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THE EVOLVING ROLE OF “FOR PROFIT” USE IN COPYRIGHT LAW:
LESSONS FROM THE 1909 ACT

Lydia Pallas Loren†

Abstract
The transformation of copyright law from a law that regulated only commercial actors to one that regulates everyone was the result not only of technological developments, but also a fundamental change 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 other rights granted without this restriction. This article examines the reasons for the “for profit” restrictions on rights contained in the 1909 Act and lessons we can learn from defining the rights of a copyright owner with a “for profit” restriction.

Part I of this article explores the 1909 Act and its legislative history, demonstrating that the “for profit” limitation on public performance rights for certain types of works was meant to preserve a space for the free enjoyment of music by the public. Permitting a certain amount of “free riding” is critical if copyright law is to serve its constitutional mandate to promote progress in knowledge and learning. Congress used the defendant’s “for profit” use as a proxy for those uses most likely to cause commercial harm to a plaintiff. In the end, Congress was trying to shape the rights of a copyright owner to ensure that actionable infringement resulted only from uses that interfered with a copyright owner’s commercial exploitation of the work and thereby affected the incentive to create new works. Part II examines how the judicial interpretation of the “for profit” limitation focused attention on the potential “free riding” nature of the use, whether or not the use caused commercial harm to the copyright

† Jeffrey Bain Faculty Scholar and Professor of Law, Lewis and Clark Law School. I would like to thank Professors Tyler Ochoa and Pamela Samuelson for organizing the 1909 Act conference and inviting my participation. I also am appreciative of the support for faculty scholarship shown by Lewis & Clark Law School through, among other activities, a generous summer research grant.
owner. In Part III the article suggests that the experience with the 
'for profit' limitation under the 1909 Act counsels that to be more 
consistent with the incentive purpose of copyright, the law should 
require copyright owners to demonstrate commercial harm in order 
to prove infringement for certain types of uses.

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,", 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, 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 
by 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. Slowly, at first, the 
rights became greater and lasted longer. A doctrine of "fair use" 
developed in the 1800s, 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 beyond the wildest dreams of the founding fathers and fair 
use is called upon to do more and more to achieve the desperately

1. See, e.g., Brett M. Frischmann & Mark A. Lemley, Essay, Spillovers, 107 COLUM. L. 
REV. 257 (2007).
ability of others to use certain aspects of a work is "not some unforeseen byproduct of a 
589 (1985))).
3. 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.
5. L. Ray Patterson & Stanley W. Lindberg, The Nature of Copyright: A Law 
needed balance in copyright law. Many have begun to talk openly and persuasively of the need for fundamental reform of the copyright system.

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 past Copyright Acts attempted to achieve that balance and evaluate their success or failure. One hundred years have elapsed since the passage of the 1909 Act, providing an 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 significance of whether or not a defendant’s exploitation of a work was commercial. 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 a defendant’s use is irrelevant to a determination of a prima facie case of infringement. Section 106 of the Copyright Act of 1976 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. These limitations are generally treated by courts as affirmative defenses with the burden placed on the


7. See, e.g., Symposium: Fixing Copyright, 2007 UTAH L. REV. 537 (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 cannot wait that long. Reform is in the air.


9. Id. at §§ 107–122. Section 106 makes the rights granted to copyright owners expressly “[s]ubject to sections 107 through 122.”
defendant to prove the defense in order to prevail. As an affirmative defense, non-commercial use might help “save” a defendant from liability for infringement, but a plaintiff need not prove the defendant’s activity is commercial in order to prevail in a case of infringement under the current Act. It has not always been that way.

The Copyright Act of 1909 (“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. The types of works that obtained these limited public performance rights were musical works, and lectures, sermons, addresses, or similar productions. 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 the 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, was granted a public performance right without the “for profit” restriction. 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 its legislative history, seeking to understand the purpose of the “for profit” limitation. The legislative history reveals three important decisions with which those involved in shaping the 1909 Act were struggling. First, was the raging debate concerning whether mechanical copies of musical works should be within a copyright owner’s scope of rights. 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

10. See, e.g., Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 590 (1994) (noting fair use is an affirmative defense and observing that a defendant would be unlikely to prevail without presenting “favorable evidence about relevant markets”).


13. Id.

14. Id. at § 1(e).

15. Id. at § 1.
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 actionable infringement only resulted from uses that interfered with a copyright owner’s commercial exploitation of the work, and thereby affected the incentive to create new works. A defendant’s “for profit” use was a proxy for those uses most likely to cause commercial harm to a 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 a defendant’s “for profit” use was considered evidence of “free riding” by the defendant and thus worthy of an infringement determination. Subsequent attempts at legislative reform of the performance right are described at the end of Part II.

Recognizing and understanding the historical development and 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 observations 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 invites courts to focus on the “free riding” qualities of a 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. These rights were generally not divisible. The right to copy, in fact, was “merely a function of the right to vend the copyrighted work.” 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 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. 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 part of the 1909 Act involves the public performance right, thus some background on the public performance 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.” 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. In 1897, Congress extended the
public performance right to musical works.\textsuperscript{23} 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.\textsuperscript{24}

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

\begin{quote}
[A]ny person entitled thereto, upon complying with the provisions of this Act, shall have the exclusive right:

\begin{enumerate}
\item To deliver or authorize the delivery of the copyrighted work in public for profit if it be a lecture, sermon, address, or similar production;
\item To perform the copyrighted work publicly for profit if it be a musical composition and for the purpose of public performance for profit.\textsuperscript{25}
\end{enumerate}
\end{quote}

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.”\textsuperscript{26} 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.”

\textsuperscript{23} Varmer, supra note 21, at 837 (citing Copyright Act of Jan. 6, 1897, ch. 4, § 4966, 29 Stat. 481, 482 (1897)).

\textsuperscript{24} 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) (2006). The distinction between general and limited public performance rights should not be confused with “grand” and “small” performance rights which concern dramatic versus nondramatic performances. See Vincent Louis Perrone, Small and Grand Performing Rights? (Who Cared Before “Jesus Christ Superstar”), 20 BULL. COPYRIGHT SOC’Y U.S.A. 19 (1972).

\textsuperscript{25} Copyright Act of Mar. 4, 1909, ch. 320, § 1, 35 Stat. 1075 (1909).

\textsuperscript{26} See, e.g., Varmer, supra note 21, at 837 (citing Copyright Act of Mar. 4, 1909, ch. 320, § 1, 35 Stat. 1075 (1909)).
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. This right, after all, had already been added to the Copyright Act in 1897. However, the inclusion of the general public performance right for musical works in the memorandum draft bill was criticized by individuals who feared that such an unrestricted right "would unduly restrict the free enjoyment of music and thus interfere with legitimate public interests." The idea for a restriction to "for profit" public performances for musical works appears to have been suggested by a representative of the American Bar Association. 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.'" 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 use and the free enjoyment of music." 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."

In part, the "for profit" limitation in the 1909 Act for public

27. Varmer, supra note 21, at 838 (citing Copyright Office Bulletin No. 10 (1905)).
28. The House Report identified the purpose of the 1897 amendment:
[T]o 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.
H.R. REP. No. 54-741, at 1 (1896).
29. Varmer, supra note 21, at 838 (citing Hearings Before the House and Senate Committees on Patents on S. 59-6330 and H.R. 59-19853 (1906)).
30. 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 1.B. infra.
31. 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).
33. Id.
34. Id.
performances of musical works was wrapped up in the battle raging over 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," 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 prohibit the public performance for profit of copyrighted music without the consent of the proprietor by any means whatever, whether mechanical or otherwise."

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 took up the issue of mechanical copies. The report justified 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.

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

36. Id.
37. Id. (emphasis added).
39. Id.
that musical composition copyright owners would need to expressly reserve that public performance right by a notice printed on published copies. 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. In one of the two cases that eventually led to the Supreme Court’s decision in *Herbert v. Shanley Company*, 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.” The implied

40. *Id.*
41. Jessica Litman, *War Stories*, 20 CARDOZO ARTS & ENT. L.J. 337 n.71 (2002). Many copies of sheet music expressly stated that the purchaser of the sheet music had a permission 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). This practice was discussed in the hearings:

Mr. Walker. . . . I would like to ask Mr. Victor Herber whether, during the last few years, he has with his orchestra performed copyrighted music of other composers, of which copyrighted music he purchased and had the sheets there for the performance?

Mr. Herbert. With their permission.

Mr. Walker. Did you get any other permission than the purchase of the sheets?

Mr. Herbert. That is included.

Mr. Walker. Did you get any special permission to perform?

Mr. Herbert. The permission is written on the sheet.

Mr. Walker. What is written on the sheet?

Mr. Herbert. Permission for performance.

Mr. Walker. It is on the sheet, is it?

Mr. Herbert. Yes.

Mr. Walker. In all cases?

Mr. Herbert. That is, on the corner of the sheets—“permission to perform.”

*Arguments Before the House and Senate Committees on Patents on S. 59-6330 and H.R. 59-19853, at 173 (1906) (discussion between Mr. Walker and Mr. Victor Herbert), reprinted in 4 E. FULTON BRYLAWSKI & ABE GOLDMAN, LEGISLATIVE HISTORY OF THE 1909 COPYRIGHT ACT 173 (1976).*

42. *Herbert v. Shanley Co.*, 242 U.S. 591 (1917). *See infra Section II.A.*
43. *John Church Co. v. Hiliard 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 *Buck v. Jewell-LaSalle Realty Co.*, the Supreme Court faced the question whether the acts of a hotel proprietor by making music available to guests through a radio receiver and speakers installed in different rooms, was performing the musical works being broadcast by the radio stations. 283 U.S. 191 (1931). The case arose in the context of a musical
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.\(^{44}\)

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.\(^{45}\) In explaining this provision, the legislative history points to Congress’ concern with the potential for certain uses to completely undercut the market for 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.”\(^{46}\)

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.” Buck, 283 U.S. at 199 n.5 (citations omitted).

44. H.R. 25133, 59th Cong. § 15 (1907). 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. (1909). See also H.R. REP. No. 60-2222, at 13 (1909) (“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.”).


46. H.R. REP. No. 60-2222, at 4 (1909); S. REP. No. 60-1108 (1909), reprinted in 6 E.
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 evidenced keen awareness of the role of the balance in copyright law. After clearly stating the constitutional basis for the Copyright Act and expressly acknowledging that copyrights are granted "[n]ot primarily for the benefit of the author, but primarily for the benefit of the public . . . .",47 the report turns to the balance in copyright law.

In enacting a copyright law Congress must consider, as has been already stated, two questions: First, how much will the legislation stimulate the producer and so benefit the public; and, second, how much will the monopoly granted be detrimental to the public? The granting of such exclusive rights, under the proper terms and conditions, confers a benefit upon the public that outweighs the evils of the temporary monopoly.48

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.49 There is 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 causing it to be performed or

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48. Id.
49. Copyright Office Bulletin No. 10, at 17-18 (1905), reprinted in 2 E. FULTON BRYLAWSKI & ABE GOLDMAN, LEGISLATIVE HISTORY OF THE 1909 COPYRIGHT ACT XXXI-XXXII, § 37(g) (1976). This memorandum draft bill proposed a public performance right for musical works that was not limited to "for profit" performances. Id. at § 37(f).
represented by others.” The Senate Report notes the performance right for this category of works was a “subsidiary privilege” with the rights of “printing, reprinting, publishing, copying, and vending” identified as “the main privileges.” The report also asserted that the subsidiary privileges recognized by the pending bill were “deemed within the contemplation of existing law and supported generally by foreign legislation. . . .” The House Report merely asserted that the addition of Paragraph (c) “secures the copyright protection to lectures, sermons, or addresses, etc., prepared for oral delivery.” 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.” In the end, the legislative history for this new category of works is not particularly illuminating. 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 to copyright owners, the 1909 Act referred to the “for profit” nature of the defendant’s activities in only one other place: to define what constituted criminal infringement.

54. Id. at 4.
55. 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.
56. See discussion Part II.B infra.
Section 28 defined criminal infringement as infringing acts engaged in “willfully and for profit.” 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. The 1909 Act expanded the scope of criminal liability to include all types of copyrighted works and all categories of infringing activity. 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.

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.”

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 a violation of the rights granted to the copyright owners, let alone a criminal infringement. Thus, the exemption appears to be unnecessary.

58. Copyright Act of Jan. 6, 1897, ch. 4, § 4966, 29 Stat. 481, 482 (1897).
62. 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.
63. Indeed, the Register of Copyrights suggested as much in a report related to the efforts
When trying to determine what "for profit" meant in the context of an owner of a musical work 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 the exception in section 28 "must contemplate the charge of an admission fee." 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." 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." In an important study of the "for profit" limitation, undertaken as part of the revision process that led to the 1976 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." In part, the support given for this statement was the express limitation on criminal sanctions contained in section 28 of the Act. 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," 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, enforcing those rights on an

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64. See Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, in 2 STUDIES ON COPYRIGHT 1199, 1227 (Arthur Fisher Mem'1 ed., 1963) (calling the provision "entirely superfluous").
66. Id.
67. Id.
68. Varner, supra note 21, at 840.
69. Id.
70. Id. at 838.
71. See Copyright Act of Jan. 6, 1897, ch. 4, § 4966, 29 Stat. 481, 481-82 (1897).
individual 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. 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 founded the collective rights society, the American Society of Composers, Authors and Publishers (ASCAP). 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 to convince them otherwise and establish the meaning of "for profit."

72. See supra notes 41-44 and accompanying text.
73. 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 W. RES. L. REV. 673, 683 (2003).
74. 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.

75. GOLDSTEIN, supra note 74, at 69.
76. See, e.g., id.; Wu, supra note 74, at 305.
Two different lawsuits were consolidated in this important Supreme Court decision. The first was the case Burkan filed on behalf of the John Church Company, John Philip Sousa's publisher. 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 Maine to Oregon" without express permission from the John Church Company. The district court 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 . . . ."

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." 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

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78. John Church Co. v. Hilliard Hotel Co., 221 F. 229, 230 (2d Cir. 1915) (rev'd sub nom); Herbert, 242 U.S. at 591.
79. John Church Co., 221 F. at 230; Herbert, 242 U.S. at 593-94.
80. Herbert, 242 U.S. at 593-94.
81. John Church Co., 221 F. at 229-30.
82. Id. at 231.
83. 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 a public performance for profit unless a fee is charged for admission to the place where such a 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. Id. 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. Finally, the court cited the penalties provision which, it concluded, would make each performer liable for the performance. Id. at 231.
them." 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 copyright owner the exclusive right to perform the work publicly for profit.

The district court in John Church Company 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." The Second Circuit rejected this reasoning by focusing on the effect on the public: "It does not make a 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[ers], or was a part of the operation of the hotel." 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." 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

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84. Id. at 230.
85. Id.
86. Id. at 231.
87. Id. Interestingly, 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. (quoting Sarpy v. Holland and Savage, 99 L.T. 317).
88. Id. Presumably, the court is referring to "customers" not "custom."
89. Id.
91. Herbert, 222 F. at 344.
their dinner performance on April 2, 1913, accompanied by an orchestra.92 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 . . . ."93 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 . . . ."94 The district court dismissed the complaint.95 Relying on its earlier ruling in the *John Church Company* case, the court of appeals affirmed the rejection of plaintiff's infringement claim concluding that the performance was not for profit.96

These two cases, *John Church Company v. Hilliard Hotel* and *Herbert v. Shanley Company*, 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 Pub'l'g Company v. Apollo Company*, which involved player piano rolls.97 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 sections 1 and 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

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92. *Id.*
94. *Id.* at 341-42.
95. *See Herbert*, 222 F. at 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.
96. *Herbert*, 229 F. at 343-44.
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. ⁹⁸

Defining "for profit" as the lower court had done in John Church Company 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:

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. ⁹⁹

The importance of this one paragraph to the development of copyright law cannot be overstated. It has been cited by over seventy federal court decisions and its effect has even reached beyond the borders of the United States to influence copyright cases in foreign countries. ¹⁰⁰ Immediate reaction in the scholarly literature appeared favorable. ¹⁰¹

The Court relied on facts not in evidence to determine that the public performances at the Shanley restaurant and the Hilliard Hotel were "for profit." First, the Court believed 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."¹⁰² There was no evidence

⁹⁹. Id. at 594–95.
¹⁰¹. "As a case of first impression it would seem that the decision, although unsupported by authorities, is correct." Recent Case, Herbert v. Shanley Co., 26 YALE L.J. 417, 418 (1917).
¹⁰². Herbert, 242 U.S. at 594–95 (emphasis added).
cited for this proposition. Next, the Court noted 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." 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 as a proxy to justify characterizing the performance as "for profit."

B. Subsequent Court Opinions

The next line of cases to confront the "for profit" limitation involved motion picture theaters. Harms v. Cohen was one of the first to reach the courts. Citing Herbert v. Shanley Company, 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, and, ultimately to sound films.

Once courts established that restaurants and hotels, along with

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103. Herbert, 242 U.S. at 594 (emphasis added).
104. See discussion Part I, supra.
105. Id.
106. Id.
107. Harms v. Cohen, 279 F. 276, 277 (E.D. Pa. 1922) (music performed in motion picture theater was not incidental, but "for profit").
108. Id. at 278.
109. Id.
110. Irving Berlin, Inc. v. Daigle, 31 F.2d 832, 832-33 (5th Cir. 1929).
111. Famous Music Corp. v. Melz, 28 F. Supp. 767, 768 (W.D. La. 1939) 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 ASCAP from seeking such licenses. United States v. ASCAP, Civ Action No. 41-1395 (S.D. N.Y. Jan. 7, 1960), available at http://www.ascap.com/reference/ascapafj2.pdf.
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 Company*, the courts had little trouble finding any commercial enterprise engaged in broadcasting musical works to be "for profit." As one court noted, citing the *Herbert* opinion, "[i]t suffices . . . that the purpose of the performance be for profit, and not eleemosynary." 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. The broadcast of musical works during the commercially sponsored programs was "for profit."

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." 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." 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." 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."

112. 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. Am. Auto. 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).


115. *Id.* (holding that it is unimportant whether a profit went to charitable or educational causes, the performance was for profit).


117. *Id.*

118. *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.

C. Attempts at legislative reform

In response to complaints of unauthorized radio broadcasts of books and poems, Congress amended the 1909 Act in 1952 to provide 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.

While representatives of several authors groups criticized the suggested limitation to "for profit" performances, ultimately, Congress included the "for profit" limitation for public performances of nondramatic literary works. The House Report reflects the sentiments expressed by the Copyright Office concerning the reasons

\[120.\] Herman Finkelstein, 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:

[un]der 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 statute cannot complain of public performance of his copyrighted works.

\[Kreymborg, 21 U.S.P.Q. at 557–58 (citations omitted).\]


\[122.\] Finkelstein, supra note 120.

\[123.\] Id.


\[125.\] Varmer, supra note 21, at 839-40 (citing Recording and Performing Rights in Certain Literary Works: Hearings Before Subcomm. No. 3 of the H. Comm. on the Judiciary, 82nd Cong. 12, 26-27, 36-37 (1951)).

for the limitation.\(^{127}\)

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.\(^{128}\) Other bills sought to leave the "for profit" limitation in place but provide additional exemptions for certain types of performances.\(^{129}\) There were also attempts to remove the "for profit" limitation, and replace it with specific, narrow exemptions.\(^{130}\) The exemptions sought included exemptions for public performances by churches, public schools, and charitable and fraternal organizations.\(^{131}\) 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 Act granted general public performance rights without qualification as to the "for profit" nature of the performance.\(^{132}\) 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.\(^{133}\)

Following the 1976 Act, a plaintiff copyright owner is no longer

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127. Varmer, supra note 21, at 840 (citing H.R. Rep. No. 82-1160, at 1 (1951)).
128. Varmer, supra note 21, at 855 (citing S. Rep. No. 72-3985 (1932); S. Rep. No. 74-3047 (1935) (expanding the "for profit" limitation to all but dramatic and dramatico-musical works); S. Rep. No. 76-3043 (1940) (same)).
129. Varmer, supra note 21, at 853-54 (citing H.R. Rep. No. 71-12549 (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.").
131. See generally Varmer, supra note 21 at 835, 852-59.
required to plead or prove that a performance was "for profit" to prevail in its prima facie case of copyright infringement.\textsuperscript{134}

To balance the public interest in access and enjoyment of the performance of copyrighted works, in addition to codifying the fair use doctrine,\textsuperscript{135} 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.\textsuperscript{136} The § 110 exceptions are specific, not only as to 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 advantage" be obtained by the performance.\textsuperscript{137} 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.\textsuperscript{138}

The Supreme Court has expressly held that fair use is an affirmative defense.\textsuperscript{139} Lower courts have further construed the limitations on the performance right codified in section 110 as affirmative defenses,\textsuperscript{140} 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.\textsuperscript{141} Entities that are "for profit" are disqualified from those

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{135} Copyright Act of 1976, 17 U.S.C. § 107 (1976).
\item \textsuperscript{136} See supra notes 124-131 and accompanying text.
\item \textsuperscript{137} See, e.g., 17 U.S.C. §§ 110(4), (8) & (9) (2006).
\item \textsuperscript{138} See, e.g., 17 U.S.C. §§ 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 section 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. § 107 (requiring inquiry into whether the use at issue is for "nonprofit educational purposes" in determining fair use); 17 U.S.C §§ 111(a)(5), 112(b), (c) & (d) (2006) (requiring a "nonprofit organization"); 17 U.S.C. § 111(f) (requiring a "noncommercial educational station"); 17 U.S.C. § 118(f) (2006) (requiring a "noncommercial educational broadcast station" or a "nonprofit institution or organization").
\item \textsuperscript{139} Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 590 (1994).
\item \textsuperscript{141} See, e.g., 17 U.S.C. §§ 110(1), 110(2) (exemption for certain activities of an "educational institution"), § 110(6) (exemption for certain activities of an "agricultural or
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exemptions.  

III. LESSONS 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 case law, 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 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 technological means of 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.

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. 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 performances, Congress intended to encompass within the copyright owners’ right the activities that were most likely to cause commercial harm and affect the copyright incentive.


143. See Part II.A. supra.

144. 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.

145. See supra notes 29-34 and accompanying text.
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. 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.

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.

148. See, e.g., Twentieth Century-Fox Film Corp. v. Stonesifer, 140 F.2d 579, 584 (9th Cir. 1944) (holding that "to avoid an unjust course by giving the originator all profits where the infringer's labor and artistry have also to an extent contributed to the ultimate result, there may be a reasonable approximation and apportionment by the court of the profits derived therefrom.").
151. 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) (2006) (exempting certain performances that are "organized and promoted by a nonprofit veterans' organization").
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.” However, by granting a broad general public performance right to all copyright owners with no limitation on the scope of the right itself, courts have interpreted the nature of the defendant’s activities as 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. 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 commercial harm resulting from 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 confine a particular right of the copyright owner should be built into the right itself. The copyright owner is in the best position to provide evidence of commercial harm caused or potentially caused by the defendant’s use. 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.

153. See, e.g., Campbell v Acuff-Rose Music, Inc., 510 U.S. 569, 576-579 (1994) (quoting 17 U.S.C. § 107 (“The first factor in a fair use inquiry is ‘the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.’”)).
154. 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 “without favorable evidence about relevant markets.” Campbell, 510 U.S. at 590.
155. See generally, Varmer, supra note 21 at 841-47.
156. Arguably, fair use was initially part of the test for infringement and thus not, strictly speaking, an affirmative defense. See Folsom v. Marsh, 9 F. Cas. 342, 345-49 (C.C.D. Mass. 1841) (No. 4,901). It is also possible to read the structure of the 1976 Copyright Act as requiring that any applicable limitations be disproved by the copyright owner. Section 106 makes clear that the rights granted therein are “subject to” the sections containing the limitations, while the limitation sections invariably provide that the limits are “notwithstanding” the rights granted to the copyright owner. 17 U.S.C. §§ 106-07. This is not, however, how the Supreme Court and the lower courts have interpreted these provisions.
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. Requiring a plaintiff to 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. 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 recoupment of 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," this 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


159. See Lemley, supra note 158, at 190-91.

160. Christina Bohannan has made this suggestion in the context of the fair use analysis. Bohannan, supra note 149. See also Shyamkrishna Balganesh, Foreseeability and Copyright Incentives, 122 HARV. L. REV. 1569 (2009). 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 note 147, at 222-24.

161. 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., Paul Goldstein, Derivative Rights and Derivative Works in Copyright, 30 J. COPYRIGHT SOC'Y U.S.A. 209, 216-17 (1983).
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. 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 past Copyright Acts 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 commercially 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 commercial 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.

162. See supra notes 49-53 and accompanying text.