

# Music Streaming: Where Interactive & Non-Interactive Services Fit Under the Homestyle Exemption

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# MUSIC STREAMING: WHERE INTERACTIVE & NON-INTERACTIVE SERVICES FIT UNDER THE HOMESTYLE EXEMPTION

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## ABSTRACT

*When business owners play music in their establishments, they have either appropriately purchased a public performance license or they are playing the musical composition without permission from the rights holder, ultimately violating the Copyright Act. Business owners commonly use what is known as the Homestyle Exemption, giving them the ability to forego purchasing a license, assuming they can meet the exemption's requirements. Before the era of music streaming, terrestrial radio was the popular way to consume music, which is reflected in the Homestyle Exemption's requirement that the music be radio broadcast. Today's business owners are taking advantage of other music services on the market, services that would not fit under the provisions of the Homestyle Exemption. Congress specifically delineated terrestrial radio under this exception, because it believed allowing such usage within the business would not hurt an artist's record sales. Non-interactive streaming services should be similarly viewed. These services likewise are not detrimental to an artist's career, but achieve the same goals outlined by Congress in the Homestyle Exemption, and should be viewed as another way to consume music in the business under this exception.*

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## INTRODUCTION

When a retail establishment, bar, or restaurant streams the newest Taylor Swift hit, Sam Smith ballad, an all-time favorite, “Don’t Stop Believin’,” or any copyrighted music, the business is required to pay a license fee for engaging in a public performance of the musical composition.<sup>1</sup> Had the business been playing the radio, it would have had the opportunity to qualify for the Homestyle Exemption, outlined in section 110(5), which allows small businesses, determined by square footage, to forego purchasing a license.<sup>2</sup> In the case of streaming services, some owners may believe either that their subscription covers their obligation to pay or that the Homestyle Exemption applies.<sup>3</sup> In either instance, these intuitions are likely not correct.<sup>4</sup> The statutory language of the exemption necessitates that the music be originated by the radio in order for a business to qualify.<sup>5</sup> Still, because the statute has not been updated to reflect music streaming technology, ambiguity exists as to whether certain services may qualify under this provision of the exemption.<sup>6</sup>

To remedy this issue, Congress should amend the language within section 110(5) by clarifying that the Homestyle Exemption applies to non-interactive streaming services. This revision would serve Congressional interests by creating a response to the presence of new technology and maintaining the equitable balance between artists and business owners originally contemplated in codifying the exemption.

## I. BACKGROUND

*A. Rights Within A Musical Work*

Music is protected within copyright law under chapter 17 of the United States Code.<sup>7</sup> Section 102(a) of the Copyright Act

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<sup>1</sup> JOURNEY, DON’T STOP BELIEVIN’ (Columbia Records 1981).

<sup>2</sup> See 17 U.S.C. § 110(5)(A)–(B) (West 2002).

<sup>3</sup> Ganka Hadjipetrova, When Should a Small Business Pay ASCAP or BMI?, The Palo Alto Area Bar Association (Oct. 13, 2011), <https://www.paaba.org/2011/10/when-should-small-business-pay-ascap-or-bmi/> [<https://perma.cc/SRU6-YSDJ>].

<sup>4</sup> See McGraw, *infra* Part III.

<sup>5</sup> See § 110(B).

<sup>6</sup> See Hadjipetrova, *supra* note 3.

<sup>7</sup> See 17 U.S.C. §§ 101–14 (2012).

defines certain “works of authorship” that may be protected.<sup>8</sup> Within the scope of a single song two “works of authorship” exist. Protection is given to “musical works, including any accompanying words”<sup>9</sup> and “sound recordings.”<sup>10</sup> A musical work, often called the composition, protects the musical arrangement and accompanying words or lyrics paired together.<sup>11</sup> Sound recordings protect the fixed musical recording in the tangible form where it is embodied.<sup>12</sup> Both of these “works of authorship” are granted protection once they are “fixed in any tangible medium of expression.”<sup>13</sup> A composition’s tangible form would be the sheet music or phonorecord, while the sound recording’s tangible form is the master recording, CD, or audio file.<sup>14</sup> With two separate copyrights per song, multiple parties may hold ownership rights in both the composition and sound recording.<sup>15</sup>

For these copyright owners, six exclusive rights are granted to them and defined in section 106 that, taken together, define the scope of ownership rights in each “work of authorship.”<sup>16</sup> By defining each right as exclusive, the law makes clear that should anyone else purport to exercise these rights without authorization, he or she would be behaving impermissibly.<sup>17</sup> The public performance right is the exclusive right implicated when a business plays music without obtaining permission from the copyright holders.<sup>18</sup> To perform is defined as “to recite, render, play, dance, or act [ ], either directly or by means of any device or process ....”<sup>19</sup> To perform in public means:

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<sup>8</sup> 17 U.S.C. § 102 (1990).

<sup>9</sup> § 102(a)(2).

<sup>10</sup> § 102(a)(7).

<sup>11</sup> *See* § 102(a)(2).

<sup>12</sup> *See* § 102(a)(7).

<sup>13</sup> *See* § 102(a).

<sup>14</sup> *See id.*

<sup>15</sup> On the composition side, a publishing company and songwriter may split ownership rights. On the sound recording side, the record label, artist, producer, and feature artists may split ownership rights.

<sup>16</sup> 17 U.S.C. § 106 (2002). Works of authorship defined under § 102 are granted the rights under § 106. *See id.*

<sup>17</sup> ROBERT BRAUNEIS & ROGER E. SCHECHTER, COPYRIGHT: A CONTEMPORARY APPROACH 227 (2nd ed. 2018).

<sup>18</sup> *See* § 106(4).

<sup>19</sup> 17 U.S.C. § 101 (2010).

to perform ... at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or ... to transmit or otherwise communicate a performance ... of the work to a place ... by means of any device or process....<sup>20</sup>

Section 106(4) creates a public performance right in the composition if the work is performed publicly.<sup>21</sup> For example, if a business owner plays Taylor Swift's album "Reputation"<sup>22</sup> through a CD player for use within the establishment, the performance right of the composition is implicated because the composition's underlying music and lyrics are embodied in the recorded album.<sup>23</sup> Section 106(6) creates a public performance right if the sound recording is performed publicly through a digital audio transmission.<sup>24</sup> If the business plays the "Reputation" album by way of Pandora, both the composition and sound recording copyright are implicated. Because the performance right in the composition and the digital performance right in the sound recording are exclusive rights, business owners must obtain permission from the rights holders in order to perform the works through the business speaker system.<sup>25</sup> In an instance where the public performance implicates both composition and sound recording, as in the example above, approval is necessary from each party.<sup>26</sup>

However, within the business establishment context, an owner would not need to purchase a license for use of the sound recording copyright, because the streaming service (such as Pandora or Spotify) pays the rights holders directly for use and transmission of the sound recording. The fee calculations are determined by reference to section 114 and the streaming service's classification as a transmission service.<sup>27</sup> This eliminates the business

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<sup>20</sup> *Id.*

<sup>21</sup> § 106(4).

<sup>22</sup> TAYLOR SWIFT, REPUTATION (Big Machine Records 2017).

<sup>23</sup> *See* § 106.

<sup>24</sup> § 106(6).

<sup>25</sup> *See id.* § 106.

<sup>26</sup> *See* § 106(4), (6). Because exclusive rights are created in both the composition and the sound recording, separate entities may own each one. Therefore, permission is necessary from each one. *See* § 106(4).

<sup>27</sup> *See* 17 U.S.C. § 114 (2010). Transmission services are classified as either interactive, non-interactive, or radio. Interactive services negotiate their licenses

owner's obligation with respect to the sound recording copyright, meaning the public performance of the composition is the only copyright that must be accounted for.

*B. The Homestyle Exemption—Origin & Roots*

A business is not required to purchase a public performance license for use of a musical composition if the business can meet certain requirements.<sup>28</sup> The “Homestyle Exemption” outlined in section 110(5)(A) of the Copyright Act gives small businesses the ability to play radio music through home-like equipment for customers without having to receive the permission of the musical composition rights holder, ultimately not infringing their public performance right.<sup>29</sup> It was created to protect the use of merely turning on a radio or television in a public space.<sup>30</sup>

§110—Limitations on exclusive rights: Exemption of certain performances and displays

Notwithstanding the provisions of section 106, the following are not infringements of copyright:

(5)(A) except as provided in subparagraph (B), communication of a transmission embodying a performance or display of a work by the public reception of the transmission on a single receiving apparatus of a kind commonly used in private homes<sup>31</sup>

The language and foundational argument first contemplated in creation of the Homestyle Exemption grew from a Supreme Court decision in 1972, *Twentieth Century Music Corporation v. Aiken*.<sup>32</sup>

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directly with the sound recording holder to obtain a license on mutually agreed upon terms. BRIAN T. YEH, CONG. RESEARCH SERV., RL33631, COPYRIGHT LICENSING IN MUSIC DISTRIBUTION, REPRODUCTION, AND PUBLIC PERFORMANCE 12 (2015). Non-interactive services are subject to the statutory license scheme, set by the Copyright Royalty Board, which is collected by SoundExchange. *Id.* at 26. Finally, terrestrial radio (AM or FM), are exempt entirely from needing a public performance license for the sound recording. *Id.* See also H.R. REP. NO. 104-274, at 5–9 (1995); *id.* at 22–23.

<sup>28</sup> See 17 U.S.C. § 110(5) (2005).

<sup>29</sup> Yvette Joy Liebesman, *When Does Copyright Law Require Technology Blindness? Aiken Meets Aero*, 30 BERKELEY TECH. L.J. 1383, 1389 (2015).

<sup>30</sup> See *id.*

<sup>31</sup> § 110(5)(A).

<sup>32</sup> 422 U.S. 151 (1975); Liebesman, *supra* note 29, at 1397.

In *Aiken*, a musician rights' organization sued Aiken for playing their copyrighted music without a license in his Pittsburgh chain of take-out restaurants, "George Aiken's Chicken," violating the 1909 Copyright Act.<sup>33</sup> His stores could hold a maximum of forty people at a time, while normal radio programming and music were broadcast through a small transmitter radio connected to four speakers.<sup>34</sup> Justice Stewart, writing for the Court, recognized the technological state of the world in 1972 had changed drastically since the 1909 Copyright Act defining public performance was drafted, leaving the question of whether the reception of a radio broadcast qualified as infringement of the public performance right.<sup>35</sup> He noted, "When technological change has rendered its literal terms ambiguous, the Copyright Act must be construed in light of [the Act's] purpose."<sup>36</sup> The Court weighed in its decision the ambiguities of the public performance right as displayed through a radio broadcast while balancing the practicability of enforcing a ruling that would affect many in Mr. Aiken's position.<sup>37</sup>

When the 1909 Act was drafted, long before the electronic advancements concerning the *Aiken* court, radio broadcast was far from maturity, and television had yet to be invented.<sup>38</sup> At that point, the public performance right was thought to protect unauthorized performances in public spaces such as, concert halls, theaters, and restaurants.<sup>39</sup> Should a performance occur without the permission of the copyright holders, the orchestra or singers performing the copyrighted piece, along with the facility that sponsored the performance, would be clear infringers under the statute.<sup>40</sup> The question that the Court considered in *Aiken* is analogous to determining the nature of liability conferred upon the audience members in the public performance above. Would the audience members, by hearing the copyrighted work, themselves

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<sup>33</sup> *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 152–53 (1975). This case was decided under the 1909 Copyright Act, which was the precursor to the 1976 Copyright Act, which is now the applicable law.

<sup>34</sup> *Id.* at 152.

<sup>35</sup> *See id.* at 156 n. 7.

<sup>36</sup> *Id.* at 156.

<sup>37</sup> *Id.* at 162.

<sup>38</sup> *Id.* at 156 n. 7.

<sup>39</sup> *Twentieth Century Music Corp.*, 422 U.S. at 159.

<sup>40</sup> *Id.*

be simultaneously “performing,” and thus be guilty of infringement?<sup>41</sup> The Court concluded this answer is clearly no.<sup>42</sup> “[T]hose who listen do not perform and therefore do not infringe.”<sup>43</sup> Additionally, the court reaffirmed the conclusion given in *Jerome H. Remick & Co. v. American Automobile Accessories Co.*,<sup>44</sup> holding that a radio performance is no less public because listeners are not gathered together in one space or able to communicate with one another; these listeners are akin to the members of the audience.<sup>45</sup>

In writing the Court’s opinion, Justice Stewart reconciled two cases seemingly in opposition to one another. The resolution of these cases and the points of view from which they come became the skeletal structure for what would soon be the Homestyle Exemption.<sup>46</sup> First, in *Buck v. Jewell-Lasalle Realty*,<sup>47</sup> the Supreme Court held that a hotel owner who installed and played radio music throughout the hotel’s common areas and private rooms did engage in a public performance.<sup>48</sup> Neither the hotel owner had permission from the copyright holders to play the music, nor did the radio broadcaster have a license to play *any* copyrighted music.<sup>49</sup> The Court recognized the possibility that had the radio broadcaster had permission, the hotel owner may not have created a public performance, a question it held for later.<sup>50</sup> Second, in *Fortnightly Corp v. United Artists Television, Inc.*,<sup>51</sup> the Supreme Court determined that Fortnightly, a community antenna television company (CATV) that transmitted broadcast television through CATV antennas

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<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

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

<sup>44</sup> *Jerome H. Remick & Co. v. American Automobile Accessories Co.*, 5 F.2d 411, 411–12 (6th Cir. 1925).

<sup>45</sup> *Twentieth Century Music Corp.*, 422 U.S. at 159.

<sup>46</sup> See Liebesman, *supra* note 29, at 1393.

<sup>47</sup> *Buck v. Jewell-Lasalle Realty*, 283 U.S. 191 (1931).

<sup>48</sup> Liebesman, *supra* note 29, at 1391. The Court took special note that the hotel owner installed the radio receivers for the entertainment of his guests. See *id.* Entertaining others seemed to lead to the clear conclusion of a public performance. See *id.*

<sup>49</sup> See *id.*

<sup>50</sup> *Twentieth Century Music Corp.*, 422 U.S. at 160.

<sup>51</sup> *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968), *overruled by American Broadcasting Companies, Inc. v. Aereo, Inc.*, 134 S. Ct. 2498 (2014) (discussing how Congress clarified their interpretation of “perform” in the 1976 Copyright Act to hold liable both the viewer and broadcaster).

located on hills<sup>52</sup> to its West Virginia customers who could not receive broadcasts through ordinary antennas positioned on the roof, were not engaging in a public performance.<sup>53</sup> The Court reasoned that CATV only made it more possible to view the broadcast, merely delivering electronic signals and not visible images.<sup>54</sup> In an effort to consider this problem through the lens of the original copyright statute, the Court compared *Fortnightly*'s contribution to that of a theater or motion picture exhibitor with an audience.<sup>55</sup> In a television broadcast sense, the "audience member" does more than passively observe the performance, unlike an audience member at the theater or motion picture.<sup>56</sup> The television broadcast viewer must provide the equipment necessary to convert the electronic signals into viewable images.<sup>57</sup> While broadcasters, as discussed in *Jewell-LaSalle*, perform, viewers do not.<sup>58</sup> In respect to this point, the *Fortnightly* Court draws their distinction between the "active performer and passive beneficiary" in considering the line between broadcaster and viewer.<sup>59</sup> The Court concluded CATV was a passive beneficiary, because if an individual had erected an antenna on a hill and strung cables connecting an amplification system, precisely what CATV did, the individual would not be performing the content that was received.<sup>60</sup>

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<sup>52</sup> These antennas functioned differently from a common over-the-air broadcast, based on the hilly terrain typical of rural West Virginia. *See Fortnightly Corp.*, 392 U.S. at 391–92. What *Fortnightly* created were "connecting coaxial cables, strung on utility poles, to carry the signals received by the antennas to the home television sets of individual subscribers." *Id.* at 392.

<sup>53</sup> Liebesman, *supra* note 29, at 1391–92.

<sup>54</sup> *Twentieth Century Music Corp.*, 422 U.S. at 161.

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

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

<sup>57</sup> *Id.*

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

<sup>59</sup> *Id.* The *Fortnightly* Court held neither the viewer nor *Fortnightly* were broadcasters because each were only passively engaging. *Twentieth Century Music Corp.*, 422 U.S. at 161. However, when the 1976 Copyright Act was enacted, a major goal was to reject this part of *Fortnightly*. *American Broadcasting Companies, Inc. v. Aereo, Inc.*, 134 S. Ct. 2498, 2500 (2014). Under current law, both broadcaster and viewer would be considered "performing," which will be discussed later in this article. *See infra* Section I.B. The specific distinction at issue in *Fortnightly* is further clarified in the Transmit Clause, which is encompassed in definitions section 101 within the term "publicly."

<sup>60</sup> *Twentieth Century Music Corp. v. Aiken*, 500 F.2d 127, 134 (3d Cir. 1974). The Supreme Court relied on the Court of Appeal's reasoning in deciding the

The *Aiken* Court thus concluded that by switching on the radio, Aiken never performed the musical compositions similarly to Fortnightly.<sup>61</sup> While the *Aiken* court did not expressly overrule *Jewell-LaSalle*, its application was limited to only unlicensed, retransmitted broadcasts.<sup>62</sup> It was the Court's fear that attempting to enforce a ruling among individuals operating businesses similar to Mr. Aiken's would be practically unenforceable.<sup>63</sup> The Court recognized that holding a radio or television broadcast in places like George Aiken's Chicken as engaging in a public performance would adversely affect "bars, beauty shops, cafeterias, car washes, dentists' offices, and drive-ins," thus fostering a monopoly, allowing copyright holders to maintain all the benefits of their work, and leaving little for the interest of the public.<sup>64</sup> Balancing protection for both, the composer and the public, is the Copyright Act's main objective in creating protection for music.<sup>65</sup>

### C. Codification of the Homestyle Exemption

In 1976, Congress drafted a general revision to the Copyright Act to address the technical advances that developed over the past half century.<sup>66</sup> As the U.S. House of Representatives report on the Copyright Act revision mentions, significant changes in technology were affecting the operation of copyright law, and new legislation was needed to confront current realities and future changes.<sup>67</sup> Congress responded to the *Aiken* decision by enacting a "homestyle" exemption.<sup>68</sup>

Although Congress agreed with the *Aiken* court's holding, it disagreed with the rationale.<sup>69</sup> While Congress wanted to create a carve-out for businesses like George Aiken's Chicken, it was not

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*Aiken* case. Justice Stewart references the language from the Third Circuit multiple times in his own opinion.

<sup>61</sup> *Twentieth Century Music Corp.*, 422 U.S. at 161.

<sup>62</sup> H.R. REP. NO. 94-1476, at 86 (1976).

<sup>63</sup> *Twentieth Century Music Corp.*, 422 U.S. at 162.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 163-64.

<sup>66</sup> See H.R. REP. NO. 94-1476, at 1. These advances included television and radio broadcasting, which Justice Stewart mentioned in *Aiken*.

<sup>67</sup> *Id.*

<sup>68</sup> Liebesman, *supra* note 29, at 1397.

<sup>69</sup> *Id.* at 1398.

willing to limit the public performance right to do so.<sup>70</sup> Instead of defining a “public performance” in a narrower way to achieve the policy goals which the *Aiken* court intended to maintain, Congress preserved the scope of the exclusive right and approved the exception for performances to the public on common “home-like” equipment.<sup>71</sup> Ultimately, the Homestyle Exemption specified certain kinds of public performances were exempt from license fees instead of defining public performance in a way that would have limited the exclusive rights of the copyright holder.<sup>72</sup> According to the Congressional Report, the goal in enacting section 110(5) was to exempt “small business commercial establishments whose proprietors merely bring onto their premises standard radio or television equipment and turn it on for their customers’ enjoyment.”<sup>73</sup> However, the statute would impose liability if the sound system was of commercial quality, or if standard equipment had been converted into a more sophisticated amplification system, both of which run counter to the ordinary equipment in Mr. Aiken’s restaurant.<sup>74</sup>

Much litigation has occurred over the intricacies of the Act’s language, primarily centered on the nature and quantity of the audio or television equipment.<sup>75</sup> For example, the exemption identifies “a single receiving apparatus of a kind commonly used in private homes.”<sup>76</sup> The courts’ analysis has focused on the type

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<sup>70</sup> See H.R. REP. NO. 94-1476, at 87.

<sup>71</sup> *Id.*

<sup>72</sup> By failing to call Aiken’s situation a public performance, the rule may have shifted, eventually chipping away at the core of the public performance right as time and technology progressed. See Liebesman, *supra* note 29, at 1386. Under this approach, Congress still achieved their goal by allowing certain public performances to occur without needing permission from the rights holder. See *id.* at 1400.

<sup>73</sup> H.R. REP. NO. 94-1476, at 87.

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

<sup>75</sup> See generally *Cass County Music Co. v. Muedini*, 55 F.3d 263 (7th Cir. 1995) (discussing what counts as a single receiving apparatus commonly used in private homes, and holding that for each situation, a case-by-case analysis must take place); *Springsteen v. Plaza Roller Dome, Inc.*, 602 F. Supp. 1113 (N.C. 1985) (concluding the size of the facility and number of speakers are not the only factors in determining whether the exemption applies).

<sup>76</sup> 17 U.S.C. § 110(5)(A) (2005).

of audio equipment the music played on,<sup>77</sup> meaning if the personal address system were something a typical homeowner would use, there would be no copyright violation.<sup>78</sup> However, as equipment improved with the advent of new technologies like Bluetooth, the bright-line divide between what kinds of technology follows under the exemption became more difficult.<sup>79</sup>

#### *D. Most Recent Revision to the Homestyle Exemption*

The American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music Inc. (BMI) are organizations responsible for collecting musical composition license fees and distributing them to artists.<sup>80</sup> These Performing Rights Organizations (PROs) are non-profits in place to support rights holders looking to get paid by offering blanket licenses to the businesses and organizations that play music publicly.<sup>81</sup> After the Homestyle Exemption was enacted, business owners became frustrated with PROs, believing they were able to double-dip in receiving license fees<sup>82</sup> because royalties were already paid for by the broadcast radio, television, and cable stations.<sup>83</sup> The restaurant, bar, and small business trade associations lobbied Congress to create an amendment explicitly speaking to small commercial establishments' secondary use of broadcast music.<sup>84</sup> In response to their efforts, Congress passed the Fairness in Music Licensing Act (FIMLA), which adds additional language to the exemption for performance of nondramatic musical works:<sup>85</sup>

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<sup>77</sup> See *id.*; Laurence R. Helfer, *World Music on a U.S. Stage: A Berne/Trips and Economic Analysis of The Fair in Music Licensing Act*, 80 B.U. L. REV. 93, 96 (2000).

<sup>78</sup> § 110(5)(A).

<sup>79</sup> *Id.* Advances in technology allowed access to equipment that was otherwise exclusively for qualified usage. *Id.* at 145.

<sup>80</sup> See ASCAP (Oct. 15, 2018), <http://www.ascap.com> [<https://perma.cc/5RDR-S5WF>]; see also BMI (Oct. 15, 2018), <http://www.bmi.com> [<https://perma.cc/7H8C-QTKW>]. Sound Exchange is the non-profit organization responsible for licensing the sound recording.

<sup>81</sup> See *id.*

<sup>82</sup> *Id.* at 116–17.

<sup>83</sup> *Id.* at 96.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

§110(5)(B) communication by an establishment of a transmission or retransmission embodying a performance or display of a nondramatic musical work intended to be received by the general public, originated by the radio or television broadcast station licensed as such by the Federal Communications Commission, or, if an audiovisual transmission, by a cable system or satellite carrier, if ...<sup>86</sup>

The requirements for the exemption primarily focus on the building specifics and the speaker system:

§110(5)(B)(i) [I]n the case of an establishment other than a food service or drinking establishment, either the establishment in which the communication occurs has less than 2,000 gross square feet of space (excluding space used for customer parking and for no other purpose), or the establishment ... has ... more ... and

§110(5)(B)(ii) in the case of a food service or drinking establishment, either the establishment in which the communication occurs has less than 3,750 gross square feet (excluding space used for customer parking and for no other purpose), or the establishment ... has ... more ... and....<sup>87</sup>

Not only must businesses meet the square footage requirement, they must also adhere to the usage of a limited number of loudspeakers used to project the music.<sup>88</sup> “§110(5)(B)(i)(I) if the performance is by audio means only, the performance is communicated by means of a total of not more than 6 loudspeakers, of which not more than 4 loudspeakers are located in any 1 room or adjoining outdoor space ....”<sup>89</sup>

The statute also compels the use of a specific kind of music played by the business owner. The language states the music must be “*originated by a radio or television broadcast station licensed as such by the Federal Communications Commission, or, if an audiovisual transmission, by a cable system or satellite carrier ....*”<sup>90</sup>

As music technology has continued to evolve, the exemption’s specific language today is failing to address new changes,

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<sup>86</sup> 17 U.S.C. § 110(5)(B) (2005). The provision creates a performance exemption for audiovisual displays as well. *See id.*

<sup>87</sup> § 110 (5)(b)(i), (ii) (2005).

<sup>88</sup> *See id.*

<sup>89</sup> § 110(5)(b)(i)(I), (ii)(I).

<sup>90</sup> § 110(B) (emphasis added).

leaving room for a variety of plausible interpretations. Under the statute's current composition, it is unclear whether an internet radio service like Pandora falls under the meaning of radio, or whether it may be interpreted as an audiovisual transmission by a satellite carrier.<sup>91</sup> Currently, there is no litigation addressing this issue, leaving the relevant parties without a precedent to guide their interpretation of the statute.

## II. CURRENT ISSUE DEFINED

When the Homestyle Exemption was codified and the Digital Millennium Copyright Act (DMCA) was passed, a law focused on bringing copyright law up to speed with the outgrowth of internet, streaming music services were barely on the horizon.<sup>92</sup> Now, over twenty years later, music streaming is a part of the conversation.<sup>93</sup> Streaming service platforms have no shortage of users.<sup>94</sup> Users have the ability to select from a variety of services offering both free and paid premium subscriptions.<sup>95</sup> Some of the market's leaders include: SoundCloud at 175 million users, Spotify at 170 million users, iHeartRadio at 100 million users, Pandora at 74 million users, and Apple Music at 50 million users.<sup>96</sup> Totaling 569 million users, it is apparent that music streaming has significant relevance within this industry.

Nielsen, a data analytics company that tracks music entertainment consumption, released their music mid-year report

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<sup>91</sup> See § 110(B).

<sup>92</sup> Compare Digital Millennium Copyright Act (DMCA), 17 U.S.C.A. §§ 512, 1201–05, 1301–32 (1998) (showing 1998 as the year this law was enacted), with John Patrick Pullen, *Everything You Need to Know About Spotify*, TIME (June 3, 2015), <http://time.com/3906839/spotify-tips/> [<https://perma.cc/H3ZS-83A4>] (showing how music streaming service Spotify did not even begin until 2008 and is still growing in popularity). The legal gaps the DMCA sought to fix in 1998 have changed in the last twenty years with Spotify's continued popularity. See *id.*

<sup>93</sup> Hugh McIntyre, *The Top 10 Streaming Services By Number of Users*, FORBES (May 25, 2018, 9:15 AM), <https://www.forbes.com/sites/hughmcintyre/2018/05/25/the-top-10-streaming-music-services-by-number-of-users/#1adddd35178> [<https://perma.cc/YX4X-LLA8>].

<sup>94</sup> See *id.*

<sup>95</sup> See *id.*

<sup>96</sup> *Id.*

in July of 2018.<sup>97</sup> Its data reveals that music streaming volume for the 2018 mid-year point is up 45 percent as compared to July of 2017.<sup>98</sup> In terms of listening time, 41% of consumers are choosing the various forms of streaming for their consumption, up from 32 percent in 2015.<sup>99</sup> In both 2015 and 2017, only 24 percent to 26 percent of consumers were choosing terrestrial and satellite radio.<sup>100</sup>

Music streaming is separated into two distinct categories: interactive and non-interactive. What separates one from the other is the user's control. Interactive streaming is characterized by its ability to create an on-demand experience, where a user is given complete control to play any content at the very moment the user chooses it.<sup>101</sup> This capability is the digital equivalent of walking into a Best Buy, selecting a CD, putting it into a CD player, and starting it at the exact track the user desires, except the customer only pays a low monthly fee instead of the price of the album, and the store never closes. Spotify and Apple Music are two choices for this kind of experience, and some of the most well-known interactive services.<sup>102</sup> Non-interactive streaming creates a more traditional radio experience for the user.<sup>103</sup> Content is pre-determined based on a few limited choices the user inputs, such as a genre of music or artist name.<sup>104</sup> Pandora and iHeartRadio serve users looking for this experience.<sup>105</sup>

To illustrate the different user experiences between the two versions of streaming, imagine you, as the user, would like to hear Justin Timberlake's album, "Man Of The Woods."<sup>106</sup> On

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<sup>97</sup> *Mid-year Report U.S. 2018*, NIELSEN MUSIC 2 (2018).

<sup>98</sup> *Id.* at 6.

<sup>99</sup> Ed Christman, *Nielsen 360 Study Finds Consumers Love Streaming Music, But Radio Still Strong*, BILLBOARD (Nov. 15, 2017), <https://www.billboard.com/articles/business/8031468/nielsen-music-360-2017-report-streaming> [<https://perma.cc/M3U7-F5UX>].

<sup>100</sup> *Id.*

<sup>101</sup> See YEH, *supra* note 27, at 12.

<sup>102</sup> APPLE MUSIC, <https://www.apple.com/apple-music/> [<https://perma.cc/ASX2-LMQ5>]; SPOTIFY, <https://www.spotify.com/us/premium/?checkout=false/> [<https://perma.cc/JV2B-PEVR>].

<sup>103</sup> See YEH, *supra* note 27, at 13.

<sup>104</sup> See *id.*

<sup>105</sup> See iHeartRadio, <https://www.iheart.com/> [<https://perma.cc/A8LB-LY84?type=image>]; Pandora, <https://www.pandora.com/> [<https://perma.cc/X5ZQ-9DDC?type=image>].

<sup>106</sup> JUSTIN TIMBERLAKE, *MAN OF THE WOODS* (RCA 2018).

Spotify, in the search bar you type in “Justin Timberlake,” view his artist page, select “Man Of The Woods,” and begin listening to the album—either in track order or by shuffle.<sup>107</sup> On Pandora, you type “Justin Timberlake” in the search bar, and the platform creates a “station” that includes his songs but also other artists that most likely fall in the same genre.<sup>108</sup> You hope a song from his “Man Of The Woods” album comes up, but there is no guarantee.<sup>109</sup> By skipping the song, you may be equally as likely to hear “Uptown Funk” by Bruno Mars.<sup>110</sup> While non-interactive services are typically free and interactive services require a monthly fee, each style of streaming appeals to various kinds of people.<sup>111</sup> Terrestrial radio continues to maintain its foothold in the market, but the law should be prepared to address the questions music streaming presents, especially considering its prevalence among consumers.<sup>112</sup>

Because of the popularity of streaming services and access to use of them, business owners are likely using streaming within their establishments. Owners may be unaware that the access they have through their streaming service only permits personal use, not commercial use. Using the service for personal use, like in the car on the way to work or while preparing dinner, does not implicate the public performance right.<sup>113</sup> Once the service is played within the business, the personal use subscription no longer grants legal access to the copyrighted music.<sup>114</sup> Streaming services have begun implementing business subscription accounts, which would legally permit use of the music.<sup>115</sup> By purchasing a business account, the streaming service would pay the license fee directly on the business

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<sup>107</sup> See *Man of the Woods by Justin Timberlake*, SPOTIFY, <https://open.spotify.com/album/0113jTY261V3CESZR4dABz> [<https://perma.cc/FWS8-Z869>].

<sup>108</sup> See *Justin Timberlake*, Pandora, <https://www.pandora.com/artist/Justin-timberlake/ARtmfdvhZhK7fdc>.

<sup>109</sup> See *id.*

<sup>110</sup> BRUNO MARS, UPTOWN FUNK (RCA 2014).

<sup>111</sup> See Amy X. Wang, *Radio survived the tape, CD, and iPod. In the age of Spotify, it's more popular than ever.*, QUARTZ (Oct. 11, 2017) <https://qz.com/1094963/radio-survived-the-tape-cd-and-ipod-in-the-age-of-spotify-its-more-popular-than-ever/> [<https://perma.cc/2P8B-Y9JP>].

<sup>112</sup> See Christman, *supra* note 99.

<sup>113</sup> See 17 U.S.C. § 101 (2010).

<sup>114</sup> See, e.g., *Pandora Terms of Service*, PANDORA ¶ 9, <https://www.pandora.com/legal> [<https://perma.cc/3F8Y-7J6Z>].

<sup>115</sup> See, e.g., *id.*

owner's behalf.<sup>116</sup> Spotify offers Soundtrack Your Brand,<sup>117</sup> Pandora offers Pandora for Business,<sup>118</sup> and SiriusXM offers SiriusXM for Business,<sup>119</sup> just to name a few. What is unclear is whether the business owners that use a non-interactive service even need a license at all because the Homestyle Exemption may apply.

Based on the language in section 110(5), “originated by the radio” could be construed in a variety of ways.<sup>120</sup> In a traditional sense, the term “radio” would be interpreted to mean terrestrial broadcasting, which exists through the transmission of signals sent from a broadcaster to a receiver commonly encountered through FM or AM programming.<sup>121</sup> Non-interactive services function similarly to traditional radio, and users may argue that because the Copyright Act never defines radio, there is room to embrace a more modern interpretation. Not quantifying the scope of this term may increase the risk of misinterpretation and misapplication of the law. Enforcers such as ASCAP and BMI are given great discretion to sanction business owners under current statutory language, and the varied interpretations of the term “radio” may lead to an inequitable and inconsistent enforcement of the law as applied from one business to the next.

Another interpretation of the statute's language could read the word “or” in the phrase “an audiovisual transmission, by a cable system or satellite carrier” as providing support for the use of streaming services under the Homestyle Exemption's requirements. Indeed, in *Lorimar Music A Corp et al v. Stockyards Armadillo, LLC et al*,<sup>122</sup> defendants argued this very point. ASCAP<sup>123</sup> sued

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<sup>116</sup> See, e.g., *Pandora for Business Terms of Service*, MOOD MEDIA ¶ 6, <https://pandora.moodmedia.com/terms/> [<https://perma.cc/NK9J-43KX>].

<sup>117</sup> *Soundtrack Your Brand*, SPOTIFY, <https://www.soundtrackyourbrand.com> [<https://perma.cc/5D9M-QLNP>].

<sup>118</sup> *Pandora For Business*, PANDORA, <https://pandora.moodmedia.com> [<https://perma.cc/U2FQ-QUJU>].

<sup>119</sup> *SiriusXM For Business*, SIRIUSXM, <https://www.siriusxm.com/siriusxmforbusiness> [<https://perma.cc/L8SA-QE47>].

<sup>120</sup> 17 U.S.C. § 110(5)(B) (2005).

<sup>121</sup> See Liebesman, *supra* note 29, at 1417.

<sup>122</sup> *Lorimar Music A Corp., et al. v. Stockyard Armadillo, LLC et al.*, 4:17-cv-00366 (ND Tex. 2018).

<sup>123</sup> Each of the individual plaintiffs are members of ASCAP and subsequently granted ASCAP a non-exclusive right to license the member's musical compositions. Pl.'s First Amend. Compl. ¶¶ 13–15 (May 26, 2017). ASCAP pursued Defendants since February of 2014 in order to obtain the proper business

The Thirsty Armadillo Saloon, operating in Fort Worth Texas for copyright infringement due to its failure to obtain a public performance license despite playing copyrighted music for its customers.<sup>124</sup> Defendants argued their establishment fell under the exemption, because it qualified under the square footage element, equipment requirement,<sup>125</sup> and it utilized an audiovisual transmission component by employing Pandora's cable internet system service.<sup>126</sup> ASCAP maintained that the term "audiovisual" was not illustrative of a service like Pandora, and further Pandora was not transmitted by a cable system or satellite carrier.<sup>127</sup> Ultimately, the parties settled before a judge was able to weigh in on this matter, but the case opens up a means of debate.

"Audiovisual transmission," like "radio," is not defined within the Copyright Act,<sup>128</sup> but Section 101 defines both "audiovisual works" and "transmit," as:

"Audiovisual works" are works that consist of a series of related images which are intrinsically intended to be shown by the use of machines, or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied....

To "transmit" a performance or display is to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent.<sup>129</sup>

Defendants in *Lorimar Music* claimed that "audiovisual transmission," as mentioned in § 110(5)(B) but not defined or further mentioned in any other place in the statute, is not intended to be equivalent to the defined term "audiovisual work."<sup>130</sup> In fact,

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license. *See id.* Upon failing in this task, ASCAP filed this action in court on behalf of the copyright owners. *See id.* The owners specifically are named in the action because they own the copyrights that have said to be infringed. *See id.*

<sup>124</sup> *See Lorimar Music A Corp., et al.*, 4:17-cv-00366.

<sup>125</sup> *See* § 110(5)(B)(ii).

<sup>126</sup> *See* Br. in Supp. of Defs.' Resp. to Pls.' Mot. for Partial Summ. J. at p. 6.

<sup>127</sup> *See* Reply Mem. of Law in Supp. of Pls' Mot. for Partial Summ. J. at p. 5.

<sup>128</sup> *See* § 101.

<sup>129</sup> *Id.*

<sup>130</sup> *See Lorimar Music A Corp., et al.*; Br. in Supp. of Defs.' Resp. to Pls.' Mot. for Partial Summ. J. at p. 6.

they argue the clear distinction in word choice is evidence that the terms do not share the same meaning.<sup>131</sup> Under this interpretation, there would be room to include a service like Pandora. Even considering the definition of “audiovisual work,” Pandora’s free platform, which displays the album artwork, various advertisements, and a “more information” page about the artist all while playing the track’s audio, could arguably fall within the definition of a work “that consists of a series of related images which are intrinsically intended to be shown by the use of ... electronic equipment ....”<sup>132</sup> If “audiovisual work” is construed to be the entire Pandora service, the individual song tracks accompanied by the album artwork could be considered “a series of related images.”<sup>133</sup> If “audiovisual work” is defined as one track, the series of images would include the track’s album art and information page, which provides a description of the artist, audio features on the track, and other similar artists.<sup>134</sup> Finally, the application of “transmit” is satisfied, as the Pandora platform communicates the album artwork image and track audio to a user’s smartphone, computer, or smart device.<sup>135</sup>

Regardless of a reader’s interpretation of these terms, the point is that arguments can be made for each version of interpretation. There must be a better bright-line divider defining the scope of the exemption, instead of merely classifying music in this section as “radio.” The language within the Homestyle Exemption should be changed to better incorporate streaming technology and to give clear direction to business owners, enforcers, and courts as to where certain platforms or services may fall within this exemption. An effective way to account for new music technology is to rewrite the statute to include “non-interactive streaming” as an additional mode for providing music to customers available under the Homestyle Exemption.

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<sup>131</sup> *Id.*

<sup>132</sup> § 101.

<sup>133</sup> *Id.* Because each track is accompanied each time with album artwork, the series is related, as each song performance is the same. *See* Pandora, *supra* note 105. The user sees the album art and hears the song simultaneously. *See id.*

<sup>134</sup> Each time a user hears an individual song, the album art will appear along with the information page. *See* Pandora, *supra* note 105.

<sup>135</sup> *See id.*

*A. Incorporating Non-interactive Streaming Under the Homestyle Exemption*

Congress should resolve the uncertainty presented in the statute by amending the language to include non-interactive services, while leaving the other requirements intact. Congress and the courts have attempted to interpret and amend the existing statutory framework of the copyright law to recognize streaming as an alternative to the traditional consumption of music.<sup>136</sup> For instance, Congress has updated 17 U.S.C. § 114<sup>137</sup> to include directions and guidance for how to address subscription streaming services.<sup>138</sup> Additionally, the Senate constructed a three-tiered system recognizing radio, non-interactive, and interactive services as appropriate classifications capable of encompassing all available services on the market during the drafting of DMCA.<sup>139</sup> Extending the analysis Congress and courts have previously applied to distinguishing non-interactive and interactives services to the Homestyle Exemption may help remedy the ambiguity present in section 110(5)(B).

The Copyright Act provides some guidance on how the law classifies an “interactive service.”<sup>140</sup> In section 114, it states an interactive service is: “one that enables a member of the public to receive a transmission of a program specially created for the recipient, or on request, a transmission of a particular sound recording, whether or not as part of a program, which is selected by or on behalf of the recipient.”<sup>141</sup>

Radio would clearly not fall within this category because listeners have no ability to control what song is being played.<sup>142</sup> The only preference a listener can elect is based upon the channel chosen, which may differ in musical genre. This definition would seemingly not apply to non-interactive streaming, because like radio, the transmission created for the user is limited to a style of genre.<sup>143</sup> Congress discussed streaming services and their impact

<sup>136</sup> See 17 U.S.C. § 114 (2010); H.R. REP. NO. 104-274, at 15 (1995).

<sup>137</sup> See 17 U.S.C. § 114 (2010) (addressing the scope of exclusive rights in the sound recording).

<sup>138</sup> See 17 U.S.C. § 114(j)(7) (2010) (defining “interactive service”).

<sup>139</sup> See S. REP. 104-128, at 14–15 (1995).

<sup>140</sup> See 17 U.S.C. § 114(j)(7) (2010) (defining “interactive service”).

<sup>141</sup> *Id.*

<sup>142</sup> See S. REP. NO. 104-128, at 14–15 (1995).

<sup>143</sup> See, e.g., Pandora, *supra* note 105.

on the record industry in passing the definition above as part of the 1995 Digital Performance Rights in the Sound Recordings Act, which provided an exclusive right to perform sound recordings publicly through a digital transmission.<sup>144</sup> In the Senate Report discussing this bill, Congress recognized that subscription, interactive streaming services may jeopardize the copyright owner's ability to control and be compensated for use of their work,<sup>145</sup> because if users had the ability to choose the song they wanted to hear at the moment they wanted to hear it, this interaction could take the place of purchasing actual records.<sup>146</sup> It noted services of this nature can provide CD-quality recordings, commercial free, for 24 hours a day.<sup>147</sup> This kind of quality and availability could significantly threaten record sales. But free, over-the-air broadcast provides a mix of entertainment and non-entertainment, community-wide public interest advertising.<sup>148</sup> While it is clear that Congress believes interactive services harm artists along with record companies, and in contrast radio does not,<sup>149</sup> it is unclear where non-interactive services may fall along this spectrum. One court has stepped in to provide more elements necessary to draw the line between an interactive and non-interactive service. In *Arista Records, LLC, v. Launch Media*,<sup>150</sup> the court considered if a particular Internet radio service constituted an interactive service within the meaning of the Copyright Act.<sup>151</sup> The court reviewed LAUNCHcast, a streaming service that created and modified personalized radio stations for each user.<sup>152</sup> Users were not able to restart or repeat a song within a playlist, or predict which song

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<sup>144</sup> H.R. REP. NO. 104-274, at 15 (1995).

<sup>145</sup> See S. REP. 104-128, at 14–15 (1995).

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> See *id.*

<sup>150</sup> *Arista Records, LLC, v. Launch Media*, 578 F.3d 148 (2d Cir. 2009).

<sup>151</sup> *Id.* at 150. The opinion walks through the process of creating a new subscription with LAUNCHcast, choosing a genre of music, selecting a percentage of new songs the user wants to hear, how the user may rate songs, and finally how the collaborative DJ feature works. *Id.* at 157–61.

<sup>152</sup> *Id.* at 158. The LAUNCHcast service was eventually acquired by Yahoo! in 2001. Elise Hu, *Yahoo's Other Billion-Dollar Bets: Where Are They Now?*, NATIONAL PUBLIC RADIO (May 20, 2013), <https://www.npr.org/sections/alltech/considered/2013/05/20/185573937/yahoos-other-billion-dollar-bets-where-are-they-now> [<https://perma.cc/N5ME-B4H3>]. The service has since closed in 2013. *Id.*

comes next, factors indicative of a non-interactive service.<sup>153</sup> They were able to rate songs based on their preference, but there was no guarantee the song would be replayed or that multiple songs by one artist would play consecutively.<sup>154</sup> The Second Circuit concluded the platform did not meet the requirements of an interactive service.<sup>155</sup> Critically, the court found, the ability to select the music in a predetermined fashion and move forwards and backwards from song to song is a conclusive element of interactive services.<sup>156</sup>

The division between interactive and non-interactive is largely attributable to the amount of control a user is given.<sup>157</sup> Services that create itemized playlists based on minimal user input, with no option to select an individual song, function more like a radio broadcast, qualifying them as a non-interactive service. These services may promote the artist, but do not take revenue directed towards actual record sales.<sup>158</sup> The definition of “interactive service” provided in section 114 and the factors used by the court in *Arista Records* should be used in helping apply streaming service analysis to the Homestyle Exemption. But Congress should not use this wholesale, because section 114 does not explicitly define “non-interactive,” and the *Arista* case may be construed as applying only to sound recordings. Instead, I propose section 110(5)(B) be updated as follows:

(B) communication by an establishment of a transmission or retransmission embodying a performance or display of a non-dramatic musical work intended to be received by the general public that: is originated by the radio or television broadcast station licensed as such by the Federal Communications Commission; is an audiovisual transmission, by a cable system or satellite carrier; or is a non-interactive service if—

In 17 U.S.C. § 101,<sup>159</sup> where definitions are highlighted, I would include a definition of non-interactive service that says:

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<sup>153</sup> *Id.* (“Notably, the user may not go back to restart the song that is playing, or repeat any of the previously played songs in the playlist.”).

<sup>154</sup> *Id.* at 164.

<sup>155</sup> *Id.* The court found the uniquely created playlists for each user did not ensure predictability, never ultimately detracting from record sales. *Id.*

<sup>156</sup> See S. REP. NO. 104-128, at 14–15 (1995).

<sup>157</sup> *Arista*, 578 F.3d at 164.

<sup>158</sup> See H.R. REP. NO. 104-274, at 13.

<sup>159</sup> Although “interactive service” is defined in § 114, I would put the “non-interactive” definition in § 101 to indicate this term applies to the entire Copyright

A “non-interactive service” is one that enables a member of the public to receive a transmission of pre-programmed or semi-random content of sound recordings, which limits the user’s ability to choose individual recordings and the order in which the user receives them.

### *B. Reasons to Revise the Law*

Revising the language of the Homestyle Exemption to include non-interactive streaming and my definition above would be consistent with the policy goals that motivated section 110(5) in the first place. As the *Aiken* court noted, the ultimate goals of copyright law have always been to spread creativity amongst the public for their benefit, despite the immediate effect of the law to secure a return for creative efforts.<sup>160</sup> The balance between these interests was reflected in section 110(5).<sup>161</sup> Just as the *Aiken* court accounted for in 1972,<sup>162</sup> this proposal also weighs and consider the interests of both the business owner and copyright holder. Like the radio, non-interactive streaming is not likely to cause economic harm by deriving sales away from physical albums. Because non-interactive services do not offer a substantial amount of choice to users, they do not act as market substitutes in terms of purchasing music, as Congress feared interactive services would. In fact, between terrestrial radio and interactive streaming, non-interactive streaming is considerably more comparable to terrestrial radio. In both cases, the terrestrial broadcast radio station or non-interactive platform gathers content for the listener, unlike an interactive service where the user selects content for themselves.

A non-interactive service does not function identically to terrestrial radio. There are differences. A user can make an artist-specific genre radio, skip songs, and elect to not hear a specific song again, all choices a traditional terrestrial radio user is not provided. Despite these differences, the holistic experience of terrestrial radio and non-interactive streaming are foundationally similar.

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Act. Eventually, a wholesale revision of the Act should move “interactive” to § 101 as well.

<sup>160</sup> *Twentieth Century Music Corp.*, 422 U.S. at 156.

<sup>161</sup> See 17 U.S.C. § 110(5) (2005).

<sup>162</sup> See *Twentieth Century Music Corp.*, 422 U.S. at 156.

The notion of what is “radio” today has simply changed, but the experience listeners are looking for has not.<sup>163</sup> Traditional radio listeners are looking for content generated and created by another, collectively gathered, to create a passive experience.<sup>164</sup> These traits are foundational to both terrestrial radio and non-interactive streaming. For these reasons, inclusion of the modern version of radio listening should be incorporated within the statute.

### C. Counterargument to Inclusion

One argument against distinguishing between interactive and non-interactive services for purposes of inclusion within the Homestyle Exemption suggests the impractical nature of this exercise, because services may offer both components. In fact, Pandora launched a premium version of their service in March of 2017 giving users the ability to search and select any artist or song for only \$9.99 per month.<sup>165</sup> Spotify also offers a radio feature within their on-demand subscription,<sup>166</sup> functioning similarly to a traditional non-interactive platform, the user may select a single artist and a playlist is generated based on related genre characteristics.<sup>167</sup>

However, section 114(j) already purports to address this issue by concluding “if an entity offers both interactive and non-interactive services (either concurrently or at different times), the non-interactive component shall not be treated as part of an interactive service.”<sup>168</sup> In other words, based on which portion of the service the business owner uses, the business may need a license or may fall within the exemption.<sup>169</sup> Monitoring this specifically could present problems for the PROs and require honest

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<sup>163</sup> See Wang, *supra* note 111.

<sup>164</sup> *Id.*

<sup>165</sup> *Pandora Premium Will Change The Way You Listen to Music*, PANDORA BLOG (Mar. 13, 2017), <http://blog.pandora.com/us/pandora-premium-will-change-the-way-you-listen-to-music/> [<https://perma.cc/6T4L-P6MM>].

<sup>166</sup> *Spotify Radio*, SPOTIFY [https://support.spotify.com/is/using\\_spotify/features/spotify-radio/](https://support.spotify.com/is/using_spotify/features/spotify-radio/) [<https://perma.cc/FXB2-WE2Y>].

<sup>167</sup> *Id.* Although the playlist only displays a few songs at a time, the user would still have the ability to select the song desired and skip ahead and come back. *Id.* Despite having the name Spotify Radio, this feature still functions more like an interactive service.

<sup>168</sup> 17 U.S.C. § 114(j) (2010).

<sup>169</sup> See *id.*

self-reporting, considering how remarkably accessible music streaming is. Although this new approach could present challenges, the benefits of including non-interactive services under the exemption and clearly illuminating which services are not exempt could present high payoffs for both the artist and the business owner.

#### CONCLUSION

Similar to the *Aiken* court in 1972, today, we also are operating under a law that is almost half a century old.<sup>170</sup> Justice Stewart rightly stated, “While statutes should not be stretched to apply to new situations not fairly within their scope, they should not be so narrowly construed as to permit their evasion because of changing habits due to new inventions and discoveries.”<sup>171</sup> Habits are changing, music consumption is different, and streaming technology is ever present. The statute should reflect this transition. In creating the Homestyle Exemption, it was decided radio listening was an optimal way to facilitate both the business owners and copyright holders’ interest.<sup>172</sup> However, Congress did not reject the possibility of being able to incorporate other services that may be as equally effective at balancing these interests.<sup>173</sup> As terrestrial radio becomes increasingly obsolete for businesses, an amendment is necessary to both, respond to new technology and preserve the balance Congress originally intended.

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<sup>170</sup> See *Twentieth Century Music Corp.*, 422 U.S. at 151.

<sup>171</sup> See *id.*

<sup>172</sup> See *id.* at 156.

<sup>173</sup> See H.R. REP. NO. 94-1476, at 86 (1976).

