> The implied right to perform a work that accompanied purchase of the sheet music is further supported by the fact that the bill presented to the House in 1907 would have required copyright owners to imprint the words “Right of public performance for profit reserved” on every published copy of a musical composition.<sup>36</sup>

How to handle the issue of mechanical copies clearly focused attention on the scope of rights granted to copyright owners of musical works. Technology had delivered a means for more widespread enjoyment of music. No longer was a trained musician needed to enjoy listening to a musical work, all that was needed was a machine and some perforated rolls. The implied right to perform a work that accompanied the purchase of sheet music was also up for debate. Just as technology offered the potential for bringing more music to the masses, copyright owners clamored for adequate compensation for their contribution to this enrichment of the public. The public performance right was part of the considerations for balancing appropriate compensation and appropriate free use by individuals in society. As the debates continued and the pending legislation wound its way through the committees of the House and Senate, Congress was attempting to craft a reasonable package of rights applicable to musical works. The “for profit” limitation was part of that overall package.

At the same time, the public performance right for dramatic works was not limited to “for profit” performances. In explaining this

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<sup>35</sup> *John Church Co. v. Hilliard Hotel Co.*, 221 F. 229, 230 (2d Cir. 1915). Arguably, as late as 1931, the Supreme Court still adhered to a notion of an implied license to perform a work from a lawful copy. In *Jewell-LaSalle Realty Co.*, 283 U.S. 191 (1931), the Supreme Court faced the question whether the acts of a hotel proprietor by making available to the guest through a radio receiver and speakers installed in the different rooms, was performing the musical works being broadcast by the radio stations. The case arose in the context of a musical composition that had been broadcast by the radio without permission of the copyright owner. Concluding that the hotel, as well as the radio station, was engaged in a public performance, the Court noted in a footnote that if the initial broadcast by the radio station had been authorized, “a license for its commercial reception and distribution by the hotel company might possibly have been implied. But [the radio station] was not licensed; and the position of the hotel company is not unlike that of one who publicly performs for profit by the use of an unlicensed phonograph record.” *Id.* at 199 n.5 (citations omitted).

<sup>36</sup> H.R. 25133 Section 15. The requirement to expressly reserve the public performance right through notice printed on the sheet music was deleted in the subsequent version of the bill. H.R. 28192 60th Cong. 2d Sess.; see also H. Rep. 2222 at 13 (“Since the right of public performance is as clearly incidental to the general right as is the right of translation or dramatization and is so treated in the bill, specific notice of it seems as little requisite as in the case of other subsidiary rights.”)

provision, the legislative history points to Congress' concern with the potential for certain uses to completely undercut the market for a dramatic works. The House Report notes that the author of a dramatic work typically did not publish copies of his work but instead "[h]is compensation comes solely from public representation of the work."<sup>37</sup> Congress believed that any public performance of a dramatic work would have a detrimental effect on the ability of the copyright owner to make a profit from his work. Only public performances of musical works that were "for profit" were thought to have that risk. In other words, the requirement that the public performance of the musical work be "for profit" was a proxy for those performances that were likely to interfere with the marketable right of the copyright owner.

The House and Senate Report on the final bill that became the 1909 Act clearly evidence keen awareness of the role of the balance copyright by the Committees. After clearly stating the constitutional basis for the Copyright Act and expressly acknowledge that copyrights are granted "[n]ot primarily for the benefit of the author, but primarily for the benefit of the public . . .",<sup>38</sup> the report turns to the balance in copyright law.

In enacting a copyright law Congress must consider, as has been already stated, two questions: Firsts, 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.<sup>39</sup>

#### *B. "For profit" performances of lectures, sermons and addresses*

The reason for the grant of a limited public performance right for other works, namely lectures, sermons, addresses or other similar productions is less clear. The right first appeared in the memorandum draft bill prepared at the earliest stages of the revision process.<sup>40</sup> There is

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<sup>37</sup> H.R. Rep. 2222, Feb. 22, 1909, at 4; S. Rep. 1108 March 1, 1901. Reprinted in R. Fulton Brylawski, 6 LEGISLATIVE HISTORY COPYRIGHT ACT 1909 (1976).

<sup>38</sup> *Id.* at 7 [H.R. Rep. 2222, Feb. 22, 1909, at 7. S. Rep. 1108 March 1, 1901. Reprinted in R. Fulton Brylawski, 6 LEGISLATIVE HISTORY COPYRIGHT ACT 1909 (1976).]

<sup>39</sup> *Id.*

<sup>40</sup> U.S. Copyright Office Bull No. 10 (1905), reprinted in R. Fulton Brylawski, 2 Legislative History Copyright Act 1909 XXXII sec. 37(g) (1976). This memorandum draft bill proposed a public performance right for musical works that was not limited to "for profit" performances. *Id.* sec. 37(f).

no indication as to why the right proposed was limited to “for profit” performances. The prior law had provided that “in the case of a dramatic composition” the copyright owner had the right “of publicly performing or representing it, or cause it to be performed or represented by others.”<sup>41</sup> The Senate Report notes the performance right for work for this new category of works was a “subsidiary privilege” with the rights of “printing, reprinting, publishing, copying and vending” identified as “the main privileges.”<sup>42</sup> The report also asserted that the subsidiary privileges recognized by the pending bill were “deemed within the contemplation of exiting law and supported generally by foreign legislation. . . .”<sup>43</sup> The House Report merely asserted that the addition of subsection c “secures the copyright protection to lectures, sermons, or addresses, etc., prepared for oral delivery.”<sup>44</sup> It offered no explanation for the inclusion of this new right.

As the work on copyright revision continued, the subsequent House Report indicated that “Paragraph (c) is new, but is believed to be a wise provision, and it needs no explanation.”<sup>45</sup> In the end, the legislative history for this new category of works is not particularly illuminating.<sup>46</sup> And, it would not be until the advent of widespread radio broadcasting, still years away, that this right would be relevant.

### *C. Other provisions referencing “for profit”*

The 1909 Act contained no definition of the phrase “for profit.” In contemplating what Congress intended this phrase to mean, it is helpful to consider the other instances in the 1909 Act where the “for profit” or “not for profit” nature of a defendant’s activity was relevant. Outside of the section defining the rights granted rights to copyright owners, the 1909 Act referred to the “for profit” nature of the defendant’s activities only in one other place: to define what constituted criminal infringement.

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<sup>41</sup> R.S. sec. 4952.

<sup>42</sup> Sen Rep. at 2. S. Rep. 6187, feb 5 1907 w/ s. 8190 59th Cong. 2d Session. The use of the word “privilege” should not go unnoticed. Considering the exclusive grants made to copyright owners as “privileges” instead of “rights” has a significant effect on how the entire system of copyright law is perceived. See, Oren Bracha, *The Ideology Of Authorship Revisited: Authors, Markets, And Liberal Values In Early American Copyright*, 118 YALE L. J. 186, 197-200 (2008).

<sup>43</sup> *Id.*

<sup>44</sup> H. Rep. at 9 H.Rep. 59th Congress 2d session rep no. 7083 1/30/1907.

<sup>45</sup> H. Rep. 2222, 60th Cong. 2d Sess. at 4.

<sup>46</sup> There was some testimony given that, for works prepared for oral delivery, a right to control performances was necessary as one would not likely attend a performance of such work more than once.

Section 28 defined criminal infringement as infringing acts engaged in “willfully and *for profit*.”<sup>47</sup> Congress had enacted the first criminal sanction for violating the federal copyright law less than ten years before the 1909 Act. In 1897 a provision creating criminal sanctions for unlawful public performances and representations of copyrighted dramatic or musical compositions also required that the infringement be done willfully and for profit.<sup>48</sup> The 1909 Act expanded the scope of criminal liability to include all types of copyrighted works and all categories of infringing activity.<sup>49</sup> The Act maintained both the mens rea element of willfulness and the requirement that the infringement be engaged in “for profit” to constitute criminal infringement.<sup>50</sup>

In addition to using “for profit” as one of the defining requirements for what constituted criminal infringement, section 28 also provided an exemption:

“[N]othing in this act shall be so construed as to prevent the performance of religious or secular works, such as oratorios, cantatas, masses, or octavo choruses by public schools, church choirs, or vocal societies, rented, borrowed, or obtained from some public library, public school, church choir, school choir, or vocal society, provided the performance is given for charitable or educational purposes and *not for profit*.”<sup>51</sup>

This exemption is odd because it relates only to performances of certain types of musical works and sermons, not the other categories of copyrighted works that were granted a public performance right, and it conditions the exemption on the performance being “not for profit.” If a public performance of any of the works specified were “not for profit” it would not have been within the rights granted to the copyright owners, let alone one that would constitute criminal liability.<sup>52</sup> Thus, the exemption would appear to be unnecessary.<sup>53</sup>

<sup>47</sup> 1909 Act § 28 (emphasis added).

<sup>48</sup> Act of Jan. 6, 1897, 29 Stat. 481 (1897).

<sup>49</sup> Copyright Act of Mar. 4, 1909, ch. 320, §28, 35 Stat. 1075, 1082.

<sup>50</sup> *Id.* See also, Lydia Pallas Loren, *Digitization, Commodification, Criminalization: The Evolution of Criminal Copyright Infringement and the Importance of the Willfulness Requirement*, 77 WASH. U. L. Q. 835, 837 (1999).

<sup>51</sup> 1909 Act, Section 28 (emphasis added).

<sup>52</sup> This would be true even if the “implied right” to perform the musical compositions was not applicable due to the rented or borrowed nature of the copies that section 28 references. If the performances were “not for profit” the activity would not constitute infringement.

<sup>53</sup> Indeed, the Register of Copyrights suggested as much in a report related to the efforts to revise the 1909 Act. REPORT OF THE REGISTER OF COPYRIGHT ON THE GENERAL

When trying to determine what “for profit” meant in the context of a musical work copyright owner suing for civil infringement under section 1(e) for an alleged “for profit” public performance, the Second Circuit, struggled with the meaning of this phrase in section 28. The court concluded that exception in section 28 “must contemplate the charge of an admission fee.”<sup>54</sup> If the performance were really “not for profit” it would be “perfectly lawful, both under section 1(e) and under the prior provision of section 28 itself.”<sup>55</sup> The court concluded that Congress intended “to permit certain high-class religious and educational compositions to be performed at public concerts where an admission fee is charged, provided the proceeds are applied to a charitable or educational purpose.”<sup>56</sup>

In an important study of the “for profit” limitation, undertaken as part of the revision process that led to the 1976 Copyright Act, the author of the study asserted that the arguments in favor of the “for profit” limitation centered on “the public interest in certain civic, education, and religious activities.”<sup>57</sup> In part, the support given for this statement was the express limitation on criminal sanctions contained in section 28 of the Act.<sup>58</sup> In reality, the legislative history reflects a concern for balance between the expanded rights being granted to musical work copyright owners and the “free enjoyment of music,”<sup>59</sup> and a desire to bring within the ambit of “infringement” only those activities that were likely to interfere with the commercial exploitation of a work.

## **II. Defining “For Profit” in the Courts**

Determining what constituted a “for profit” public performance, left undefined by the 1909 Act, did not take long to reach the courts. Initially, the scope of the public performance right was of most concern to copyright owners of musical works. While Congress had granted musical composition copyright owners an exclusive right to control public performances in 1897,<sup>60</sup> enforcing those rights on an individual

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REVISION OF THE U.S. COPYRIGHT LAW in 2 STUDIES ON COPYRIGHT 1199, 1227 (Copyright Society of the U.S.A. ed., 1963) (calling the provision “entirely superfluous”).

<sup>54</sup> *John Church Co. v. Hillard Hotel Co.*, 221 F. 229, 230 (2d Cir. 1915) rev’d sub nom. *Herbert v. Shanley*, 242 U.S. 591 (1917).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> Varmer *supra* n. 20 at 840.

<sup>58</sup> *Id.*

<sup>59</sup> See *supra* nn. 23-28 and accompanying text.

<sup>60</sup> 29 Stat. 481 (1897).

basis was difficult. Additionally, there was the lingering sentiment that those who purchased copies of the sheet music had the right to perform the music.<sup>61</sup> The requirement that the public performance needed to be “for profit” to come within the copyright owner’s control, was simply, another hurdle to overcome.

#### A. *Herbert v. Shanley Company*

In 1913, led by New York lawyer Nathan Burkan, musical composers and music publishers<sup>62</sup> founded the collective rights society known as ASCAP, the American Society of Composers, Authors and Publishers.<sup>63</sup> At first ASCAP attempted to convince hotels and restaurants to voluntarily enter into license agreements with ASCAP that would permit them to continue publicly performing the musical works owned by ASCAP members. Restaurants were not quick to sign up, believing their performances were not “for profit” as the 1909 Act required. It would take several lawsuits and ultimately the Supreme Court decision in *Herbert v. Shanley Company*<sup>64</sup> to convince them otherwise and establish the meaning of “for profit.”

Two different lawsuits were consolidated for that important Supreme Court decision. The first was the case Burkan filed on behalf

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<sup>61</sup> See supra n. 33-36 and accompanying text.

<sup>62</sup> Music publishers play an important role in the music industry, taking assignments of copyrights from composers and working to commercially exploit the musical works in whatever markets exist. See Lydia Pallas Loren, *Untangling the Web of Music Copyright*, 53 CASE WESTERN. R. L. REV. 673 (2003).

<sup>63</sup> Timothy Wu tells a different story of the founding of ASCAP:

In 1913, the legend goes, composer Victor Herbert was dining in New York’s Shanley’s Restaurant when the in-house orchestra struck up one of his songs, “Sweethearts.” He complained to the proprietor, who presented him with a theory of copyright liability: since no admission was being charged, the performance was not “for profit,” and the restaurant not guilty of infringement. Herbert was determined to prove him wrong and in 1914, with others, founded the ASCAP, a collection of 170 authors and composers of music, along with 22 publishers of sheet music. The ASCAP’s first target was the restaurant and the performance that had attracted Herbert’s ire.

Timothy Wu, *Copyright’s Communications Policy*, 103 MICH. L. REV. 278, 297-303 (2004) (footnotes omitted) (citing Edward Samuels, *THE ILLUSTRATED STORY OF COPYRIGHT* 41 (David Stanford Burr ed., Thomas Dunne Books 2000); Leonard Allen, *The Battle of Tin Pan Alley*, 181 Harper’s Mag. 514, 516 (1940); and 2 Melvin Nimmer, *NIMMER ON COPYRIGHT* § 8.19 (1988)). The first lawsuit was filed on behalf of John Philip Sousa’s music publisher against the Hillard Hotel. *John Church Co. v. Hillard Hotel Co.*, 221 F. 229, 230 (2d Cir. 1915) *rev’d sub nom. Herbert v. Shanley*, 242 U.S. 591 (1917). Two months *after* the court of appeals reversed the lower court’s decision denying a preliminary injunction in that suit, the lawsuit on behalf of Herbert was filed against Shanley. Paul Goldstein, *COPYRIGHT’S HIGHWAY* 69 (1994).

<sup>64</sup> 242 U.S. 591, 37 S.Ct. 232 (1917).

of the John Church Company, John Philip Sousa’s publisher.<sup>65</sup> The Hilliard Hotel Company had an orchestra playing in the dining room of the Hotel Vanderbilt in New York. That orchestra had played Sousa’s march “From Main to Oregon” without express permission from the John Church Company. The district court had granted a preliminary injunction against the hotel and the leader of the orchestra, concluding that the performances at the Hotel Vanderbilt were for profit. The Second Circuit reversed, concluding that “Congress seems to have meant by the words ‘for profit’ a direct pecuniary charge for the performance, such as an admission fee . . . .”<sup>66</sup>

In reaching this conclusion, the Second Circuit analyzed the different sections of the 1909 Act that referenced the “for profit” or “not for profit” nature of the defendant’s activity, trying to reconcile the potential inconsistency created by the exemption from criminal liability for certain performances given “not for profit.”<sup>67</sup> Additionally, the court noted the implied right to publicly perform the work: “[w]hen the copyright proprietor of a musical composition sells printed copies of it to the public, the performing right goes with them.”<sup>68</sup> Presumably, the hotel orchestra had purchased copies of the sheet music. The Court then stated that “[f]or the greater protection of the copyright proprietor, Congress” granted the exclusive right to perform the work publicly for profit.<sup>69</sup>

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<sup>65</sup> John Church Co. v. Hillard Hotel Co., 221 F. 229, 230 (2d Cir. 1915) *rev’d sub nom.* Herbert v. Shanley, 242 U.S. 591 (1917).

<sup>66</sup> John Church Co. v. Hilliard Hotel Co., 221 F. 229, 231 (2d Cir. 1915) *rev’d sub nom.* Herbert v. Shanley, 242 U.S. 591 (1917).

<sup>67</sup> The Court of Appeals examined three other sections of the statute to determine the meaning of “for profit.” First, it cited the provision concerning “coin-operated” machines. “The reproduction or rendition of a musical composition by or upon coin-operated machines shall not be deemed public performance for profit unless a fee is charged for admission to the place where such reproduction or rendition occurs.” From this the court concluded that because they are coin-operated they “are, of course, operated directly for profit.” *Id.* at 230. Next it cited section 28 concerning criminal infringement. The mention of “not for profit” in that section was the focus of the court’s concern. The court concluded that:

This proviso must contemplate the charge of an admission fee, because, if the performance is really ‘not for profit,’ it would be perfectly lawful, both under section 1 (e) and under the prior provision of section 28 itself. We must attribute a more plausible intention to Congress. We think it was to permit certain high-class religious and educational compositions to be performed at public concerts where an admission fee is charged, provided the proceeds are applied to a charitable or educational purpose.

*Id.* at 230. Finally, the court cited the penalties provision which, it concluded, would make each performer liable for the performance. *Id.* at 231.

<sup>68</sup> *Id.* at 230.

<sup>69</sup> *Id.*

The district court in *John Church Co. v. Hilliard Hotel* had pointed to the fact that the musicians playing the music were paid a fee for their services. From that fact the district judge concluded that “the hotel would not have paid for the playing of the piece, unless it were to gain something thereby.”<sup>70</sup> The Second Circuit rejected this reasoning by focusing on the effect on the public: “It does not make the performance any less gratuitous to an audience because some one pays the musician for rendering it, or because it was a means of attracting custom, or was a part of the operation of the hotel.”<sup>71</sup> Again focusing on the language of the statute, the Second Circuit worried that if it read “for profit” broadly to include merely making a business more attractive, churches that played music would be liable for infringement and, perhaps even imprisonment “because there is an expectation that the congregation will be increased by making the service more attractive.”<sup>72</sup> Clearly the district court was focusing on the “free riding” nature of the defendant’s activities. The Second Circuit, however, was focused on the language of the statute and the effect on the public’s free enjoyment of music.

Undeterred by the loss in the Second Circuit, Burkan filed a second suit two months later on behalf of composer Victor Herbert against the Shanley Company. Shanley ran a Manhattan theater-district restaurant with a floor show including performances of songs from the popular shows of the day. Professional singers had performed the song “Sweethearts” from a Herbert musical during its dinner on April 2, 1913, accompanied by an orchestra. The complaint alleged that the performances were open to the public and were “not given for a charitable, religious, or educational purpose, but for the purpose of the defendant’s business. . . .”<sup>73</sup> In its answer to the complaint, the defendant averred “that no charge for admission [was] made to the patrons of its restaurant, or for the privilege of listening to any performance of the music therein; that no additional charge is made for meals furnished in the restaurant at the time when such music is performed over the charge made when no music is performed . . . .”<sup>74</sup>

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<sup>70</sup> Interesting, the district court relied on an opinion from France involving a copyright owner who had reserved the public performance rights by printing notices on the copies of sheet music it sold. Those notices stated that while the public performance rights were reserved, performances that were “gratuitous” or “absolutely free” were permitted by the copyright owner. The French court pointed to the defendant’s payments to the musicians as evidence that the “license cannot justify what was done.” *Id.* at 231 (quoting *Sarpy v. Holland and Savage*, 99 L.T. 317).

<sup>71</sup> *Id.* Presumably the court is referring to “customers” not “custom”.

<sup>72</sup> *Id.*

<sup>73</sup> *Herbert v. Shanley Co.*, 229 F.340, 341 (1916), rev’d 242 U.S. 591 (1917).

<sup>74</sup> *Id.* at 342.



The district court dismissed the complaint.<sup>75</sup> Relying on its earlier ruling in the *John Church Co.* case, the court of appeals affirmed the rejection of plaintiff’s infringement claim concluding that the performance was not “for profit.”<sup>76</sup>

These two cases, *John Church Co. v. Hillard Hotel* and *Herbert v. Shanley Co.*, were consolidated on appeal to the Supreme Court. When the case arrived at the Supreme Court, it had been only eight years since the case of *White Smith Music Publ’g v. Apollo* involving player piano rolls.<sup>77</sup> In the interim, Congress had passed the 1909 Act.

The *Herbert* opinion is short, only three paragraphs long. The first two paragraphs are devoted to the facts and the proceedings below. The final paragraph contains the court’s full analysis of what it means for a public performance to be “for profit.” The paragraph itself is only ten sentences long. The Court did not concern itself with the conflict between section 1 and section 28 or arguments about implied rights to perform a work upon purchase of the sheet music, or the significance of the paid performers. Instead, citing no authority, statutory language, or legislative history, Justice Holmes’ decision succinctly opines what “for profit” must mean.

It is clear that the Court was concerned with protecting the monopoly granted to the copyright owners. The paragraph begins:

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.<sup>78</sup>

Defining “for profit” as the lower court had done in *John Church Co.* was too narrow a definition. The Court did not acknowledge that perhaps Congress meant to “imperfectly protect” this particular right of the copyright owner as a means of balancing the public’s interest in the free enjoyment of music.

Instead of any recognition of the balance for public use built into the 1909 Act, the Court expressed concern for free riding. The final paragraph continues:

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<sup>75</sup> 222 Fed. 344. The case was complicated by the fact that the musical composition was part of a larger dramatic work, copyright in which was not initially claimed.

<sup>76</sup> *Herbert v. Shanley Co.*, 229 F.340, 341 (1916), rev’d 242 U.S. 591 (1917).

<sup>77</sup> *White Smith Music Publ’g v. Apollo*, 209 U.S. 1 (1908).

<sup>78</sup> *Herbert v. Shanley Co.*, 242 U.S. 591, 594 (1917).

The defendants' performances are not eleemosynary. 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.<sup>79</sup>

The importance of this one paragraph to the development of copyright law cannot be understated. It has been cited by over 70 federal court decisions and its effect has even reached beyond the borders of the United States to influence outcomes in copyright cases in other countries.<sup>80</sup> Immediate reaction in the scholarly literature appeared favorable.<sup>81</sup>

The Court relies on facts not in evidence to determine that the public performances at The Shanley and the Hilliard Hotel were "for profit." First, The Court believes that the public does, in fact, pay for the music, through the prices charged for the food, as it "*probably* could be got cheaper elsewhere."<sup>82</sup> There was no evidence cited for this proposition. Next, the Court notes that these types of performances and others like them "*might* compete with and even destroy the success of the monopoly that the law intends the plaintiffs to have."<sup>83</sup> The legislative history demonstrates that the monopoly the law intended the plaintiff to have was not absolute. The potential harm to the copyright owner of "for profit" performances was the concern, not free riding by the public. In fact, evidence indicates that the free enjoyment of music was what Congress thought it was protecting by including the "for profit" restriction. The "for profit" character was meant to be a proxy for whether the monopoly, in fact, would be negatively affected. Instead, the Court used the *potential* negative effect to be a proxy to justify characterizing the performance as "for profit."

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<sup>79</sup> Herbert v. Shanley Co., 242 U.S. 591, 594-95 (1917).

<sup>80</sup> See, e.g., Society of Composers, Authors & Music Publishers of Canada v. 348803 Alberta Ltd., 1997 CarswellNat 2832, 79 C.P.R. (3d) 449 (Fed. T.D. Jul 03, 1997).

<sup>81</sup> "As a case of first impression it would seem that the decision, although unsupported by authorities, is correct." 26 YALE L.J. 417 (1917).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

*B. Subsequent Court Opinions*

The next line of cases to confront the “for profit” limitation involved motion picture theaters. *Harms v. Cohen*<sup>84</sup> was one of the first to reach the courts. Citing *Herbert v. Shanley Co.*, the Second Circuit rejected the defendant’s argument that the performance was not “for profit” because no separate charge was made to listen to the music. Rather, the court concluded, the performance was “for profit.” While *Harms v. Cohen* involved silent pictures with live music played as an accompaniment, the ruling there was extended in subsequent cases involving the playing of records to accompany silent films,<sup>85</sup> and, ultimately to sound films.<sup>86</sup>

Once courts established that restaurants and hotels, along with theaters, were engaged in “for profit” performances, the next challenge came with the advent of radio broadcasts. The initial cases concerned music played over the airwaves. In light of the Supreme Court’s ruling in *Herbert v. Shanley*, the courts had little trouble finding any commercial enterprise engaged in broadcasting musical works to be “for profit.”<sup>87</sup> As one court noted, citing the *Herbert* opinion, “[i]t suffices . . . that the purpose of the performance be for profit, and not eleemosynary.”<sup>88</sup> This ruling was subsequently extended to cover even nonprofit broadcasters who used revenue from commercial sponsors to defray expenses with private donations covering remaining expenses.

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<sup>84</sup> *Harms v. Cohen*, 279 F. 276 (E.D. Pa. 1922) (music performed in motion picture theater was not incidental, but “for profit”).

<sup>85</sup> *Irving Berlin, Inc. v. Daigle*, 31 F.2d 832 (5th Cir. 1929).

<sup>86</sup> *Famous Music Corp. v. Melz*, 28 F.Supp. 767 (W.D. La. 1939). *Famous Music Corp.* involved a sound film that was not authorized to include the musical work in question. Had the inclusion of the musical work been authorized, it is unlikely the result would have been the same. For a period of time ASCAP sought licenses from film theaters for the exhibition of films and the related public performances of the musical works they embodied. Subsequent consent decrees barred ASCP from seeking such licenses. ASCAP Domestic Consent Decree, Civil Action No. 13-95, amended final judgment, entered March 14, 1950, section IV subsection E.

<sup>87</sup> See, e.g., *M. Witmark & Sons v. L. Bamberger & Co.*, 291 F. 776 (D.N.J. 1923) (finding department store’s broadcasts to be “for profit”, noting the periodic broadcast of the store’s famous slogan); *Jerome H. Remick & Co. v. American Automobile Accessories Co.*, 5 F.2d 411 (6th Cir. 1925) (finding radio manufacturer that operated a radio station as part of its business to be engaged in a public performance for profit).

<sup>88</sup> *Jerome H. Remick & Co. v. American Automobile Accessories Co.*, 5 F.2d 411 (6th Cir. 1925).

The broadcast of musical works during the commercially sponsored programs was “for profit.”<sup>89</sup>

In 1963, the Register of Copyrights opined that as a result of a number of court decisions the phrase “for profit” had a “fairly well-defined meaning.”<sup>90</sup> The Register stated that “[a] public performance may be ‘for profit,’ even though no admission fee is charged, if it is given in furtherance of a commercial enterprise.”<sup>91</sup> If, on the other hand, the performance were “given by a charitable, educational, or similar organization, with no motive of private gain” it would not be “for profit.”<sup>92</sup> One commentator has suggested that “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.”<sup>93</sup> Under this conception of the struggle, authors’ rights to control the uses of their works emerged victorious.

### C. Attempts at legislative reform

In response to complaints of unauthorized radio broadcasts of books and poems,<sup>94</sup> Congress amended the 1909 Act in 1952 to provide

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<sup>89</sup> *Associated Music Publishers, Inc. v. Debs Mem’l Radio Fund, Inc.*, 141 F.2d 852, 855 (2d Cir. 1944) (holding that “it is unimportant whether a profit went to charitable or educational causes, the performance was for profit”).

<sup>90</sup> REPORT OF THE REGISTER OF COPYRIGHT ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW in 2 STUDIES ON COPYRIGHT 1199, 1227 (Copyright Society of the U.S.A. ed., 1963).

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* The report notes that this would be true “even though the performance was part of a fund-raising event.” *Id.* The holding in *Associated Music Publishers, Inc. v. Debs Mem’l Radio Fund, Inc.*, 141 F.2d 852, 855 (2d Cir. 1944), however, puts this statement in doubt.

<sup>93</sup> Julien H. Collins III, *When in Doubt, Do Without: Licensing Public Performances By Nonprofit Camping or Volunteer Service Organizations Under Federal Copyright Law*, 75 Wash. U. L.Q. 1277, 1287 n.44 (1997).

<sup>94</sup> Herman Finklestein, *The Copyright Law: A Reappraisal*, 104 U. Pa. L. Rev. 1025, 1062 (1956). The case often cited as inciting this amendment is *Kreymborg v. Durante*, 21 U.S.P.Q. 557 (S.D.N.Y. 1934), involving a poet who sued Jimmy Durante and NBC for singing and broadcasting three of his poems. The court dismissed the complaint because:

[u]nder the present Copyright Act, protection against public performance or delivery of copyrighted works is afforded only in the case of a lecture, sermon, address, or similar production, a drama, or a musical composition. Other copyrighted works may be recited in public for profit without infringement. The point is of some moment, now that radio broadcasting of novels, poems and so on is widespread. Nevertheless, it is recognized that except as to the classes of copyrighted works referred to above, the author under the existing

copyright owners of “nondramatic literary works” a public performance right. The first bill proposing this right placed the right in the section that granted public performance rights to dramatic works, and thus did not limit the right to “for profit” performances. The Copyright Office suggested that the right be limited to only “for profit” public performances. The Copyright Office’s concern related to the consequences of granting an unlimited public performance right:

This might have the result that a teacher reading excerpts from a copyrighted textbook in a schoolroom, a minister reading from a literary work in a church, a scientist at a convention, or a speaker at a civic meeting would be held to have infringed the copyright. It may be questioned whether such a result would be in the public interest.<sup>95</sup>

While representatives of several authors groups criticized the suggested limitation to “for profit” performances,<sup>96</sup> ultimately, Congress included the “for profit” limitation for public performances of nondramatic literary works.<sup>97</sup> The House Report reflects the sentiments expressed by the Copyright Office concerning the reasons for the limitation.<sup>98</sup>

All other attempts at revision of the public performance right were unsuccessful. There were some proposals to expand the “for profit” limitation to all categories of copyrighted works.<sup>99</sup> Other bills sought to leave the “for profit” limitation in place but provide additional exemptions for certain types of performances.<sup>100</sup> There were also attempts to remove the “for profit” limitation, and replace it with

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statute cannot complain of public performance of his copyrighted works.

Kreymborg, 21 U.S.P.Q. at 557-58 (citation omitted).

<sup>95</sup> Hearing Before Subcommittee No. 3 of the Judiciary Committee, House or Rep., 82d Cong., 1st Sess. (1951) at 14 (letter of Mr. Arthur Fisher, Acting Register of Copyrights April 26, 1951).

<sup>96</sup> Hearing Before Subcommittee No. 3 of the Judiciary Committee, House or Rep., 82d Cong., 1st Sess. (1951) at 12 (John Schulman, representing the Author’s League of America); at 26-27 (Herman Finkelstein, representing ASCAP); at 36-37 (Arthur E. Farmer, representing the American Book Publishers Council, Inc.).

<sup>97</sup> 66 Stat. 752 (1952).

<sup>98</sup> H.R. Rep. No. 1160, 82d Cong., 1st Sess. 1 (1951).

<sup>99</sup> S. 3985, 72d Cong., 1st Sess. (1932); S. 3047, 74th Cong., 1st Sess. (1935) (expanding the “for profit” limitation to all but dramatic and dramatico-musical works); S. 3043, 76th Cong., 3d Sess. (1940)(same).

<sup>100</sup> H.R. 12549, 71st Cong. 2d Sess., §(1)(d) (1930) (exempting performances of musical works by “churches, schools, and/or fraternal organizations, provided the performance is given for charitable or educational or religious purposes, unless a fee is charged for admission to the place where the music is so used.”).

specific, narrow exemptions.<sup>101</sup> The exemptions sought included exemptions for public performances by churches, public schools, and charitable and fraternal organizations.<sup>102</sup> None of these attempts were successful. Until the complete revision of the Copyright Act in 1976, the public performance right remained limited to only certain works and for some of those works the right remained limited to only “for profit” public performances.

The 1976 Copyright Act granted general public performance rights to all works. The House Report on the final bill provided the rationale for the elimination of the “for profit” requirement:

The line between commercial and “nonprofit” organizations is increasingly difficult to draw. Many “nonprofit” 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. In addition to these trends, it is worth noting that performances and displays are continuing to supplant markets for printed copies and that in the future a “not for profit” exemption could not only hurt authors but could dry up their incentive to write.<sup>103</sup>

Following the 1976 Act, a plaintiff copyright owner was no longer required to plead or prove that a performance was “for profit” to prevail in its prima facie case of copyright infringement.<sup>104</sup>

To balance the public interest in access and enjoyment of the performance of copyrighted works, in addition to codifying the fair use doctrine,<sup>105</sup> Congress codified a set of exemptions from the public performance right in section 110. Some of the express and specific exemptions now codified in section 110 began as proposed limitations in the course of earlier attempts to eliminate the “for profit” requirement.<sup>106</sup> The section 110 exceptions are specific, not only as the right being limited but also to the type of work to which the exemption applied. Some of the exemptions require no “direct or indirect commercial

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<sup>101</sup> See, e.g. H.R. 11258, 68th Cong., 2d Sess. (1925); S. 4355, 68th Cong., 2d Sess. (1925); H.R. 10434, 69th Cong. 1st Sess. (1926); H.R. 6990, 71st Cong., 2d Sess (1929).

<sup>102</sup> See generally, Borge Varmer, Study No.16: Limitations on Performing Rights, in 2 Studies on Copyright 835, 852-59 (Copyright Society of the U.S.A. ed., 1963).

<sup>103</sup> H.R. Rep. No. 1476, 94th Cong., 2d Sess. 62–63 (1976).

<sup>104</sup> See *Almo Music Corp. v. 77 East Adams, Inc.*, 647 F. Supp. 123 (N.D. Ill. 1986); *LaSalle Music Publishers, Inc. v. Highfill*, 622 F. Supp. 168 (W.D. Mo. 1985).

<sup>105</sup> 17 U.S.C. § 107.

<sup>106</sup> See *supra* nn. 99-102 and accompanying text.

advantage” be obtained by the performance.<sup>107</sup> In many of the exemptions, however, the “for profit” distinction is present in the inverse – for the exemption to be applicable the entity engaged in the performance must be a “nonprofit” institution.<sup>108</sup>

The Supreme Court has expressly held that fair use is an affirmative defense.<sup>109</sup> Lower courts have further construed the limitations on the performance right codified in section 110 as affirmative defenses,<sup>110</sup> thus placing the burden on the defendant to prove the elements of any of these express limitations on the public performance right. Additionally, several of these performance exemptions are tied to the nature of the entity, not the nature of the activity. Entities that are “for profit” are disqualified from those exemptions.<sup>111</sup>

### **III. Lessons to Learn from the 1909 Act Experience**

Following enactment of the 1909 Act, it took only seven years for the seminal case concerning the “for profit” requirement to reach the Supreme Court. The interpretation of that statutory phrase, done with no reference to other provisions in the statute or earlier caselaw, was as clear as it was broad. If the defendant was publicly performing copyrighted works and was profiting in any way while engaged in such

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<sup>107</sup> See, e.g., §§ 110(4), (8) & (9).

<sup>108</sup> See, e.g., 17 U.S.C.A. §§ 110(1), 110(2) (exemption for certain activities of a “nonprofit educational institution”), § 110(6) (exemption for certain activities of a “nonprofit agricultural or horticultural organization”); §110(10) (exemption for certain activities of a “nonprofit veterans’ organization or a nonprofit fraternal organization”). Outside of § 110, other limitations on the rights granted to copyright owners require examination of the nonprofit character of the use or entity engaged in the alleged infringement. See., e.g., 17 U.S.C.A. § 107 (requiring inquiry into whether the use at issue is for “nonprofit educational purposes” in determining fair use); 17 U.S.C.A. §§ 111(a)(5), 112(b), (c) & (d) (requiring a “nonprofit organization”); 17 U.S.C.A. § 111(f) (requiring a “noncommercial educational station”); 17 U.S.C.A. § 118(g) (requiring a “noncommercial educational broadcast station” or a “nonprofit institution or organization”).

<sup>109</sup> *Campbell v. Acuff-Rose Music, Inc.*, 519 U.S. 572, 590 (1994).

<sup>110</sup> See, e.g., *U.S. Songs, Inc. v. Downside Lenox, Inc.*, 771 F.Supp. 1220, 1226 (N.D.Ga. 1991); *Broadcast Music, Inc. v. Claire’s Boutiques, Inc.*, 754 F.Supp. 1324, 1327 (N.D.Ill. 1990).

<sup>111</sup> “[R]egardless of whether the alleged infringer actually profited from the performance itself, ‘a profit-making enterprise which publicly performs copyrighted musical compositions is deemed to do so for profit.’” *U.S. Songs, Inc. v. Downside Lenox, Inc.*, 771 F.Supp. 1220, 1226 (N.D.Ga. 1991) (citing *Gnossos Music v. DiPompo*, 13 U.S.P.Q.2d 1539, 1540 (D.Me.1989)). Also an enterprise is considered to be a profit-making enterprise even if it never actually makes a profit. *Bourne Co. v. Speeks*, 670 F.Supp. 777, 779 (E.D.Tenn. 1987).

performances, the “for profit” requirement was satisfied. The ease in meeting this requirement meant that copyright owners needed only to litigate the “for profit” issue when new means of technologically engaging in a performance became available. Beyond the new technology cases, the issue of whether a performance was “for profit” faded into the background. Public performances that did not meet the Supreme Court’s broad interpretation were not pursued by copyright owners. The “for profit” requirement became a non-test.<sup>112</sup>

The legislative history of the 1909 Act demonstrates a concern for striking an appropriate balance between permitting free enjoyment of music and allowing copyright owners sufficient protection for their marketable rights.<sup>113</sup> In granting what was seen as the “subsidiary right” to control public performances, Congress was attempting to ensure the protection of the “principle rights” was not undermined through new or different means of exploitation. At the same time, Congress was sensitive to the rights of the public to enjoy the fruits of the copyright system, such as the free enjoyment of music. By focusing on “for profit” public performance Congress had intended to encompass within the copyright owners’ right the activities that were most likely to cause commercial harm and affect the copyright incentive.

The courts promptly turned this attempt at balancing the public interest into a focus on the “free riding” nature of the defendants’ activities. It is understandable that this would happen. In the context of a dispute between two parties, one with a right granted by federal law and one who appears to be benefiting from using a creative work in some manner, instinct may be to protect the party who owns the right and construe that right broadly.<sup>114</sup> It is difficult in the context of a dispute between two parties to recognize the public interest at stake, to recognize the need for balance and Congress’ attempt to strike that balance by limiting the nature of the right granted. Congress’ use of the defendant’s “for profit” character as a proxy for commercial harm, caused the courts to focus on the benefit obtained by the defendant. Because copyright law is not based on natural law rights, a benefit to a user that does not harm a copyright owner is a use that should be permitted.<sup>115</sup>

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<sup>112</sup> Admittedly, by shaping the behavior of copyright owners, the “for profit” limitations was important in establishing some boundaries on the public performance rights of certain copyright owners. Those boundaries, however, turned out to reach quite far.

<sup>113</sup> See supra nn. 23-28 and accompanying text.

<sup>114</sup> This is consistent with a restitutionary impulse. Wendy J. Gordon, *On Owning Information: Intellectual Property and the Restitutionary Impulse*, 78 Va. L. Rev. 149, 196-204 (1992).

<sup>115</sup> Such use is, in fact, a Pareto improvement. See, Christina Bohannon, *Copyright Harm, Foreseeability, and Fair Use*, 85 WASH. U. L. REV. 969, 973 (2007).



The most important lesson that we can learn from the history of the 1909 Act’s “for profit” limitation is that if Congress desires to limit a right to only uses that will affect the copyright incentive, Congress should avoid the use of a proxy for commercial harm. The “for profit” limitation was meant to limit the right to those performances that had the most potential to cause damage to the copyright owner. Instead, a reformulation of rights that requires a defendant’s use to cause commercial harm to the copyright owner before it will be considered infringing would avoid the problems that come with the use of a proxy.<sup>116</sup>

Some may argue that this is, in fact, what the 1976 Act accomplished through the fair use doctrine’s fourth factor inquiry into the harm to the “potential market for or value of the copyrighted work.”<sup>117</sup> However, by granting a broad general public performance right to all copyright owners with no limitation on the scope of the right itself, the courts have interpreted the nature of the defendant’s activities to be part of the inquiry into affirmative defenses. By inquiring into market harm in the context of an affirmative defense, the defendant must show the *absence* of market harm, rather requiring the plaintiff to show the *presence* of such harm.<sup>118</sup> The fourth factor of the fair use analysis is a step in the right direction, but the shoe is on the wrong foot. Instead, for uses that are not within the core of the right granted to copyright owners, a copyright owner should be required to demonstrate the potential of commercial harm as a result of the defendant’s use. The 1909 Act had the burden in the right place, but evidence of a defendant’s “for profit” use was really a proxy for commercial harm.

Thus, the second important lesson from the 1909 Copyright Act is that a limitation meant to cabin a particular right of the copyright owner should be built into the right itself.<sup>119</sup> The copyright owner is in

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<sup>116</sup> The nonprofit character of the defendant’s use, despite commercial harm shown by the plaintiff, might be reason to provide an exemption in the style of an affirmative defense. The justification for such a defense lies in the social policy choice to permit certain uses. For example, certain performances by a nonprofit veterans group, even if commercial harm is shown, might nonetheless be exempted based on favoring greater ability for veterans to engage in public performances of musical works. See, e.g., 17 U.S.C. § 110(10) (exemption certain performances that are “organized and promoted by a nonprofit veterans’ organization”).

<sup>117</sup> 17 U.S.C. 107(4).

<sup>118</sup> The Supreme Court clearly places the burden on the defendant when it states that the defendant would have difficulty prevailing on the defense of fair use with out “favorable evidence concerning relevant markets.” *Campbell v. Acuff-Rose Music*, 519 U.S. 572, 590 (1994).

<sup>119</sup> Arguably, fair use was initially part of the test for infringement and thus not, strictly speaking, an affirmative defense. See *Folsom*, 9 F.Cas. at 345-49. It is also possible to read the structure of the 1976 Copyright Act as requiring that any applicable limitations

the best position to provide the evidence of commercial harm caused or potentially caused by the defendant's use.<sup>120</sup> Therefore, a formulation of rights that requires demonstration of commercial harm for subsidiary rights would best be implemented if the burden were initially placed on the copyright owner.

Defining what constitutes sufficient commercial harm is not without its difficulties. Currently a similar difficulty is encountered in the circularity problem found in the determination of market harm required by the fourth factor of the fair use analysis.<sup>121</sup> Requiring a plaintiff demonstrate commercial harm would shift that problem to the plaintiff's prima facie case. For example, a plaintiff could attempt to argue that commercial harm is demonstrated because the defendant failed to pay the license fee that the plaintiff desires to charge for that use. As with the circularity problem currently experienced in fourth factor fair use analysis, the courts would need to recognize attempts by copyright owners to merely expand their monopoly beyond the rights granted, versus legitimate evidence of harm that will affect the incentive to create new works. Focusing on the foreseeability of that harm and its effect on the incentive to create new works would be consistent with the underlying aim of copyright law.<sup>122</sup> In judging such evidence of commercial harm, courts should be more cautious in the context of subsidiary rights. Copyright law is meant to provide a marketable right to facilitate recouping the costs associated with the creation of the work, thereby encouraging the investment in the creation of new works. While it may be tempting to think that "if some is good, more is better,"<sup>123</sup> this

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be disproved by the copyright owner. Section 106 makes that the rights granted therein are "subject to" the sections containing the limitations, while the limitation sections invariable provide that the limits are "notwithstanding" the rights granted to the copyright owner. 17 U.S.C. §§ 106, 107. This is not, however, how the Supreme Court and the lower courts have interpreted these provisions.

<sup>120</sup> Christopher Springman, *Copyright and the Rule of Reason*, Draft 2009.

<sup>121</sup> See, e.g., *Am. Geophysical Union v. Texaco*, 60 F.3d 913, 929 (2d Cir. 1994); *Princeton Univ. Press v. Mich. Document Servs.*, 99 F.3d 1381, 1387 (6th Cir. 1996). Scholars have written about this circularity problem, see, e.g. Mark A. Lemley, *Should a Licensing Market Require Licensing?*, 70 L. & CONTEMP. PROBS. 185 (2007); Lydia Pallas Loren, *Redefining the Market Failure Approach to Fair Use in an Era of Copyright Permission Systems*, 5 J. INTEL. PROP. L. 1 (1997).

<sup>122</sup> Christina Bohannon has made this suggestion in the context of the fair use analysis. Christina Bohannon, *Copyright Harm, Foreseeability, and Fair Use*, 85 WASH. U. L. REV. 969 (2007). See also, Shyamkrishna Balganesh, *Foreseeability and Copyright Incentives*, 122 HARV. L. REV. (forthcoming, 2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1117655](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1117655). Wendy Gordon had suggested such a focus on foreseeability in the context of requiring a "competitive nexus" for proof of the tort of misappropriation. See Gordon, *supra* n. 114 at .

<sup>123</sup> Determining what constitutes a derivative work that should be within the control of the copyright owner is one area where this type of thinking is pronounced. See, e.g.,

conception, ignores the cost incurred in providing more protection. That cost can result in a reduction of new works created, as well as a reduction in the overall “progress” that copyright law seeks to achieve.

The final lesson of the 1909 Act’s limitation of the public performance right to “for profit” public performances is more subtle and yet is probably the most significant. Some rights granted to copyright owners are the primary rights and should be protected without a showing of commercial harm. Other rights, however, are properly viewed as subsidiary rights – extra protection meant to ensure that the primary rights are not undercut by advances in technology that permit new uses that supplant the commercial value of the primary rights. The 1909 Act did this by granting the subsidiary right of public performance to musical works and works prepared for oral delivery, explicitly acknowledging the subsidiary nature of the public performance right.<sup>124</sup> In the context of such subsidiary rights the law should recognize a prima facie case of copyright infringement only when the copyright owner can demonstrate commercial harm.

### **Conclusion**

As history shows us, there are many different ways to strike the proper balance between the rights granted to copyright owners and the limits on those rights that permit uses of copyrighted work. It is healthy to revisit how the Copyright Acts of the past attempted to achieve that balance and evaluate the success or failure of those balances. The limitation to “for profit” public performances for certain copyrighted works under 1909 Act was intended as a balance permitting some “free enjoyment” of certain types of copyrighted works, including musical compositions. Congress intended the requirement of “for profit” to limit the expanded rights of a copyright owner to only those activities that would harm the copyright owner and interfere with the incentive to create. Focusing on the character of the defendant’s use was a proxy for determining harm. The lessons of the 1909 Act teach us that if we desire to limit the subsidiary rights of a copyright owner to only those uses that cause harm to the creation incentive, we should require the copyright owner to offer some proof of that harm.

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Paul Goldstein, *Derivative Rights and Derivative Works in Copyright*, 30 J. COPYRIGHT SOC’Y U.S.A. 209, 216-17 (1983).

<sup>124</sup> See supra nn. 39-40 and accompanying text.