



10-1-2004

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Recommended Citation

Adam B. Townshend, *Crashing by Design: Toward a Uniform Standard for Public Place Analysis under Federal Copyright Law*, 79 Notre Dame L. Rev. 2045 (2004).

Available at: <http://scholarship.law.nd.edu/ndlr/vol79/iss5/10>

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NOTES

CRASHING BY DESIGN:¹ TOWARD A UNIFORM STANDARD FOR PUBLIC PLACE ANALYSIS UNDER FEDERAL COPYRIGHT LAW

*Adam Barrett Townshend**

Pay no attention to that man behind the curtain.

The Wizard of Oz²

PROLOGUE

Harry “Sea Bass” Christmas was a chef and cinema buff whose unsurpassed entrepreneurial spirit (and penchant for puns) led him to open Dinner and a Movie, an eatery where patrons could watch feature films while enjoying Harry’s gastronomical delights. The idea behind the restaurant was innovative in its simplicity. Hosts, dressed like ushers, escorted patrons to individual booths, consisting of two bench seats bordered by one wall that housed a video screen. The other end of the booth remained open so that waiters, dressed like movie stars, could serve the diners. The menu, styled after a theater

* Candidate for Juris Doctor, Notre Dame Law School, 2005; B.A., English and German, Bucknell University, 2002. All credit for this Note lies with my family. To my Dad, Douglas, for continuing to be the best role model a kid could ask for, from Little League through law school; my Mom, Susan, whose unparalleled resolve is a constant source of inspiration; and my sister, Katie, whose sense of humor and perspective remain invaluable—I thank you. I would also like to express my sincere gratitude to Professor Joseph Bauer and the members of the *Notre Dame Law Review* for their tireless efforts in bringing this piece to fruition. This Note received the 2004 Arthur Abel Memorial Writing Prize at Notre Dame Law School.

1 PETE TOWNSHEND, *Crashing By Design, on WHITE CITY: A NOVEL* (Atco Records 1985):

Nothing must pass this line
Unless it’s well defined
You just have to be resigned
You’re crashing by design.

2 THE WIZARD OF OZ (Metro-Goldwyn-Mayer 1939).

program, listed the titles of available movies as suggested pairings to ingeniously named dishes such as “On Her Majesty’s Secret Sirloin” and “The Lamb-Shank Redemption.” After taking a patron’s order, waiters retrieved the selected feature from Harry’s vault and inserted it into a DVD player installed at each table. Diners proceeded to enjoy the film of their choice, which proved to be a welcome distraction from the restaurant’s often sub-par cuisine.

Harry’s lack of culinary skill notwithstanding, Dinner and a Movie received rave reviews from the local press. One critic, impressed with the freshness of Harry’s food, described how “the steak still had marks from where the jockey was hitting it!”³ The restaurant’s popularity and the sheer length of each guest’s dining experience made reservations difficult to come by. On one particular Friday evening, Harry, ever the business-savvy owner, decided to wait tables himself. He served a young man and an older woman, new to the area, who ordered spaghetti (“Pasta La Vista, Baby”), cocktails (“Muppets Take Manhattan”) and “Pulp Fiction” as their movie of choice. Having served their cocktails, Harry placed the couple’s film in the DVD player and pressed the play button. He complimented the young man, whispering “Oh, this is your wife, huh? A lovely lady. She must have been something before electricity!”⁴

Suddenly, the young man pulled out a gun, yelling “Everybody be cool, this is an arrest for an unlawful public performance under 17 U.S.C. § 106!” The woman stood up, pistol in hand, screaming, “Any of you patrons move and I’ll execute every . . . last one of you! Got that?”⁵ The couple, law enforcement officials in disguise, handcuffed Harry and led him to their paddy wagon. The next day, city officials took a wrecking ball to Dinner and a Movie and, likewise, to Harry’s dreams.⁶

INTRODUCTION

A clearly defined public place standard under the current version of the Copyright Act⁷ might have preserved Harry Christmas’s inventive vision. Vague legislative drafting interpreted by seemingly irreconcilable judicial opinions leaves the definition of a public place for the purposes of copyright infringement analysis in a state of disrepair,

3 CADDYSHACK (Orion Pictures 1980).

4 *Id.*

5 See PULP FICTION (Miramax Films 1994).

6 This is a fictional hypothetical. Similarity to any event, actual or fictitious, is purely coincidental.

7 17 U.S.C. § 101 (2000).

especially at its fringes. Common sense intuitions of what constitutes a public place are often ineffective in resolving peculiar factual situations, and judges have little else to guide them in defining when a performance is public under 17 U.S.C. § 106. The result has been an assortment of apparently conflicting opinions that do not further a reasoned, comprehensive public place standard. It is the purpose of this Note to reconcile the language of the Copyright Act with concomitant case law to provide a three-pronged test against which courts can measure factual situations to determine whether a performance is public. Part I of this Note will track the public performance right as it evolved from its pre-colonial form to its current incarnation in the Copyright Act. Part II will introduce relevant case law interpreting the public performance right in a particular factual situation. Part III will resolve the apparent discrepancies amongst these cases and introduce a three-pronged test, implied in each of these decisions, to determine whether a place is open to the public for the purposes of copyright infringement analysis. Part IV applies this standard to the existing case law and suggests ways in which Harry Christmas might have built his restaurant to prevent such an awkward and embarrassing scene.

I. STATUTORY DEVELOPMENT OF THE PUBLIC PERFORMANCE RIGHT

A. *Early Statutory Incarnations of the Public Performance Right*

The right of public performance specifies that “the copyright owner [for a particular artistic work] has the exclusive right to perform the work publicly.”⁸ While the sheer variety of media encompassed by the public performance right has expanded over time, the basic notion that the copyright owner holds the right to publicly perform a given work is a concept that accompanied the Founding of the United States.

Long before the passage of the first Copyright Act in 1909,⁹ the Continental Congress laid the logical foundation from which the modern public performance right emerged. A congressional committee

recommended to the several States, to secure to the authors or publishers of any new books not hitherto printed . . . the copy right of such books for a certain time not less than fourteen years from the

⁸ 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8.14[A] (2003).

⁹ Copyright Act of 1909, ch. 320, 35 Stat. 1075, *repealed by* Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541.

first publication . . . such copy or exclusive right [consisting] of printing, publishing and vending the same¹⁰

Several states, acting on this congressional recommendation, enacted legislation creating a copyright for the owners of literary works.¹¹ State legislatures demonstrated a general agreement that the policy for such copyrights was to secure for authors and publishers the financial benefits of literary works, thereby encouraging artistic endeavors that enriched and benefited public life.¹² For example, as early as 1783, the Massachusetts legislature noted that

the progress of civilization, the public weal of the community, and the advancement of human happiness, greatly depend on the efforts of learned and ingenious persons in the various arts and sciences: As the principal encouragement such persons can have to make great and beneficial exertions of this nature, must exist in the legal security of the fruits of their study and industry to themselves.¹³

This basic literary copyright and its attendant policy served as wellsprings for more complicated copyright statutes.¹⁴ Initially, the copyright protection afforded literary works encompassed similar me-

10 JOURNAL OF THE UNITED STATES IN CONGRESS ASSEMBLED, CONTAINING THE PROCEEDINGS FROM NOV. 1782 TO NOV. 1783, at 256-57 (Philadelphia, C.D. Claypoole, 1783).

11 See Act of Jan. 8, 1783, 1783 Conn. Pub. Acts 617, 617 (stating “[t]hat the author of any book or pamphlet not yet printed, being an inhabitant or resident in these United States, and his heirs and assigns, shall have the sole liberty of printing, publishing and vending the same within this State, for the term of fourteen years, to commence from the day of its first publication in this state”); see also Act of Mar. 15, 1784, ch. 124, 1784 Pa. Laws 182 (providing the author of a literary work the exclusive right to print, reprint and public his work, and stating that “if any person . . . shall presume to print, publish, vend, or distribute any such book or pamphlet within this State . . . without the consent of the author thereof first lawfully obtained, every such person . . . shall forfeit and pay to the author . . . double the value of all the copies of such book or pamphlet so printed.”).

12 See, e.g., Act of Jan. 8, 1783, 1783 Conn. Pub. Acts at 617 (stating that “every author should be secured in receiving the profits that may arise from the sale of his works, and such security may encourage men of learning and genius to publish their writings; which may do honor to their country, and service to mankind”); Act of May 27, 1783, ch. 21, 1783 N.J. Laws 47 (noting that “learning tends to the . . . general good of mankind; and as [such,] . . . men of learning who devote their time and talents to the preparing of treatises for publication, should have the profits that may arise from the sale of their works secured to them”).

13 Act of Mar. 17, 1783, ch. 26, 1783 Mass. Acts 236, 236.

14 See *infra* Part I.C.

dia which could likewise be printed and copied.¹⁵ Three considerations have forced legislatures to engage in increasingly complicated applications of copyright theory: (1) the advent of technology allowing for new artistic media;¹⁶ (2) an increased recognition that these artistic endeavors are beneficial to the public and, under the established policy, worthy of copyright protection;¹⁷ and (3) the realization that these works could be put to various uses, thereby expanding both the number and nature of the rights bundled with a given copyright.¹⁸ As time progressed, copyright statutes both encompassed a wider variety of media and afforded the owner a wider variety of rights.¹⁹ In 1856, Congress established the first public performance right when it amended the existing copyright acts to protect dramatic compositions designed or suited for public presentation.²⁰ The public performance right, in this incarnation, consisted of

the sole right . . . to act, perform, or represent the [dramatic composition], or cause it to be acted, performed, or represented, on any stage or public place during the whole period for which the copyright is obtained; and any manager, actor, or other person acting, performing, or representing the said composition, without . . . the consent of the said author or proprietor . . . shall be liable for damages.²¹

Just as the literary right and policy promoted by the First Continental Congress served to facilitate protection for like media that could be printed or copied, the public performance right for dramatic works tendered by the Thirty-Fourth Congress acted as a catalyst for

15 For example, photographs were protected from being copied or printed. See Act of Mar. 3, 1865, ch. 126, 13 Stat. 540.

16 See Julien H. Collins III, Note, *When In Doubt, Do Without: Licensing Public Performances by Nonprofit Camping or Volunteer Service Organizations Under Federal Copyright Law*, 75 WASH. U. L.Q. 1277, 1287 (1997) (stating that "further advances in technology [] caused . . . clarification and revision" of copyright law).

17 See *Am. Geophysical Union v. Texaco, Inc.*, 802 F. Supp. 1, 27 (S.D.N.Y. 1992) (declaring that "copyright law celebrates the profit motive, recognizing that the incentive to profit from the exploitation of copyrights will redound to the public benefit by resulting in the proliferation of knowledge").

18 See Joseph P. Liu, *Owning Digital Copies: Copyright Law and the Incidents of Copy Ownership*, 42 WM. & MARY L. REV. 1245, 1315 (2001) (arguing that "the primary limits on the scope of copyright law come from the need to reduce transaction costs associated with licensing uses of the work").

19 See, e.g., Act of Apr. 29, 1802, ch. 36, 2 Stat. 171 (extending the benefits of copyright protection to engravings and prints and protecting reproduction rights); see also Act of Feb. 3, 1831, ch. 16, 4 Stat. 436 (extending copyright protection to musical compositions and protecting their reproduction rights).

20 See Act of Aug. 18, 1856, ch. 169, 11 Stat. 138.

21 *Id.* at 139.

measures protecting other public performance media, including literary works and musical compositions.²² Vital to the scope of this protection, however, are definitions of "performance" and "public." The drafters of these early statutes, possibly assuming that the courts would apply common sense to facts lying before them, failed to provide a concrete statutory definition of either term. These omissions laid the groundwork for future problems.

B. The Public Performance Right Under the Copyright Act of 1909

In 1909, Congress provided an authoritative amendment to and consolidation of acts respecting copyright. The Copyright Act of 1909 (1909 Act) reformed several areas of copyright law, ultimately tilting the scales towards creators' rights.²³ A clarification of the public performance right stood amongst these revisions. Under the 1909 Act, owners of nondramatic literary works including lectures, sermons, and addresses had the exclusive right to "deliver or authorize the delivery of the copyrighted work in public for profit."²⁴ Additionally, the 1909 Act afforded owners of dramatic works the exclusive right to "perform or represent the copyrighted work publicly."²⁵ Finally, the owner of a musical composition had the exclusive right to "perform the copyrighted work publicly . . . for the purpose of public performance for profit."²⁶ The public performance right in the 1909 Act, similar to its prior manifestations, added one significant requirement: the performance had to be *for profit* to infringe the public performance right. This added condition, however, did not change the necessity for ascertaining exactly what constituted a performance in "public."

Although Congress fashioned the 1909 Act as a comprehensive statement of existing copyright law, Title 17 contained the noticeable absence of a standard by which to determine whether a performance was "public" for the purposes of copyright infringement analysis. The common sense boundaries for public place analysis under the 1909 Act were easily identifiable. That is, performances limited to family members and invited guests were never public, while performances open to the public at large, involving a gathering of a substantial num-

22 See Act of Jan. 6, 1897, ch. 4, § 4966, 29 Stat. 481, 481.

23 Changes in the 1909 Act included extending the length of copyright terms to fifty-six years and changing the definition of controlled activities from "printing" to "copying" in response to creators' anxieties about the invention of mechanical recording devices. See Copyright Act of 1909, ch. 320, 35 Stat. 1075 (codified at 17 U.S.C. § 1 (1970)) (repealed 1976).

24 17 U.S.C. § 1(c) (1970).

25 *Id.* § 1(d).

26 *Id.* § 1(e).

ber of persons outside the family, were nearly always public.²⁷ Between these two poles, however, lay a gray area in which the lack of a meaningful standard fostered uncertainty and divergence as to whether a performance was indeed “public.”

Take, for instance, *Metro-Goldwyn-Mayer Distributing Corp. v. Wyatt*.²⁸ The disputed performances in *Wyatt* involved films shown in a private yacht club to which only club members and their invited guests could gain entrance.²⁹ Based on these relatively straightforward facts, Judge Coleman articulated the issue as follows: “Was the performance of these films here in question public, as that word is to be understood in [the 1909 Act]?”³⁰ The court felt “constrained to the conclusion that it was not a public showing as contemplated by the law.”³¹ The yacht club, the court reasoned, was not one “to which the public, as long as they behaved themselves and paid the price, were entitled to have entrance and to hear and see whatever form of entertainment was given.”³² *Wyatt*, then, defined a “public place” narrowly under the 1909 Act as one which offered entrance to anyone, without restriction. Any constraint on admission necessarily purged the “publicness” from a particular place. After *Wyatt*, it appeared that performances at places with even the most modest restrictions on admission were private and noninfringing under the 1909 Act.

Consider, in contrast, the conception of “publicness” in *Porter v. Marriott Motor Hotels, Inc.*³³ The dispute in *Porter* arose out of a copyright infringement suit brought after copyright owners (including famed American songwriter Cole Porter) learned that the Sirloin & Saddle Club, located in a Marriott Motor Hotel, was playing their compositions.³⁴ According to the court, entrance to the club was limited to hotel lodgers and their invited guests.³⁵ The copyright owners argued, however, that despite the club’s express limitation on the composition of its audience, it was a public place operating for profit,

27 See *Lerner v. Schectman*, 228 F. Supp. 354, 355 (D. Minn. 1964) (suggesting that performances theoretically open to the general public are always public performances under the 1909 Act); *Metro-Goldwyn-Mayer Distrib. Corp. v. Wyatt*, 21 C.O. Bull. 203 (D. Md. 1932) (stating that under the 1909 Act, performances were never public as long as audiences were limited to a particular group rather than the general public).

28 *Wyatt*, 21 C.O. Bull. at 203.

29 *Id.*

30 *Id.* at 204.

31 *Id.*

32 *Id.* at 205.

33 137 U.S.P.Q. (BNA) 473 (N.D. Tex. 1962).

34 *Id.* at 474.

35 *Id.* at 473–74.

thereby infringing on copyrights when it performed particular songs.³⁶ Under *Wyatt*, a performance was never public as long as the audience was limited to a particular group rather than the general public, no matter how large the composition of the group. Given established authority, then, it seems as though the result in *Porter* should have been clear: playing *C'est Magnifique* and *I Could Have Danced All Night* at the Sirloin & Saddle Club was not a public performance for the purposes of copyright infringement analysis under the 1909 Act. The *Porter* court, however, reached the opposite conclusion, holding that “[t]he Sirloin & Saddle Club . . . is . . . a ‘public place’ operated ‘for profit’ wherein ‘public performances for profit’ of musical compositions occur.”³⁷

Attempting to reconcile decisions such as *Wyatt* and *Porter* demonstrates the 1909 Act’s inherent problems. While it is apparent, given the relative dearth of opinions dealing with the subject, that the statute did not suffer from the lack of a definition for “performance,” the absence of a concrete public place standard rendered copyright infringement analysis difficult under the 1909 Act.

C. *The Public Performance Right Under the Copyright Act of 1976*

In 1976, after consideration dating back to the early 1960s, Congress undertook the first massive reform of the Copyright Act since 1909.³⁸ This expansion contains the modifications that remain in effect today. The revision, designed to address the impact of new technology³⁹ and bring domestic law into accord with international law, appears to recognize that the lack of a specific public place standard generated difficulties in defining the scope of the public performance right. Thus, the Copyright Act of 1976 (1976 Act) contained substantial revisions to the public performance right.

While amendments to the 1909 Act gradually increased the variety of media to which the exclusive right of public performance applied,⁴⁰ the 1976 Act further expanded coverage to include motion

36 *Id.* at 474.

37 *Id.*

38 Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified at 17 U.S.C. §§ 101-803 (2000)).

39 Technological advancements that Congress addressed in the 1976 revision included video recording and photocopying.

40 *See* Sound Recording Amendment Act of 1971, Pub. L. No. 92-140, 85 Stat. 391 (extending limited copyright protection to sound recordings “for the purpose of protecting against unauthorized duplication and piracy”); Act of July 31, 1939, ch. 396, 53 Stat. 1142 (extending copyright protection to “prints and labels used for articles of

pictures and audiovisual works.⁴¹ The 1976 Act extended to copyright owners the right to perform “literary, musical, dramatic and choreographic works, pantomimes, and motion pictures and other audiovisual works” in public.⁴²

The language of the Act makes clear that, like incarnations of the public performance right dating back to the eighteenth century, the scope of the public performance right is dictated by the definition of a public place. *Jobete Music Co. v. Johnson Communications, Inc.*⁴³ supports this concept, noting that

[t]o establish a claim for copyright infringement . . . by means of public performance, a claimant must prove: (1) the originality and authorship of a composition; (2) a valid copyright under the formalities of the [1976 Act]; (3) [the] claimant’s ownership of the copyright at issue; (4) *defendant’s public performance of the composition*; and (5) defendant’s failure to obtain permission from the claimant for such performance.⁴⁴

The conjunctive structure of the *Jobete Music* factors connotes that the public nature of a performance is necessary to finding infringement. If the boundaries of the public performance right are defined by the instances in which it is infringed, then, both copyright owners and potential infringers must rely on the definition of public to guide their behavior.

In contrast to earlier copyright enactments, the 1976 Act provides some guidance for determining when a performance is deemed public for the purposes of 17 U.S.C. § 106. There are three ways to determine whether a performance for purposes of the 1976 Act is public: (1) the performance can be transmitted;⁴⁵ (2) the performance may occur “at any place where a substantial number of persons outside of a normal circle of family and its social acquaintances is gathered”;⁴⁶ or (3) the performance may occur at a place open to the public.⁴⁷

Unlike its predecessors, the 1976 Act provides a clear path to determine whether a copyrighted work has been “performed.” Section 101 states:

merchandise”); Act of Aug. 24, 1912, ch. 356, 37 Stat. 488 (extending copyright protection to “motion-picture photoplays” and “motion pictures other than photoplays”).

41 17 U.S.C. § 106(4) (2000).

42 *Id.*

43 285 F. Supp. 2d 1077 (S.D. Ohio 2003) (emphasis added).

44 *Id.* at 1082 (emphasis added).

45 *See* 17 U.S.C. § 101.

46 *Id.*

47 *Id.*

To "perform" a work means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible.⁴⁸

The verbosity of this definition belies its basis in common sense, as a performance is essentially any "act by which [a] rendition or showing [of the work] is transmitted or communicated to the public."⁴⁹ This includes "reading a literary work aloud . . . [playing a work on] equipment for reproducing . . . sounds or visual images . . . [and] showing portions of a motion picture" sequentially, although in no particular order."⁵⁰

Having established when a performance takes place, the next determination that must be made is whether that performance is public. At this point, the 1976 Act provides more assistance than any of its predecessors, providing three express situations in which a performance is deemed to be public.⁵¹ This Note is primarily concerned with the third.

First, the Act plainly states that

[t]o perform or display a work "publicly" means . . . (2) to *transmit* . . . a performance . . . of the work to a place [open to the public or to any place where a substantial number of persons outside of a normal circle of family are gathered], by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.⁵²

Simply put, "[t]o 'transmit' a performance . . . is to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent."⁵³ Unless the transmission is determined to fall under the exceptions in 17 U.S.C. §§ 110

48 *Id.*

49 H.R. REP. NO. 94-1476, pt. 1, at 63 (1976).

50 *Id.*

51 Under section 101, to perform a work publicly means

(1) to perform or display it 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

(2) to *transmit* or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.

17 U.S.C. § 101 (emphasis added).

52 *Id.* (emphasis added).

53 *Id.*

and 111,⁵⁴ then, a transmission of a protected work by the terms of this definition is *always* a public performance that infringes on the exclusive right set forth in 17 U.S.C. § 106. A common situation in which courts define a transmission as a public performance occurs when the performance of a particular work is dispersed from a central site to remote locations.⁵⁵ While just how far beyond the central site the dispersal must travel to qualify as a “transmission” is an issue in itself, it is a secondary concern for the purposes of this Note. Thus, “[w]hat is clear is that if a transmission is found to have occurred, a public performance will be deemed to have taken place regardless of location.”⁵⁶

Second, the 1976 Act specifies that a performance is deemed “in public” if it takes place “at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered.”⁵⁷ This definition of a public place is designed to deal with situations in which a performance transpires at a place not “open to the public” (i.e., a country club) but in the presence of a substantial number of persons not bound by traditional social ties of family or friendship.⁵⁸ Although Congress did not identify the thresh-

54 Sections 110 and 111 provide the circumstances purging the “publicness” from a particular performance even if it is “transmitted” under the statutory definition. *See, e.g., id.* § 110(1) (declaring that performances in nonprofit educational institutions are not public); *id.* § 110(3) (declaring that performances in the course of religious worship are not public); *id.* § 110(6) (declaring that performances by nonprofit agricultural or horticultural organizations are not public); *see also id.* § 111 (purging certain secondary transmissions of their publicness).

55 *See, e.g.,* Video Pipeline, Inc. v. Buena Vista Home Entm’t, Inc., 192 F. Supp. 2d 321 (D.N.J. 2002), *aff’d*, 342 F.3d 191 (3d Cir. 2003) (finding a public performance when remote Internet users clicked on Internet icon, thereby accessing video clips from the defendant’s central website).

56 John Kheit, *Public Performance Copyrights: A Guide to Public Place Analysis*, 26 RUTGERS COMPUTER & TECH. L.J. 1, 17 (1999).

57 17 U.S.C. § 101. Congress expressly intended this common sense definition of a public place “to make clear that, contrary to the decision in [Wyatt], performances in ‘semipublic’ places such as clubs, lodges, factories, summer camps, and schools are ‘public performances’ subject to copyright control.” H.R. REP. NO. 94-1476, pt. 1, at 65 (1976).

58 Courts seem to disagree over the required strength of the social bond among a substantial gathering of individuals to render a performance private. *Compare* Diagnostic Unit Inmate Council v. Motion Picture Ass’n of Am., 953 F.2d 376, 379 (8th Cir. 1992) (noting that “the [gathering of inmates at a prison] may constitute an exception to the copyright law’s proscriptions for public performance”), *with* Diagnostic Unit Inmate Council v. Films Inc., 88 F.3d 651, 654 (8th Cir. 1996) (citing the district court’s conclusion that prison showings are public performances).

old at which a “substantial number of persons” gather, the courts have established more concrete numbers.⁵⁹

Finally, the 1976 Act dictates that a performance is public if it occurs “at a place open to the public.”⁶⁰ Unfortunately, the definition of “open to the public” is devoid of the specificity that renders the “transmission” and “substantial number of persons” clauses moderately successful. Instead, Congress defines space “open to the public” as “a public place”⁶¹ and an area open “to the public at large.”⁶² The circular reasoning with which Congress defines “open to the public” is ultimately unresolved and the definition is left to wallow in illogic, an abstruse standard unhelpful to students and courts alike.⁶³ In the event a performance falls under neither the “transmission” nor the “substantial number of persons” clauses, the 1976 Act leaves us in the same position as the 1909 Act to determine whether that performance is “open to the public.” While we can be certain of the bright-line boundaries of places *never* or *always* open to the public,⁶⁴ the gray area in between fosters contrary judicial decisionmaking that, in the aggregate, reflects a general aura reminiscent of opinions like *Wyatt* and *Porter*. A series of four opinions stresses the need for a comprehensive standard for public place analysis under the 1976 Act.

59 Courts seem to be in rough agreement that the threshold for publicness under the “substantial number of persons” clause of 17 U.S.C. § 101 is twenty. See *Fermata Int’l Melodies, Inc. v. Champions Golf Club, Inc.*, 712 F. Supp. 1257, 1260 (S.D. Tex. 1989) (“The Court considers twenty-one members plus guests to be a ‘substantial number of persons outside of a normal circle of a family.’”); *St. Nicholas Music, Inc. v. D.V.W., Inc.*, No. Civ. C84-0307W, 1985 WL 9624 at *1 (D. Utah Feb. 20, 1985) (holding that a gathering of twenty-three people constituted a public performance); see also Daniel Cantor, *How Many Guests May Attend a Wedding Reception Before ASCAP Shows Up? Or, What Are the Limits of the Definition of Perform “Publicly” Under 17 U.S.C. § 101?*, 27 COLUM. J.L. & ARTS 79, 92 (2003) (“A performance for 100 wedding guests would probably violate the ‘substantial number of persons’ sub-clause . . . because more than twenty guests would probably be ‘strangers,’ which is ‘a substantial number of persons outside of a normal circle of a family and its social acquaintances.’”).

60 17 U.S.C. § 101.

61 H.R. REP. NO. 94-1476, pt. 1, at 64.

62 *Id.*

63 See, e.g., Joshua P. Binder, *Current Developments of Public Performance Rights for Sound Recordings Transmitted Online: You Push Play, but Who Gets Paid?*, 22 LOY. L.A. ENT. L. REV. 1, 8 (2001) (stating that “music performed at any place that is open to the public is publicly performed”); see also Bruce P. Keller & Jeffrey P. Cunard, *What Rights Does a Copyright Owner Enjoy?*, in COPYRIGHT LAW: A PRACTITIONER’S GUIDE § 4:1 (Practising Law Inst. ed. 2001) (defining a place open to the public as “one that members of the public could attend”).

64 For example, renting a movie and enjoying it in the confines of one’s own home is certainly not a public performance, while inviting all of Pittsburgh to watch a film on the Jumbotron at PNC Park is obviously a public performance.

II. CASES EXPOSING THE NEED FOR A COMPREHENSIVE PUBLIC PLACE STANDARD

A. Columbia Pictures Industries, Inc. v. Redd Horne, Inc.

In *Columbia Pictures Industries, Inc. v. Redd Horne, Inc.*,⁶⁵ the Third Circuit illuminated the shortcomings of the 1976 Act in a factual situation that directly challenged the definition of "open to the public." The setting for the copyright infringement dispute in *Redd Horne* was Maxwell's Video Showcase, Ltd. (Maxwell's), a facility that provided in-store rentals for its customers.⁶⁶ The store's layout was simple: a showroom in the front contained videos and video equipment for sale or rent. The rear of the store housed an exhibition area, in which patrons could view an assortment of videos on televisions "in small, private booths [measuring approximately four feet by six feet] with space for two to four people."⁶⁷ The *Redd Horne* court noted that while Maxwell's was open to any member of the public, "[a]ccess to each [booth was] limited to the individuals who rent it as a group. Although no restriction is placed on the composition of a group, strangers are not grouped in order to fill a particular room to capacity."⁶⁸ Each patron wishing to utilize one of the viewing rooms in the facility simply selected a film from a list of available titles, and an employee placed the cassette into a player at the front of the store and transmitted the film to the patron's viewing booth.⁶⁹ Based on the contours of this space, the *Redd Horne* court faced the issue of whether the defendants' activities constituted a public performance of the plaintiffs' motion pictures. The issue encompassed two questions: Were the performances private, as the defendants urged, because they were limited to the individuals within the confines of each private booth? Or, were the performances public, as the plaintiffs contended, because the premises were open to any member of the public who wished to utilize its facilities or services?

At first blush, it seems as though the court in *Redd Horne* should never even have wrestled with this problem. Maxwell's employees certainly communicated these films by a device whereby images and sounds were received beyond the place from which they were sent, so it seems as though *Redd Horne*, on its face, should have been summarily dismissed as a public performance under the transmission clause.

65 749 F.2d 154 (3d Cir. 1984).

66 *Id.* at 156.

67 *Id.* at 157.

68 *Id.*

69 *Id.*

While the court recognized the transmission clause as a basis for decision,⁷⁰ it ultimately reasoned that the performances at issue transpired in a public place. The court listed tenuous factors supporting its decision. First, the court noted that “[s]imply because the cassettes can be viewed in private does not mitigate the essential fact that Maxwell’s [was] unquestionably open to the public.”⁷¹ This argument, essentially that the performances at issue were private but at a place open to the public, is logical but unconvincing. Second, the court noted that “[a]ny member of the public can view a motion picture by paying the appropriate fee,” and thus the “services provided by Maxwell’s are essentially the same as a movie theatre, with the additional feature of privacy.”⁷² While the first half of this reasoning is sound, the second point relies on tenuous logic, arguing that the performances were public, albeit with the added element of privacy. Thus, while the performances at issue in *Redd Horne* were unquestionably public under the transmission clause, the court decided to place the decision in the hands of its public place analysis—an interpretation that is ultimately unsatisfying.

B. *Columbia Pictures Industries, Inc. v. Aveco, Inc.*

Only two years later, the Third Circuit was again confronted with a copyright infringement suit turning on facts remarkably similar to *Redd Horne*. In *Columbia Pictures Industries, Inc. v. Aveco, Inc.*,⁷³ the plaintiffs, producers of motion pictures, sued the defendants, owners of a video rental business, for allegedly infringing on their exclusive right to publicly perform copyrighted works.⁷⁴ Like the defendants in *Redd Horne*, the store owners in *Aveco* made available private rooms in their facilities in which individuals could enjoy feature films. The defendants insisted that “it rent[ed] its viewing rooms to individual customers who . . . [were] joined in the room only by members of their families and social acquaintances. . . . [The defendants’] stated practice [was] not to permit unrelated groups of customers to share a viewing room”⁷⁵ Additionally, unlike *Redd Horne*, the customers in *Aveco* exercised complete control over the performance of a video.⁷⁶

70 *Id.* at 159 (“[T]he transmission of a performance to members of the public, even in private settings such as hotel rooms or Maxwell’s viewing rooms, constitutes a public performance.”).

71 *Id.*

72 *Id.*

73 800 F.2d 59 (3d Cir. 1986).

74 *Id.* at 61.

75 *Id.*

76 *Id.* at 62.

Instead of an employee transmitting the film from a central site, customers operated video cassette players located in each viewing room.⁷⁷ Based on these facts, it is clear that the public performance issue in *Aveco* could not be resolved by either the transmission or the substantial number of persons clauses. Thus, the *Aveco* court was left in the gray area of public place analysis and stripped of all but one basis for decision—whether playing a copyrighted work in the private room of a public establishment constituted a public performance under 17 U.S.C. § 106.

Acknowledging the decision in *Redd Horne*, the *Aveco* court resolved that such performances were indeed public for purposes of copyright infringement analysis.⁷⁸ The court certainly realized that the customers exercised complete control over performances “closed to other members of the public . . . [and] in private screening rooms . . . [that were] private during each rental period, and therefore, not ‘open to the public.’”⁷⁹ Nonetheless, the *Aveco* court held that these performances were public.⁸⁰ The decision rested on a “nature of the place” standard derived from a portion of the *Redd Horne* analysis. That is, the availability of the private rooms to any member of the public rendered each private room, in theory, a public space.⁸¹ The *Aveco* court analogized the situation to telephone booths and pay toilets, both of which are commonly regarded as being open to the public.⁸² On a purely theoretical level, while the reasoning in *Aveco* essentially echoes *Redd Horne*, it is intellectually more satisfying than the chaotic analysis in that case.

C. Columbia Pictures Industries, Inc. v. Professional Real Estate Investors, Inc.

The two aforementioned lines of attack are, at least implicitly, taken up in *Columbia Pictures Industries, Inc. v. Professional Real Estate Investors, Inc.*,⁸³ a Ninth Circuit opinion affirmatively establishing that even after *Redd Horne* and *Aveco*, public place analysis is still unresolved.

The plaintiffs, ever the vigilant copyright enforcers, filed suit after learning that the defendants, operators of a hotel resort, allowed

77 *Id.* at 61.

78 *Id.* at 64.

79 *Id.* at 63.

80 *Id.* at 61.

81 *Id.* at 63.

82 *Id.*

83 866 F.2d 278 (9th Cir. 1989).

guests to rent videodiscs from the gift shop for viewing in their individual rooms.⁸⁴ Guests simply went to the lobby gift shop, paid a daily fee for a disc, and retired to their room to watch the film on a large screen projection television.⁸⁵ Factually, *Professional Real Estate Investors* is similar to *Aveco*, in that both involve owner-controlled video performances in private rooms on public premises. Based on this similarity, *Aveco* arguably controls this situation, regardless of the fact that *Professional Real Estate Investors* involved a hotel and *Aveco* concerned a video rental store. That is, the reasoning in *Aveco* purports to transcend such differences, for if a private room is "available to any member of the public with the inclination to avail himself [of the space],"⁸⁶ any performance taking place therein is considered public. Certainly, a hotel room is open to any member of the public who desires to avail himself of the space, so it follows that under *Aveco*, the performance in *Professional Real Estate Investors* should be public.

The Ninth Circuit, however, disagreed, maintaining that "[t]he plain language and the legislative history [of the statute] lead us to conclude that hotel guest rooms are not 'public.'"⁸⁷ The court rested its reasoning on two principles. First, like the Third Circuit, the Ninth Circuit employed a "nature of the place" standard, albeit in a slightly modified form. Instead of simply using the standard to classify a place as public or private, the court considered the "nature of the place" to be defined by how it derives its primary economic benefit. Thus, the Ninth Circuit opined that the defendant's operation differed from those in *Redd Horne* and *Aveco* because "its 'nature' is the providing of living accommodations and general hotel services, which may incidentally include the rental of videodiscs to interested guests for viewing in guest rooms."⁸⁸ Based on this consideration, the court shifted its focus from the hotel generally to the individual guest room. Thus, "[w]hile the hotel may indeed be 'open to the public,'" the court argued, "a guest's hotel room, once rented, is not."⁸⁹

The Ninth Circuit concluded that the hotel room was private from the perspective of its occupant, noting that "guest rooms [are] places where individuals enjoy a substantial degree of privacy, not unlike their own homes."⁹⁰ As authority for this position, the court cited the proposition that individuals are afforded constitutional protection

84 *Id.* at 279.

85 *Id.*

86 *Aveco*, 800 F.2d at 63.

87 *Prof'l Real Estate Developers*, 866 F.2d at 280.

88 *Id.* at 281.

89 *Id.*

90 *Id.*

from unreasonable searches and seizures in hotel rooms.⁹¹ Contrary to *Aveco*, the court in *Professional Real Estate Investors* determined that, given the nature of the place and the occupant's expectation of a substantial degree of privacy, private rooms in public places, at least insofar as hotels are concerned, are not "open to the public" for purposes of copyright infringement analysis.⁹²

D. Video Views, Inc. v. Studio 21, Ltd.

After *Redd Horne*, *Aveco*, and *Professional Real Estate Investors*, public place analysis, at least in the gray area between places always private and always public, seemed to rest at an impasse. The apparent discord between these differing views was further exacerbated as the Seventh Circuit joined the fray in *Video Views, Inc. v. Studio 21, Ltd.*⁹³

The space at issue in *Video Views* was an adult entertainment business that contained on its premises six video arcade booths, large enough to accommodate between one and six people.⁹⁴ Customers viewed adult films by informing employees which video they desired and purchasing tokens which allowed them to view five-minute segments of their selection.⁹⁵ The plaintiffs, recognizing the factual similarity between this situation and *Redd Horne* and *Aveco*, cited those opinions as express authority for the position that the adult book store violated their exclusive right to publicly perform their videos.⁹⁶ The defendants, on the other hand, cited *Professional Real Estate Investors* for the proposition that the Ninth Circuit had authoritatively changed the law as expounded in *Redd Horne* and *Aveco*.⁹⁷ Thus, *Video Views* pitted the Third Circuit against the Ninth Circuit, thereby leaving the Seventh Circuit to take sides in an open conflict on the issue of whether performances in private rooms on public premises constitute public performances as contemplated under the 1976 Act.

91 *Id.* (citing *Stoner v. California*, 376 U.S. 483, 490 (1964)).

92 *Id.* at 281.

93 925 F.2d 1010 (7th Cir. 1991).

94 *Id.* at 1019.

95 *Id.* at 1012. It is unclear from the facts as recited in the opinion whether the video was transmitted by an employee from a central location. The court did not address this issue in its decision, deciding instead to focus on the issue of whether videos shown in private booths on premises open to the public are public performances under 17 U.S.C. § 106. *Id.* at 1019.

96 *Id.* at 1019.

97 *Id.* ("Studio 21 contends that there has been a change in the law since the time of trial, citing [*Professional Real Estate Investors*]. It suggests that we are obligated to apply the 'new' law on this appeal . . .") (citation omitted).

The *Video Views* court expressly sided with the Third Circuit, holding that “[w]e find that *Professional Real Estate Investors* did not ‘change’ the law. . . . To the extent that [it] may be viewed to contradict the rule established by *Redd Horne* and *Aveco*, we decline to follow it.”⁹⁸ The court proceeded to simply look to the nature of the premises as a whole, concluding that because adult book stores are places where the public is openly invited, any performance taking place therein is necessarily public as well.⁹⁹

III. RECONCILIATION: TOWARD A UNIFORM PUBLIC PLACE STANDARD UNDER THE COPYRIGHT ACT OF 1976

The holdings in *Redd Horne*, *Aveco*, *Professional Real Estate Investors*, and *Video Views* have left many commentators scratching their heads, finally concluding that the decisions are ultimately irreconcilable.¹⁰⁰ Indeed, the situation would appear hopeless. From a purely theoretical perspective, it is inconceivable that the Ninth Circuit recognizes precisely what the Third and Seventh Circuits deny: that private spaces can exist in public places. Confusing the matter even more, the reasoning in one decision seems particularly applicable to the others, thereby providing a quandary without a clearly defined solution.

Fortunately, these decisions are far more instructive than they might first appear. The solution requires, as one might expect, a change in perspective, as any one of these four decisions does not itself conclusively resolve the public place problem. Instead, one must approach each individual opinion as an important assignment in a larger lesson. That is, *Redd Horne*, *Aveco*, and *Professional Real Estate Investors* each provide one principle that assists public place analysis toward realizing its full potential. By arranging the significant concepts from each decision, then, one may construct a three-pronged public place standard that not only resolves apparent discrepancies between cases arising under the 1976 Act, but provides a method by which jurists may surmount similar challenges in the future. Each element may be resolved in favor of finding either a private space or public place, with the resulting majority controlling the outcome. The three factors for public place analysis are:

98 *Id.* at 1020.

99 *Id.*

100 *See, e.g.*, Gayle E. Coleman, *Copyright and Videos: Current Trends in the Right of Public Performance*, FLA. B.J., Apr. 1992, at 46 (“The courts are divided on the factors which constitute ‘public performance,’ particularly as it relates to the viewing of videos”); Kheit, *supra* note 56, at 5 (“[T]he definition of what constitutes a public place is unsettled; the courts splinter somewhat haphazardly when construing the metes and bounds of a public place with regard to public performances.”).

- (1) whether the immediate space in which the performance takes place affords its occupant a reasonable expectation of privacy;
- (2) whether the individual (or individuals) witnessing the performance controls that performance, or whether that individual (or individuals) lacks control over the performance; and
- (3) whether the nature of the place in which the performance takes place is generally used for the purpose of enjoying such performances, or whether the performance is incidental to the overall function of the enterprise.

A. *A Reasonable Expectation of Privacy*

The first issue to be determined under the test is whether the immediate space in which the performance takes place affords the occupant a reasonable expectation of privacy. This factor, derived from *Professional Real Estate Investors*, is conceptually the simplest element of the public place standard and, therefore, the logical starting point for public place analysis.

The pervasiveness of a reasonable expectation of privacy in the factual setting of *Professional Real Estate Investors* was, for Judge O'Scannlain, a determinative element in finding a private performance on public premises.¹⁰¹ While noting that the hotel in general is open to the public, he looked to the immediate confines in which the disputed performances took place, surroundings that afforded the occupant a substantial degree of privacy.¹⁰² The privacy determination is premised on two factors. First, a guest in a hotel room is entitled to constitutional protection against unreasonable searches and seizures.¹⁰³ Second, common experience dictates that hotel rooms are "places where individuals enjoy a substantial degree of privacy, not unlike their own homes."¹⁰⁴ Based on the Ninth Circuit's analysis, then, the first element of the standard takes shape. Regardless of whether the premises are public, the scales lean against finding a public performance if the immediate confines of the space in which the

101 See *Columbia Pictures Indus., Inc. v. Prof'l Real Estate Investors, Inc.*, 866 F.2d 278, 281 (9th Cir. 1989) ("The movies are viewed exclusively in guest rooms, places where individuals enjoy a substantial degree of privacy, not unlike their own homes").

102 *Id.*

103 *Id.* ("No less than a tenant of a house, or the occupant in a boarding house, a guest in a hotel room is entitled to constitutional protection against unreasonable searches and seizures.") (citations omitted). The court cited *Stoner v. California*, 376 U.S. 483, 490 (1964), a case addressing the scope of a permissible search under the Fourth Amendment, for this point.

104 *Prof'l Real Estate Investors*, 866 F.2d at 281.

disputed performance takes place prompt a reasonable expectation of privacy.

Professional Real Estate Investors underscores the importance of an expectation of privacy (or lack thereof) to public place analysis, but what is the standard to apply in making this determination? The opinion mentions Fourth Amendment decisions as instructive.¹⁰⁵ Indeed, given their emphasis on privacy, Fourth Amendment cases define a sound measure for determining whether a particular place affords an individual a "reasonable expectation of privacy" for purposes of public place analysis under the 1976 Act.¹⁰⁶ The U.S. Supreme Court, in *Minnesota v. Olson*,¹⁰⁷ provides just such a useful standard. Justice White, writing for the Court, held that an individual may legitimately expect privacy in a place if "society is prepared to recognize [that expectation] as reasonable."¹⁰⁸

In sum, then, the first prong of public place analysis under the 1976 Act is whether a space affords its occupant a reasonable expectation of privacy. That determination must be made, in turn, by shifting the focus from the place to the individual to establish whether society, based on common experience, deems legitimate his or her expectation of privacy therein. If so, the first element of public place analysis weighs toward finding a private performance and no infringement of the public performance right. If not, this factor shifts the inquiry toward finding a public place and, therefore, copyright infringement.

B. *The Extent to Which the Individual Controls the Performance*

Having completed a preliminary analysis of the space in which the performance takes place, the second determination to be made is the extent to which the performance of a particular work is controlled by the individual(s) witnessing that performance. This factor, lifted from *Aveco*, involves an elaborate inquiry that requires further explanation.

105 See *id.* at 281 (citing *Stoner*, 376 U.S. at 483).

106 See *id.* (referencing the Fourth Amendment's "reasonable expectation of privacy" standard in analyzing whether a performance was "public" for purposes of federal copyright law).

107 495 U.S. 91 (1990).

108 *Id.* at 95-96 (citing *Rakas v. Illinois*, 439 U.S. 128, 143-44 (1978)). Judge O'Scannlain seems to rely on a similar standard in *Professional Real Estate Investors*, as he appeals to *common experience* to determine whether a place affords an individual a reasonable expectation of privacy. *Prof'l Real Estate Investors*, 866 F.2d at 281 ("This conclusion is further supported by common experience. [Hotel] guests do not view the videodiscs in hotel meeting rooms used for large gatherings. The movies are viewed exclusively in guest rooms . . .").

Although the holding in *Aveco* seems to rest primarily on adherence to the *Redd Horne* decision,¹⁰⁹ Judge Stapleton's opinion reveals that the element of control should be a significant factor in public place analysis.¹¹⁰ *Aveco's* factual scenario reflects two factors that weigh toward finding a private performance that does not infringe on the plaintiff's copyright. First, "the viewing room was closed to other members of the public."¹¹¹ Second, "*Aveco's* customers are the ones performing the works, for it is they who actually place the video cassette in the video cassette player and operate the controls."¹¹² While the court mentions control as a factor that bears on public place analysis, it fails to provide the attendant justification.

Understanding the importance of control to public place analysis requires spatial thinking. When an individual (or group of individuals not falling under the "substantial number of persons" clause) exercises complete control over a performance of a particular work, no other member of the public can be said to have been involved in that performance. That is, the causal boundaries of that particular performance are drawn narrowly, prior to implicating any member of the public. When an individual (or group of individuals not falling under the "substantial number of persons" clause) does *not* exercise complete control over the performance of a particular work, however, the causal boundaries of that performance are ductile, allowing for the possibility that a member of the public is involved. In sum, when an individual does not exercise complete control in taking in the performance of a particular work, that performance tends to be public, as members of the public constitute a link in the chain of causation. If the individual exercises complete control over the performance of a particular work, however, the chain of causation necessarily excludes members of the general public, thereby weighing against finding a public performance.

This reasoning provided the basis for decision in *Cohen v. Paramount Pictures Corp.*,¹¹³ a dispute centered on whether the defendant could reproduce a musical composition in videocassettes under a license permitting it to perform a musical composition at "places of

109 See *Columbia Pictures Indus., Inc. v. Aveco, Inc.*, 800 F.2d 59, 63 (3d Cir. 1986) ("Because we find *Redd Horne* indistinguishable from the case at bar, we find that *Aveco's* operations constituted an authorization of public performances of [the plaintiff's] copyrighted works.").

110 See, e.g., Kheit, *supra* note 56, at 39-41 (recognizing that *Aveco* suggests that a lack of recipient control weighs towards finding a public performance).

111 *Aveco*, 800 F.2d at 63.

112 *Id.* at 62.

113 845 F.2d 851 (9th Cir. 1988).

public entertainment.”¹¹⁴ The defendant asserted that reproduction in videocassettes was permissible because it was equivalent to broadcasting the composition on television, a “place of public entertainment.”¹¹⁵ Given that television and videocassettes are both viewed in the home, the defendant’s argument nullified space characteristics as the determinative factor by which to distinguish reproductions for private performances from those for public performances.

The court, however, used the issue of control to distinguish reproductions for private performances, prohibited under the license, from reproduction for public performances, permitted by the license.¹¹⁶ Videocassettes are reproductions intended for private performance, the court held, because “[v]ideocassette entertainment is controlled within the home, at the viewer’s complete discretion . . . [which] eliminate[s] the involvement of an intermediary, such as a network.”¹¹⁷ On the contrary, the court held that duplicates intended for television are reproductions for public performance because “[t]he menu of entertainment appearing on television is controlled entirely by [an] intermediary and, thus, . . . beyond the viewer’s grasp.”¹¹⁸

Barred from relying on the qualities of the space in which future performances would take place, the court used the aforementioned reasoning to recognize that the extent to which the viewer controls a performance is effective in distinguishing private from public performances.¹¹⁹

To this point, we have come to a basic understanding that control—the second element of the three-pronged test for public place analysis—is a useful factor by which to distinguish public from private performances. The last question to resolve is what standard to use in identifying the extent that an individual exercises control over a given performance. The issue is more easily resolved if the question is phrased in the negative. More concretely, when can an individual reasonably be said to lack control over the performance of a particular work so as to implicate members of the public, thereby resolving the issue in favor of finding a public performance?

Thankfully, while *Aveco* abandons the control inquiry at the point of providing a justification, it rejoins the fray to supply an applicable

114 *Id.* at 853.

115 Television would be considered a public performance under the transmission clause of the 1976 Act. *See* 17 U.S.C. § 101 (2000).

116 *Cohen*, 845 F.2d at 854.

117 *Id.*

118 *Id.*

119 *See id.*

test for control, supported by the doctrine of contributory infringement.¹²⁰ “Contributory infringement originated in tort and ‘stems from the notion that one who *directly contributes* to another’s infringement should be held accountable.’”¹²¹ Based on this definition, then, contributory infringement and the control prong of public place analysis are conceptually related, as both seek to define a chain of causation for the performance of a copyrighted work to establish whether the links extend to one individual or several parties. Tailoring the contributory infringement standard to public place analysis, an individual lacks control over a performance if another party induces, causes, or materially contributes to the disputed performance.¹²²

In sum, the extent to which an individual controls the performance of a copyrighted work is an influential element in the three-pronged test for public place analysis. If, under the standard articulated here, the individual is deemed to exercise control over a performance, this prong should be resolved in favor of a private performance; if, however, the individual does not control a performance, the factor emphasizes a public quality of the performance.

C. *The Nature of the Place*

The third and final element of the three-part public place standard involves establishing whether the “nature of the place where the performance takes place . . . is generally used for the purpose of enjoying performances.”¹²³ If the place *is* generally used to enjoy performances, this factor will be resolved in support of finding a public performance.¹²⁴ If the disputed performance is merely incidental to the principal operations of the enterprise, this factor will be resolved in favor of finding a private performance.

120 *Columbia Pictures Indus., Inc. v. Aveco, Inc.*, 800 F.2d 59, 62 (3d Cir. 1986) (citing *RCA Records v. All-Fast Sys., Inc.*, 594 F. Supp. 335 (S.D.N.Y. 1984); *Italian Book Corp. v. Palms Sheepshead Country Club, Inc.*, 186 U.S.P.Q. (BNA) 326 (E.D.N.Y. 1975)).

121 *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 243 F. Supp. 2d 1073, 1089 (C.D. Cal. 2003) (quoting *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 264 (9th Cir. 1996)).

122 This standard is modified from the contributory infringement standard set forth by Professors Nimmer: “A party ‘who, with knowledge of the infringing activity, induces, causes, or materially contributes to the infringing conduct of another, may be held liable as a ‘contributory infringer.’” 3 NIMMER & NIMMER, *supra* note 8, § 12.04[A][2][a] (citing *Gershwin Publ’g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971)).

123 *Kheit*, *supra* note 56, at 28.

124 *Id.*

While the analytical leap from “business purpose” to “public place” may seem somewhat arbitrary, it is the only element of public place analysis inhering in all four of the aforementioned decisions (*Redd Horne*, *Aveco*, *Professional Real Estate Investors*, and *Video Views*). Upon further analysis, this “nature of the place” factor makes perfect sense.

The “nature of the place” standard was first pronounced, albeit rather coarsely, in *Redd Horne*.¹²⁵ While the court did not refine the standard to its current incarnation, the controlling theory behind the holding in the case was that “‘the showcasing operation is not distinguishable in any significant manner from the exhibition of films at a conventional movie theater.’ . . . The charges or fees received for viewing the cassettes at [the facility] are analytically indistinguishable from admission fees paid by patrons to gain admission to any public theater.”¹²⁶

By emphasizing that the principal purpose of the facility was to house the performance of videocassettes, the court shifted the focus of its inquiry to the entire facility, thereby resolving the “nature of the place” element in favor of finding a public performance.¹²⁷

Using *Redd Horne* as the stimulus for its decision, *Aveco* refined the “nature of the place” analysis, stating that “[o]ur opinion in *Redd Horne* turned not on the precise whereabouts of the video cassette players, but on the *nature* of [the facilities].”¹²⁸ Although *Aveco*’s customers viewed videos in private screening rooms, the court overcame this presumption of privacy because *Aveco* derived its primary economic benefit from such performances. Thus, the “nature of the place” analysis shifted back to the entire facility, which was a public place because “*Aveco* [] was willing to make a viewing room and video cassette available to any member of the public with the inclination to avail himself of this service.”¹²⁹

The “nature of the place” standard also played a significant role in *Professional Real Estate Investors*. Like *Redd Horne* and *Aveco*, the

125 See *Columbia Pictures Indus., Inc. v. Redd Horne, Inc.*, 749 F.2d 154, 159 (3d Cir. 1984) (arguing that because the business was organized primarily for the enjoyment of performances, “[t]he services provided by Maxwell’s are essentially the same as a movie theatre.”).

126 *Id.* at 159–60 (quoting *Columbia Pictures Indus., Inc. v. Redd Horne Inc.*, 568 F. Supp. 494, 500 (W.D. Pa. 1983)).

127 *Id.* at 159 (“The relevant ‘place’ within the meaning of section 101 is each of Maxwell’s two stores, not each individual booth within each store.”).

128 *Columbia Pictures Indus., Inc. v. Aveco, Inc.*, 800 F.2d 59, 63 (3d Cir. 1986) (emphasis added).

129 *Id.*

space in which the video performances took place created an initial presumption of privacy.¹³⁰ Unlike those decisions, however, the court did not shift the inquiry back to the entire hotel facility.¹³¹ One of the principal justifications for keeping the analysis focused on a single room was that “[the hotel’s] operation differ[ed] from those in *Aveco* and *Redd Horne* because its ‘nature’ is the providing of living accommodations and general hotel services, which may *incidentally* include the rental of videodiscs to interested guests for viewing in guest rooms.”¹³² As the enterprise at issue in *Professional Real Estate Investors* was not organized for the sole purpose of housing performances, the “nature of the place” standard weighed against finding a public performance.

Finally, *Video Views*, factually similar to *Redd Horne* and *Aveco*, adopted the reasoning in those decisions pertaining to the resolution of the “nature of the place” factor.¹³³ The court acknowledged that “the proper inquiry is directed to the nature of the place in which the private video booths are located”¹³⁴ As the enterprise at issue derived its primary financial benefits from “providing its customers with the opportunity to view on its premises films that had been licensed to [the plaintiff],”¹³⁵ the court directed the “nature of the place” analysis to the entire facility, resolving that this standard pointed toward a public performance of the plaintiff’s films.¹³⁶

While it is apparent from these decisions that the nature of the place is a significant factor in public place analysis, they provide no principled reasoning why this should be so. The answer lies in the economic policy behind the public performance right. From the eighteenth through the twenty-first centuries, it has been well recognized that one rationale for the rights bundled within a given copyright is to secure the financial interests of inventors and authors so as to stimulate creative endeavors for the good of society.¹³⁷ The “nature

130 *Columbia Pictures Indus., Inc. v. Prof'l Real Estate Investors, Inc.*, 866 F.2d 278, 281 (9th Cir. 1989) (noting that “a guest’s hotel room, once rented, is not [open to the public]”).

131 *Id.* (concentrating the public performance analysis exclusively on an individual guest room).

132 *Id.*

133 *See Video Views, Inc. v. Studio 21, Ltd.*, 925 F.2d 1010, 1020 (7th Cir. 1991) (declaring that “[w]e agree with the rationale of both *Redd Horne* and *Aveco*”).

134 *Id.*

135 *Id.* at 1013.

136 *Id.* at 1020.

137 *Compare* Copyright Act of 1909, ch. 320, 35 Stat. 1075 (1909) (repealed 1976) (affording authors a copyright for the “legal security of the fruits of their study and industry”), *with* *Princeton Univ. Press v. Michigan Document Servs., Inc.*, 99 F.3d

of the place” standard is rationally related to this goal, as it is a means by which fruits derived from the performance of a work are secured for its owner. Roger W. Wallach describes the “nature of the place” standard as a means by which to determine whether the copyright owner is losing proceeds from market expenditures for its product. He deftly identifies the relationship as follows:

By inquiring whether the copyright holder is losing proceeds from market expenditures from its product, one can easily distinguish [*Professional Real Estate Investors*] from *Redd Horne* and *Aveco*. The consumer who considers leaving home to watch a movie chooses between video stores with booths—as in *Redd Horne* and *Aveco*—and a public theater, which pays a public performance royalty. Conversely, the consumer who decides to rent a movie on a supplied videodisc player chooses between the hotel’s selection and that of a local video store, which pays no public performance royalty. The copyright holder therefore loses money if video stores with booths do not pay the public performance royalty that public theaters pay.¹³⁸

The “nature of the place” standard thus ensures that the copyright holder is receiving the financial benefits to which he is entitled. Wallach’s analysis identifies an economic rationale that both clarifies and justifies the conclusion that under the “nature of the place” factor, performances taking place in private rooms are considered public if the enterprise as a whole is organized to provide such performances.

Under the “nature of the place” prong of the public place standard, if an enterprise exists primarily to provide performances of the type in dispute, the factor is resolved in favor of publicness, regardless of whether the actual performance took place in a private room. If the performance in question is merely incidental to the overall function of the entire entity, however, the copyright holder is not being deprived of any financial benefit, and the factor should be resolved in support of privacy.

IV. RESOLUTION AND APPLICATION

The individual factors comprising the standard for public place analysis are each capable of resolution in favor of finding either a pub-

1381, 1399 (6th Cir. 1996) (echoing even the earliest copyright statutes by declaring that the “protection of the financial interests of inventors and authors” forms one of the bases of copyrights).

138 Roger W. Wallach, *Not in Public! The Ninth Circuit Devises a Two-Step Test for Public Performances Under the Copyright Act*, 68 WASH. U. L.Q. 203, 211–12 (1990) (footnotes omitted).

lic or a private performance. After each element is applied and its proper outcome determined in light of a particular set of facts, the majority of factors—public or private—point toward the proper outcome. The utility of this three-pronged test is evident in its ability to reconcile the conflicting holdings in *Redd Horne*, *Aveco*, *Professional Real Estate Investors*, and *Video Views*.

A. *Redd Horne Under the Public Place Standard*

Although the *Redd Horne* performance is necessarily “public” under the transmission clause of the 1976 Act, the application of the public place standard developed in this Note reaches the same conclusion.

First, although the court suggested that the individual booths in which the performances took place were private, under the test for a “reasonable expectation of privacy” as articulated here, it is highly unlikely that society would recognize the occupants’ expectation of privacy therein as legitimate. Professors Nimmer provide ample justification for this conclusion, likening the situation in *Redd Horne* to an “old-fashioned penny arcade, where a short motion picture sequence might be seen in a coin-operated ‘peep show’ device.”¹³⁹ Based on this analogy, they conclude that “[i]t would be strange, indeed, to conclude that these were private performances simply because only one person at a time observed each such performance.”¹⁴⁰ Professors Nimmers’ reasoning is intuitively correct. Based on common experience with such devices, it is patently unreasonable to conclude that such performances offer the viewer a reasonable expectation of privacy simply because the eyepiece on such machines limits the performance to a single person. Taking Professors Nimmers’ analogy as true, then, the booths in *Redd Horne* could not afford their occupants a reasonable expectation of privacy. Thus, the first prong of the three-part public place standard favors finding a public performance.

Second, the patrons in *Redd Horne* exercised no control over the disputed performances.¹⁴¹ Instead, the customer chose a film from a catalogue at the front of the store.¹⁴² “Closing the door of the viewing

139 2 NIMMER & NIMMER, *supra* note 8, § 8.14[C][3].

140 *Id.*

141 See *Columbia Pictures Indus., Inc. v. Redd Horne, Inc.*, 749 F.2d 154, 157 (3d Cir. 1984) (observing that “[a]n employee of Maxwell’s then places the cassette of the motion picture chosen by the viewer into one of the video cassette machines in the front of the store and [transmits] the picture . . . to the patron’s viewing room”).

142 See *id.* (describing how “[t]he customer selects a film from a catalogue which contains the titles of available films”).

room activate[d] a signal in the counter area at the front of the store. An employee . . . then place[d] the cassette . . . into one of the video cassette machines . . . and the picture [was] transmitted to the patron's viewing room."¹⁴³ Under the control standard developed in this Note, the employees in *Redd Horne* materially contributed to the disputed performances, thereby stripping the patrons of control. Thus, because the chain of causation for each performance implicated members of the public, this factor is resolved in support of a public performance.

Finally, the places at which the performances in *Redd Horne* took place were organized for the purposes of providing such performances.¹⁴⁴ Although the stores sold and rented videocassettes, they contained a total of eighty-five booths for in-store performances.¹⁴⁵ The nature of the place was to provide performances of the kind disputed in the principal litigation and this factor is resolved toward finding a public performance.

Even if the performances in *Redd Horne* were not public under the transmission clause of the 1976 Act, the public place standard as developed in this Note would lead to the same conclusion, as all three factors weigh toward finding a public performance.

B. *Aveco Under the Public Place Standard*

Aveco is easily resolved under the three-pronged public place standard because it simply presents a different wrinkle of the *Redd Horne* facts. Although the lack of transmission in *Aveco* alters the analysis somewhat, the result is still, as the court found, a public performance.¹⁴⁶

First, the booths in *Aveco* are indistinguishable from those in *Redd Horne*.¹⁴⁷ Given Professors Nimmers' analysis, the *Aveco* booths, like those in *Redd Horne*, could not afford their occupants a reasonable expectation of privacy. The "reasonable expectation of privacy" prong, then, must be resolved in support of a public performance.

The second factor in the public place standard, the element of control, is where the public place analysis in *Aveco* departs from that in *Redd Horne*. Unlike in *Redd Horne*, the cassettes in *Aveco* were per-

143 *Id.*

144 *See id.* at 159 (holding that "[t]he services provided by Maxwell's are essentially the same as a movie theatre, with the additional feature of privacy").

145 *Id.* at 156-57.

146 *Columbia Pictures Indus., Inc. v. Aveco, Inc.*, 612 F. Supp. 315, 320 (M.D. Pa. 1985), *aff'd*, 800 F.2d 59 (3d Cir. 1986).

147 *Id.* at 319 ("[W]e see no difference between [the premises in *Aveco* and *Redd Horne*].").

formed by the customers themselves, without any assistance or interference from store employees.¹⁴⁸ The test for control under the public place standard—whether another party induced, caused, or materially contributed to the disputed performance—provides that the patrons in *Aveco* completely controlled the videocassette performances. As a result, the second prong of the analysis must be resolved in favor of a private performance.

Third, the nature of the place inquiry leans toward finding a public performance. The stores at issue in *Aveco* were constructed for the primary purpose of affording customers the opportunity to view videocassettes on the premises. The performances were not merely incidental to the operation of the enterprise, and the third prong of the public place standard must be resolved in support of a public performance.

Although similar to *Redd Horne*, the performance in *Aveco* was controlled by patrons, thereby requiring modification of the public place analysis. This adjustment necessarily impacts the resolution of the control element, but on the whole, the factors inhering in the comprehensive public place standard support the court's decision, as their resolution weighs toward finding a public performance.

C. Professional Real Estate Investors *Under the Public Place Standard*

The facts detailed in *Professional Real Estate Investors* lend themselves to an uncomplicated resolution toward a private performance under the public performance standard articulated in this Note.

First, the disputed performances took place in individual hotel rooms. The court's reasoning makes common sense and supports one's natural inclination—that the occupants of these rooms could legitimately expect a substantial degree of privacy therein.¹⁴⁹ Given the test for a reasonable expectation of privacy that comprises the first inquiry under the public place standard, this factor must be resolved toward finding a private performance.

Second, it is readily apparent from the factual synopsis that hotel guests exercised complete control over the performances in question. In order to watch a film, each guest had to visit the hotel lobby, pay a rental fee, take the videodisc back to his or her room, and personally place it in the videodisc player.¹⁵⁰ The hotel, in no way contributing

148 *Id.*

149 *Columbia Pictures Indus., Inc. v. Prof'l Real Estate Investors, Inc.*, 866 F.2d 278, 281 (9th Cir. 1989).

150 *Id.* at 279. "Hotel employees [were] available upon request to answer questions by guests about operating the in-room equipment." *Id.* While employee assis-

to the disputed performance, thus failed the "material contribution" test. Hotel guests retain control over each performance, thereby shifting the control element of the public place standard toward a private performance.

Finally, the *Professional Real Estate Investors* court provides a thorough analysis of the "nature of the place" inquiry. Judge O'Scannlain notes that the purpose of the hotel as an enterprise is not to provide an opportunity for guests to view videodiscs, but rather to provide living accommodations and general hotel services.¹⁵¹ As the performances forming the basis of the plaintiff's complaint were merely incidental to the overall operation of the hotel, the inquiry under the "nature of the place" prong is disposed of in support of a private performance.

Given this factual scenario, each element of the public performance standard is resolved in favor of finding a private performance that did not infringe on the plaintiff's copyright. Thus, while the test endorses the decisions in *Redd Horne* and *Aveco*, it also supports the holding in *Professional Real Estate Investors*. *Video Views* is correct, then, in arguing that the Ninth Circuit did not change the law, for its decision is entirely consistent with it.

D. Video Views Under the Public Place Standard

As the circumstances surrounding the dispute in *Video Views* were strikingly similar to *Redd Horne* and *Aveco*, it is sensible that the three factors comprising the public place standard should dictate the same result.

First, the six video arcade booths in *Video Views* corresponded to similar booths in *Redd Horne* and *Aveco*. As applied to *Video Views*, therefore, Professors Nimmers' argument assumes the same analytical force it exhibits under factually similar conditions. Thus, the booths at issue in *Video Views* cannot be said to have afforded occupants a reasonable expectation of privacy. This factor must be resolved toward finding a public performance.

The question of control, the second inquiry under the public place standard, presents an interesting issue under *Video Views*'s facts. To view a particular film, the customer purchased a token which enti-

tance in some instances may have resulted in material contribution to a performance that would resolve the control factor in favor of a public performance, this "public" factor would consistently be outweighed by the two "private" factors, which remain constant regardless of control. The conclusion would thus remain unaffected.

151 *Id.* at 281.

tled him or her to view five minutes of a selection.¹⁵² While patrons did not exercise complete control over the performance, as did the hotel guest in *Professional Real Estate Investors*, they did not completely lack control over the performance like the customers in *Redd Horne*. From the court's vague recitation of the facts on this issue, it is difficult to determine whether the performances were transmitted, whether another party provided material contribution, or whether the individual in the booth was solely responsible.¹⁵³ The court, however, mentions that prior to entering the booths, customers informed employees of the selection that they wanted to view.¹⁵⁴ It would logically appear that this situation is analogous to *Redd Horne*, and employees in *Video Views*, therefore, materially contributed to the performances in question. Given this conclusion, the control inquiry of public place analysis must be resolved in favor of finding a public performance.

Finally, the nature of the place, as defined by the court, is to "provide . . . customers with the opportunity to view adult films in viewing rooms located on premises."¹⁵⁵ The adult bookstore in *Video Views* is, like the stores in *Redd Horne* and *Aveco*, organized primarily to house performances of the type in dispute. Accordingly, the third prong of the three-part public place test tends to favor finding a public performance.

Directed to the facts provided in *Video Views*, the three factors comprising the public place test unanimously point to a public performance. *Redd Horne*, *Aveco*, *Professional Real Estate Investors*, and *Video Views* are ostensibly incongruous decisions. The three-pronged public place standard articulated in this Note, however, proves that all four decisions are essentially guided by an unstated theory.

CONCLUSION

The comprehensive standard for public place analysis defined over the course of this Note is more than simply an organizing template for four apparently contrasting opinions. It is a uniform standard for public place analysis applicable to any copyright dispute in which the "publicness" of a performance is disputed.

152 *Video Views, Inc. v. Studio 21, Ltd.*, 925 F.2d 1010, 1012 (7th Cir. 1991).

153 This situation may be analogized to *Professional Real Estate Investors*, wherein there is a possibility that another party could materially contribute to the disputed performances. Like the public place analysis in that situation, the control element in *Video Views* is ineffectual, as the other two factors—each public—remain constant and control the determination.

154 *Video Views*, 925 F.2d at 1012.

155 *Id.*

Moreover, in the framework proposed by this Note, public place analysis should function to ensure satisfactory results by guaranteeing that several perspectives are represented in the estimation. The privacy element analyzes the situation based on common sense reasoning and experience. The control factor ensures that the intellect is properly represented. Finally, the nature of the place standard evaluates the scenario through the lens of the policy underlying copyright law. By appealing to these three constituencies, the public place standard assures a fundamentally sound conclusion.

EPILOGUE

We last left Harry Christmas in his cell at the federal penitentiary in Lewisburg, Pennsylvania, contemplating what went wrong. All he wanted was Dinner and a Movie, yet he got fried mush and pinstripes. What could Harry have done differently to avoid this fate?

Under the three-pronged public place test, the problem with Dinner and a Movie wasn't the nature of the place. While Harry certainly hoped to provide his patrons with an enjoyable movie-watching experience, when looked at as a whole, the restaurant was primarily designed to prepare and serve Harry's culinary wonders. The third element of the analysis, then, leans toward finding *private* performances. Harry's problems, therefore, lay in the privacy and control elements of the analysis. At least one of the two factors would have to have been resolved in favor of privacy to have kept Harry from chiseling rocks.

Given the treatment that individual booths received in *Redd Horne* and *Aveco*, it is unlikely Harry could have argued that patrons could reasonably expect privacy while watching movies at his restaurant. Even if he had closed off the ends of the booths so that only customers could enter or exit, Professors Nimmers' "penny arcade" analysis is not limited to the type of stores in *Redd Horne*, *Aveco*, and *Video Views*. The reasoning logically extends to individual booths in a restaurant. It seems that no matter what Harry had done to close the booths, movie buffs would have never been able to legitimately expect privacy therein.

Harry was thus left to remedy the control factor, to swing the balance of the public place analysis toward private performances. Unfortunately for Harry, handing control over to his patrons was a simple task that he merely overlooked (although Harry would have abandoned his usual outgoing nature and the stroke of creative genius that led to waiters serving movies on a silver platter as though they were entrees). There are two ways Harry could have ensured that custom-

ers retained control over the performances. First, he could have instituted a BYOM¹⁵⁶ policy. Second, he could have simply placed all the available videos on racks in the restaurant lobby, thereby allowing patrons to select a DVD, take it to the table, and insert it into the player themselves. Either solution would have shifted the determination of the control inquiry toward finding a private performance. Doing so, in turn, would have kept the disputed movie performances private.

Instead, poor Harry is in central Pennsylvania, muttering over and over again that he “had to go to prison to become a criminal.”¹⁵⁷ Now if you’ll excuse me, I have a restaurant to open.

156 *Bring Your Own Movie.*

157 *THE SHAWSHANK REDEMPTION* (Castle Rock Entertainment 1994).

