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**THE EVOLUTION AND SCOPE OF THE PUBLIC  
PERFORMANCE RIGHT OF MUSICAL WORKS UNDER  
INTERNATIONAL, U.S. AND EGYPTIAN COPYRIGHT LAWS**

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*INTRODUCTION*

It is often stated that no problem in contemporary copyright law has been debated more extensively or intensely than the question of whether a specified act of communication has taken place in public or in private,<sup>1</sup> yet relatively little is written on the evolution and scope of the public performance right. Furthermore, the literature that exists does not cover the copyright and *droit d'auteur* traditions or compare the approach adopted by the developed countries to that of the developing countries. This article aims to partially fill this gap by examining the evolution and scope of the public performance right in the United States of America and Egypt.

In addition to being a developed country that follows the copyright tradition, the U.S. hosts the biggest music market in the world, with revenues from communication in public making up the largest share in that market.<sup>2</sup> Egypt, on the other hand, is a developing country with a *droit d'auteur* system that has been followed by a number of Middle Eastern countries, including UAE, Bahrain and Kuwait.<sup>3</sup> Furthermore, Egypt has long been a cultural powerhouse in the Middle East, with arguably the biggest music market in the region.

*I. SCOPE AND STRUCTURE*

While the public performance right in the U.S., and to a lesser extent in Egypt, covers communication in and to the public, this article is solely concerned with the communication in public, i.e., the communication of musical works before a gathered audience. Therefore, any communication to the public, whether by broadcasting, cabling, retransmission by cable and/or Internet streaming fall outside the scope of this article. Accord-

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<sup>1</sup> 14 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW § 86, at 56 (Sig Ströholm & Friedrich-Karl Baier eds., 1990).

<sup>2</sup> Deidre McPhillips, *Top 10 Most Musical Countries*, U.S. NEWS (Feb. 15, 2016), <https://www.usnews.com/news/best-countries/articles/2016-02-15/top-10-most-musical-countries>.

<sup>3</sup> From the outset, it should be noted that very little is written on the *droit d'auteur* of Egypt in general and the public performance right in particular.

ingly, throughout this article, the term public performance and communication in public are used interchangeably.

This article is divided into three sections. While Section II traces the origin and development of the public performance right in the U.S. and Egypt, Section III delves into the evolution and scope of the public performance right under the Berne Convention for the Protection of Literary and Artistic Works (1971). Section IV examines the “public” requirement under the copyright law of the U.S. and the author’s right law of Egypt.

## II. ORIGIN AND DEVELOPMENT OF THE PUBLIC PERFORMANCE RIGHT IN THE U.S. AND EGYPT

Although the public performance of musical and dramatic works is well recorded in the ancient civilisations of Egypt and Greece, the issue of whether authors and composers enjoyed a public performance right in either civilization seems to have been generally ignored.<sup>4</sup> Therefore, it would seem that the author’s right of public performance was developed in France during the eighteenth century.<sup>5</sup> For this reason, a brief summary of the evolution of the public performance right in France is given here.

With the French Revolution, the demands of the Commission for the Defence of Dramatic Authors were recognized and as a result, the decree of January 13-19, 1791, was adopted.<sup>6</sup> This decree not only terminated the monopoly enjoyed by the Comédie Française on the works of Molière and others,<sup>7</sup> but also recognized for authors of dramatic works the exclusive right to authorize the performance of their works in public theatres.<sup>8</sup> Although some argue that the 1791 law extended protection to musical works,<sup>9</sup> and that it covered all public performances and not only those given in public theatres, it was not until the judgement of the “tribunal de

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<sup>4</sup> Astonishingly, neither Egyptology nor Coptology seems to show interest in the protection of authorship in ancient Egypt.

<sup>5</sup> For a view that in Rome authors might have enjoyed a performing right in dramatic works, see MARIE CLAUDE DOCK, *ÉTUDE SUR LE DROIT D’AUTEUR* 34 (1963).

<sup>6</sup> Le décret des 13-19 janvier 1791, *COLLECTION COMPLÈTE DES LOIS* 151 (Jean Baptiste Duvergier ed., Paris, Guyot et Scribe, Libraires-Editeurs 2d ed. 1834).

<sup>7</sup> Jane C. Ginsburg, *A Tale of Two Copyrights: Literary Property in Revolutionary France and America*, in *OF AUTHORS AND ORIGINS* 144 (Brad Sherman & Alain Strowel eds., 1994).

<sup>8</sup> Article Three of the 1791 Decree stated: “*Les ouvrages des auteurs vivants ne pourront être représentés sur aucun théâtre public, dans toute l’étendue de la France, sans le consentement formel et par écrit des auteurs sous peine de confiscation du produit total des représentations au profit des auteurs.*”

<sup>9</sup> GAVIN MCFARLANE, *COPYRIGHT: THE DEVELOPMENT AND EXERCISE OF THE PERFORMING RIGHT* 49 (1980).

la Seine” of September 18, 1847, that that was categorically confirmed. Owing to its historical significance, the facts of this case will be outlined.

The composer Alexandre Bourget was accompanied by Victor Parizot and Paul Henrion. They went to the Les Ambassadeurs café on the Champs-Élysées. There, they heard one of Bourget’s musical works being performed, and as a result Bourget refused to pay the bill for the refreshments they had on the grounds that the café proprietor had not paid him for the public performance of his composition. Bourget applied for and obtained an injunction against the café proprietor in respect of the unauthorised performance of his work.<sup>10</sup> Astonishingly, the café proprietor ignored the court injunction and resumed performing Bourget’s work in his café. Thereupon, the composer filed another suit before the same court claiming compensation. On August 3, 1848, the court awarded him compensation,<sup>11</sup> and on April 26, 1849, the judgment was confirmed by the Paris Court of Appeal.<sup>12</sup>

Encouraged by the success of the case against the café proprietor, authors and composers tried to enforce their performing right. Soon, however, they realised the limitations of individual enforcement.<sup>13</sup> Aware of the operation of the Société des Auteurs et Compositeurs Dramatiques (“SACD”) for the administration of the public representation right in dramatic works,<sup>14</sup> Bourget, Parizot, and others decided to set up a collection society to which they would assign the exercise of their public performance right in musical works, and which would grant licences and collect royalties on their behalves.

As a result, on February 28, 1851, the Société des Auteurs, Compositeurs et Editeurs de Musique (“SACEM”) was established and became the first national collecting society for the administration of the public performance right in musical works. Shortly after coming into existence, SACEM enjoyed great success and became a model for future collecting societies in several countries, including the U.S. and Egypt.

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<sup>10</sup> JEAN-LOUP TOURNIER, *VIVRE DE SA MUSIQUE AVEC LA SACEM* 27-28 (2006).

<sup>11</sup> Louis Joseph D’Alton, *A Critical Historical Analysis of the Public Performance Right 161-62*, (unpublished Ph.D. dissertation, University of Western Ontario 2012), <http://ir.lib.uwo.ca/etd/442>.

<sup>12</sup> Archives de Paris, 3d chamber of the *Cour d’appel de Paris*, file D1U9/154, cited in Staffan Albinsson, *The Advent of Performing Rights in Europe*, 6 *MUSIC & POLITICS* (2012), <http://dx.doi.org/10.3998/mp.9460447.0006.204>. It is worth noting that Albinsson offers a different narrative than that mentioned above in the main text.

<sup>13</sup> These limitations include monitoring what venues perform the work, which in turn would require a large force of investigators, contracting with each of these venues, and pursuing through litigation those responsible for unauthorized public performances.

<sup>14</sup> SACD was founded in 1829.

Compared to France, the public performance right was a relative latecomer to U.S. copyright law. While in France the public performance right was the first exclusive economic right to be recognized,<sup>15</sup> the first U.S. Copyright Act of 1790 was solely concerned with the reproduction right.<sup>16</sup> It was not until 1856 that authors of dramatic works in the U.S. had successfully obtained the exclusive right to perform their works in public.<sup>17</sup> In granting such a right, Congress had recognized the unique nature of dramatic works and that it could provide income to their creators through performance, and not only through sale of copies.<sup>18</sup> Therefore, it could be argued that this Act reflected a change in the understanding of copyright in the U.S., from a limited right to reprint to ownership of an intellectual work that entitled the owner to the market profits from any exploitation of the work, irrespective of changes of form and medium.<sup>19</sup>

Unfortunately, similar to the position adopted under the British Dramatic Copyright Act 1833,<sup>20</sup> the scope of the 1856 Act was limited to dramatic works, and did not extend to musical works.<sup>21</sup> However, with the widespread unauthorised public performance of operatic works, a bill was introduced in 1894 for the protection against these acts through penal sanctions.<sup>22</sup> In order to secure to musical works the same level of protection afforded to dramatic works, a second bill was introduced and proposed the adoption of the term “musical works” instead of “operatic

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<sup>15</sup> While in France, as discussed above, the public representation (performance) right was recognized by the 1791 Decree, the reproduction right was recognized as one of the author's exclusive rights by the Decree of 19 July 1793. See *Le décret des 19-24 juillet 1793*, 1 COLLECTION COMPLÈTE DES LOIS, DÉCRETS, ORDONNANCES, RÉGLEMENTS ET AVIS DU COUNSEIL D'ÉTAT 29-32 (Jean Baptiste Duvergier ed., Paris, Chez Guyot et Scribe, Libraires-Éditeurs 2d ed. 1834).

<sup>16</sup> Copyright Act of 1790, ch. 15, 1 Stat. 124.

<sup>17</sup> Act of Aug. 18, 1856, ch. 169, 11 Stat. 138. Section 1 of that Act granted authors and proprietors of dramatic compositions “along with the sole right to print and publish the said composition, the sole right also to act, perform, or represent the same, 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.”

<sup>18</sup> H.R. REP. NO. 2222, at 4 (1909).

<sup>19</sup> See Oren Bracha, *Commentary on the U.S. Copyright Act Amendment 1856*, in PRIMARY SOURCES ON COPYRIGHT (1450–1900) (Lionel Bently & Martin Kretschmer eds., 2008), [www.copyrighthistory.org](http://www.copyrighthistory.org).

<sup>20</sup> Dramatic Copyright Act 1833, 3 & 4 Will. 4. c. 15. For the evolution and scope of the public performance in the UK, see Makeen F. Makeen, *Rationalising Performance “in Public” Under UK Copyright Law*, INTELL. PROP. Q. 117 (2016).

<sup>21</sup> MacGillivray argued that a musical composition might have been protected against unauthorized public performance under the 1856 Act, if it could be shown to be part of a dramatic piece. See EVAN J. MACGILLIVRAY, A TREATISE UPON THE LAW OF COPYRIGHT 287 (1902).

<sup>22</sup> See H.R. REP. NO. 1191 (1894).

works.”<sup>23</sup> As a result, the 1897 Act was passed and granted authors and composers the exclusive right to authorize the public performance of their works.<sup>24</sup>

Strangely enough, the 1897 Act was hardly invoked by authors or copyright owners of musical works. This was mainly because the prevailing logic among music publishers at the time perceived the public performance of a song as the best stimulus to sales of sheet music, which for copyright owners reflected the major source of revenue.<sup>25</sup> Some publishers even went as far as to include a printed notice on sheet music granting the purchaser the right to perform the composition in public.<sup>26</sup>

Notwithstanding that the 1897 Act was almost dormant, during the debates that preceded the 1909 Copyright Act, concerns were expressed that the law as existed brought too many innocent performances within its scope. It was argued that it might even subject churches and schools to copyright liability. Accordingly, the 1909 Act limited the scope of the public performance right in musical works to performances for profit.<sup>27</sup>

The odd approach adopted by the 1909 Act created an unjustified distinction between dramatic and musical works. Any unauthorized public performance of a dramatic work would automatically trigger copyright liability, whereas the unauthorized performance of a musical work had to take place in public and to be for profit, in order to constitute infringement.<sup>28</sup> Accordingly, neither a private performance for profit nor a gratuitous or philanthropic public performance of a musical work fell within the Act.<sup>29</sup>

Although it is difficult to rationalize such a distinction, it arguably stemmed from the belief that someone who viewed a dramatic performance, even if given by amateurs on a non-profit basis, was not likely thereafter to attend a performance for profit of the same work.<sup>30</sup> On the other hand, it was believed that people would still pay for a “for profit” perform-

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<sup>23</sup> See H.R. REP. NO. 54-741, at 1 (1896).

<sup>24</sup> Act of Jan. 6, 1897, ch. 4, 29 Stat. 481.

<sup>25</sup> Bernard Korman, *Performance Rights in Music Under Section 110 and 118 of the 1976 Copyright Act*, 22 N.Y. L. SCH. L. REV. 521, 523 (1977).

<sup>26</sup> *Id.*

<sup>27</sup> 1909 Copyright Act, ch. 320, § 1(e), 35 Stat. 1075. By virtue of section 1(c), the “for profit” requirement was also to cover the delivery, reading or presentation of lectures, sermons, addresses or similar productions.

<sup>28</sup> For a general criticism of the wording of the public performance provisions of the 1909 Act, see R. ROGERS BOWKER, *COPYRIGHT, ITS HISTORY AND ITS LAW* 164-66 (1912).

<sup>29</sup> HORACE G. BALL, *THE LAW OF COPYRIGHT AND LITERARY PROPERTY* 423 (1944).

<sup>30</sup> MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* 8-177 (2018).

ance of a musical work given by professionals, even though they might have attended a non-profit performance earlier of the same work. In other words, it was believed that any public performance of a dramatic work would have a detrimental effect on the copyright owner's ability to profit from his or her work, but only public performances of musical works that were "for profit" were thought to have that risk.<sup>31</sup>

As discussed above, the music industry was initially reluctant to enforce the public performance right. However, by the second decade of the twentieth century, there was widespread use of gramophone records and piano rolls to perform protected musical works in public, which seems to have encouraged the industry to reconsider its position. Concurrently, American authors, composers and publishers became aware of the amount of revenue collected by SACEM in France. This led to a shift in their perception of the notion of public performance, from being a mere stimulus to sales of sheet music and gramophone records to a separate and independent serious source of revenue. In recognizing the potential of the public performance right, authors, composers and publishers, together with the assistance of the dedicated New York lawyer Nathan Burkan, set up the American Society of Composers, Authors and Publishers ("ASCAP") in 1914.<sup>32</sup>

While at present ASCAP is one of the biggest and most influential collecting societies in the world, at its inception it had a difficult few years. Shortly after it had been established, ASCAP's very existence was challenged. This was mainly because the 1909 Act failed to define the term "for profit," which allowed the Second Circuit of the Court of Appeals in *John Church Co. v. Hilliard Hotel Co.* to give that term an extremely narrow interpretation.<sup>33</sup> According to the court, the term "for profit," as used in the Copyright Act of 1909, meant a direct pecuniary charge for the performance, such as an admission fee.<sup>34</sup> Conversely, it did not cover an indirect charge to the public, such as a performance in the dining room of a hotel, which was only intended to increase patronage, and for which no admission fee was charged.

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<sup>31</sup> Lydia Pallas Loren, *The Evolving Role of "for Profit" Use in Copyright Law: Lessons from the 1909 Act*, 26 SANTA CLARA COMPUTER & HIGH TECH. L.J. 255, 266 (2010).

<sup>32</sup> Unlike most countries, where only one collecting society is entrusted with the administration of the public performance right, in the U.S. there are four collecting societies. In addition to ASCAP, there is the Society of European Stage Authors and Composers ("SESAC") established in 1930, Broadcast Music Inc. ("BMI") established in 1939, and Global Music Right ("GMR") established in 2013.

<sup>33</sup> 221 F. 229 (2d Cir. 1915).

<sup>34</sup> *Id.* at 321.

Shortly after that decision, Nathan Burkan filed *Herbert v. Shanley* before the same court.<sup>35</sup> This case concerned the song *Sweethearts*, which was performed live in a restaurant where no admission fee was charged. The owner of the copyright in the song sued the restaurant owner for infringing his exclusive public performance right. The defendant argued that there was no performance for profit: even though the performers were paid, no charge for admission was made to the patrons of the restaurant for the privilege of listening to the music; neither was any additional charge made for meals provided in the restaurant when such music was performed. The district court followed the Court of Appeals ruling in *John Church Co. v. Hilliard Hotel Co.* and dismissed the claim. The Court of Appeals followed its earlier ruling and affirmed the rejection of Herbert's claims.<sup>36</sup>

These two judgements almost put an end to ASCAP's short life. However, when the two cases were consolidated before the Supreme Court, it reversed the decisions of the Second Circuit, and ASCAP resumed its normal activities. According to the Supreme Court, the indirect charge to the public was enough to make the performance one for profit. Justice Holmes said:

If the rights under the copyright are infringed only by a performance where money is taken at the door, they are very imperfectly protected. . . . [T]here is no need to construe the statute so narrowly. The defendant's performances are not eleemosynary. They are part of a total for which the public pays, and the fact that the price of the whole is attributed to a particular item which those present are expected to order is not important. It is true that the music is not the sole object, but neither is the food, which probably could be got cheaper elsewhere. The object is a repast in surroundings that to people having limited powers of conversation, or disliking the rival noise, give a luxurious pleasure not to be had from eating a silent meal. If music did not pay, it would be given up. If it pays, it pays out of the public's pocket. Whether it pays or not, the purpose of employing it is profit, and that is enough.<sup>37</sup>

The Supreme Court decision had established beyond doubt that even an indirect charge amounted to "profit." Even when there was neither direct nor indirect charge to the public, courts followed the spirit of the Supreme Court decision and interpreted the term "for profit" broadly to cover any indirect benefit or profit obtained by a commercial enterprise.<sup>38</sup>

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<sup>35</sup> 222 F. 344 (S.D.N.Y. 1915).

<sup>36</sup> 229 F. 340 (2d Cir. 1916).

<sup>37</sup> *Herbert v. Shanley Co.*, 242 U.S. 591, 595 (1917).

<sup>38</sup> MAKEEN F. MAKEEN, *COPYRIGHT IN A GLOBAL INFORMATION SOCIETY: THE SCOPE OF COPYRIGHT PROTECTION UNDER INTERNATIONAL, US, UK AND FRENCH LAW* 39-41 (2000).

From the beginning of the fourth decade of the twentieth century, many attempts were made to reform the public performance right. Among the very many proposals, some sought to apply the “for profit” requirement to all types of works, including dramatic works, whereas others sought to remove the “for profit” requirement altogether.<sup>39</sup> The Copyright Act of 1976 adopted the latter approach and abolished the “for profit” requirement.

Abolishing the “for profit” requirement stemmed from the belief that a broad “not for profit” exemption would hurt authors and could destroy their incentive to compose or write.<sup>40</sup> This is especially so, since performances continually supplant markets for sales of copies of music. Furthermore, it was recognized that the line between commercial and non-profit organizations was becoming increasingly difficult to draw: many of the so-called “non-profit” organizations were highly subsidised and capable of paying royalties.<sup>41</sup> By repealing the “for profit” requirement, the 1976 Act had removed the odd distinction between dramatic and musical works and attempted to adopt, at least in theory, a public performance right that was subject matter neutral.<sup>42</sup>

Unlike in the U.S., it was not until the middle of the twentieth century that Egypt enacted a specific author’s right law.<sup>43</sup> Although Article 12 of the old Civil Code of 1883 recognized the notion of author’s right, it intentionally left the scope of protection to be determined by specific laws. The same approach was adopted under Article 86 of the new Civil Code of 1948, which states “rights in respect of intangibles are to be governed by special laws.”<sup>44</sup> This provision of the new Civil Code, which came into force concurrently with the abolition of foreign privileges and Egypt regaining full sovereignty over its legal system, seems to have indirectly called upon the legislature to enact a specific law for the protection of

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<sup>39</sup> For the different proposals, see Loren, *supra* note 31, at 277-78. Interestingly, one of the many proposals and views expressed was to expand the performance right to cover “home viewing” of motion pictures. See Boardman Lloyd, *Disc-TV: Some Recurring Copyright Problems in the Reproduction and Performance of Motion Pictures*, 34 U. CHI L. REV. 686, 703 (1967).

<sup>40</sup> H.R. REP. NO. 94-1476, at 63 (1976); *see also* S. REP. NO. 93-983, at 112 (1974).

<sup>41</sup> H.R. REP. NO. 94-1476, at 62-63 (1976); S. REP. NO. 93-983, at 112 (1974).

<sup>42</sup> Regrettably, Congress seems to have failed to keep the public performance right subject matter neutral. *See, e.g.*, 1976 Copyright Act § 110[5](A), (B) (enacted by the Fairness in Music Licensing Act, Pub. L. 105-298, 112 Stat. 2827 (1998)).

<sup>43</sup> It is worth noting that Egyptian law uses the term “author” and “right” in the singular and this has been followed here.

<sup>44</sup> Law No. 131 of 1948 (Civil Code), vol. 108*bis* (a) *El Waqāi’al Mišrīyah* of 29 July 1948 (Egypt).



literary and artistic works. This was achieved with the enactment of the Author's Right Law of 1954.<sup>45</sup>

It is unclear whether the general principles of criminal or civil law had offered any protection to authors against the unauthorized public performance of their works before the enactment of the Author's Right Law of 1954. This is mainly because, until 1949 Egypt had two main systems of courts operating in parallel: Mixed Courts and National Courts.<sup>46</sup>

While National Courts seemed reluctant to extend the application of the Penal Code of 1937 to protect authors and composers against the unauthorized public performance of their works,<sup>47</sup> the Mixed Courts were too willing to offer such protection.<sup>48</sup> In doing so, the Mixed Courts seem to have created a superficial distinction between the unauthorized public performance and the unauthorized reproduction of works. Whereas an unauthorized public performance would automatically trigger the application of the Penal Code, the application of that Code to unauthorized reproductions was conditional on the enactment of a specific author's right law.<sup>49</sup> Since no such law was enacted until 1954, five years after the Mixed Courts had been abolished, it seems that the automatic application of the Penal Code was never extended to cover unauthorized reproductions.

Similarly, civil law protection seems to have only been offered by the Mixed Courts. In 1931, the Alexandria Mixed Court of Appeal extended the protection of civil law to protect authors and composers against the unauthorized public performance of their works. In reaching its decision, the Court based its judgement on the general principles of "natural law

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<sup>45</sup> Law No. 354 of 1954 (enacted on 24 June 1954), vol. 49*bis* *El Waqā' al Miš-rīyah* of 24 June 1954 (Egypt).

<sup>46</sup> The Mixed Courts began operating in 1876. These Courts exercised jurisdiction over all matters involving foreign elements. As a result of the Montreux Convention of 1937, between Egypt and the European powers, the Mixed Courts were abolished. However, the Convention provided for a transition period of twelve years, after which Egypt would assume full sovereignty over its legal system. Thus, all the functions of the Mixed Courts were transferred to National Courts in 1949. For the development and scope of jurisdiction of the Mixed Courts, see MARK HOYLE, *MIXED COURTS OF EGYPT* (1991). It is worth noting that in addition to the Mixed Courts and National Courts, there were Consular Courts and various Religious Tribunals for personal status matters operating in Egypt. For an overview of the courts' system in Egypt before 1949, see Herbert J. Liebesny, *The Development of Western Judicial Privileges*, in *LAW IN THE MIDDLE EAST* 330-32 (Majid Khadduri & Herbert J. Liebesny eds., 1955).

<sup>47</sup> Law No. 58 of 1937, *El Waqā' al Miš-rīyah El Waqae* art. 351 of Aug. 1937 (Egypt).

<sup>48</sup> 33 Mixed Courts Gaz. 135, 4 Jan. 1941.

<sup>49</sup> MOHAMMED HOSSAM LOUTFI, HAQ EL ADA EL ALANY LEL MOUSANAFAT EL MOUSIQEYA 12 (1987).

and justice.”<sup>50</sup> Unfortunately, no cases of unauthorized public performance seem to have been filed with National Courts.

The Mixed Courts’ willingness to protect authors and composers against the unauthorized public performance of their works stemmed mainly from the specific purpose for which these courts were established: to have jurisdiction over all matters involving foreign interest. In the handful of cases where the public performance issue was raised, the plaintiff was either SACEM or a foreign author or composer. Unsurprisingly, therefore, the Mixed Courts were determined to extend the scope of the law to protect foreign claimants.

With the enactment of the Author’s Right Law of 1954, all provisions covering literary and artistic works in the Criminal Code were repealed.<sup>51</sup> As a result, the 1954 Law became the only source for the protection of authorship. Article six of that Law offered national and foreign authors, residing in Egypt, the exclusive right of public performance. The legislature, however, decided to use a subject-matter specific terminology. Accordingly, authors were granted the exclusive right to authorize the public recitation of literary works, public performance of musical works, and public representation of dramatic works.

Shortly after the coming into force of the 1954 Law, Egyptian authors and composers took the lead in convincing publishers of the importance of establishing a collecting society to administer the newly recognized public performance right. As a result, in 1960, with the help of SACEM,<sup>52</sup> the Société des Auteurs, Compositeurs et Editeurs de la République Arabe Unis (“SACERAU”) was established.

In order to ratify TRIPs and to replace the fragmented and outdated provisions of the 1954 Law, Egypt enacted its new Intellectual Property Code in 2002 (“IP Code”).<sup>53</sup> Interestingly, unlike the U.S. Copyright Act, which lists the author’s exclusive economic rights in the form of an exhaustive list, the Egyptian legislature elected to give authors full control over the exploitation of their works and did not commit to a specific number of economic rights. According to Article 147 of the IP Code:

[T]he author and his successor in title shall have the exclusive right to authorize or prevent any form of exploitation of his work, particularly through reproduction, broadcasting, re-broadcasting, public performance, communication to the public, translation, adaptation, rental, lending or making the work available to the public in any manner, including through

<sup>50</sup> Decision of 16th Feb. 1931, 82 Bull. SACEM 46 (1931).

<sup>51</sup> Author’s Right Law, No. 354 for 1954 art. 51 (Egypt).

<sup>52</sup> It is worth noting that SACEM has had a representative office in Egypt since 1884.

<sup>53</sup> Law No. 82 of 2002 (Intellectual Property Code), *22bis al Jaridah al-Rasymah*, 2nd of June 2002 (entered into force on June 3, 2002).

computers, internet, information networks, communication networks and other means.

The poor drafting of the economic rights provision of Article 147 leaves much to be desired. While it does not mention specific exclusive rights,<sup>54</sup> the above provision adopts a non-exhaustive list of modes of exploitation that fall within the author's prerogative. However, in classifying public performance, communication to the public and reproduction as modes of exploitation, the legislature seems to be self-contradictory. This is especially so, since those same terms were treated under the definition provision of Article 138 of the IP Code as economic rights.

### *III. THE EVOLUTION AND SCOPE OF THE PUBLIC PERFORMANCE RIGHT UNDER THE BERNE CONVENTION*

From its conception, the Berne Convention was based on two basic principles: national treatment and minimum rights.<sup>55</sup> The first Conference for the Berne Convention of 1886 failed to introduce the public performance right as one of the minimum rights specifically recognized under the Convention. However, Article 9 extended the application of the national treatment provision of Article 2 to cover the public performance of dramatic, musical and dramatico-musical works of authors of the Union.<sup>56</sup> Therefore, although under the 1886 Act, the public performance right was not recognized as one of the minimum rights, it was still covered by the national treatment principle. As such, if a member country did not recognize a public performance right in its own national law, there was no obligation under the Convention for that country to protect foreign authors of the Berne Union against the public performance of their works.<sup>57</sup>

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<sup>54</sup> *Fahmy v. Jay-Z*, No. 2:07-cv-05715-CAS (PJWx), 2015 WL 7280761 (C.D. Cal. Oct. 29, 2015). Although this is a U.S. case, the applicable law was that of Egypt.

<sup>55</sup> The Berne Convention, often referred to as the Berne Union, was established on September 9, 1886. However, Article 17 of the 1886 Act provided for periodic revisions and these have taken place roughly every twenty years. The first revision took place in Berlin in 1908 (the Berlin Act), followed by Rome in 1928 (the Rome Act), Brussels in 1948 (the Brussels Act), Stockholm in 1967 (the Stockholm Act), and Paris in 1971 (the Paris Act). It is also worth noting that an Additional Act was attached to the Convention in 1896 together with an Additional Protocol in 1914.

<sup>56</sup> For an author to become "an author of the Union" or "unionist" according to Articles 2 and 3 of the 1886 text of the Convention, he or she had to meet one of the two following requirements: citizenship of a member country or if the author did not belong to a member country, first publication in a country of the Union through a publisher [sic] that belonged to a Union country.

<sup>57</sup> STEPHAN LADAS, *THE INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY* 396 (1938).

The original text of 1886, however, made a distinction between the application of the national treatment principle to dramatic and dramatico-musical works on the one hand and musical works on the other.<sup>58</sup> For dramatic and dramatico-musical works, the national treatment principle applied without any further qualification. Accordingly, a Berne member that recognized in its own national law a public performance right of dramatic or dramatico-musical works was required to extend such protection to all foreign authors of the Berne Union. As for musical works, the application of the national treatment principle was subject to a formality requirement: the author had to explicitly forbid the public performance of his or her work by fixing a notice to that effect on the title page of the sheet music.<sup>59</sup>

It could be argued that such a distinction was specifically introduced to accommodate the needs of some national laws. For instance, in order to put an end to Thomas Wall's vexatious proceedings,<sup>60</sup> the UK law adopted the notice requirement in 1882 as a prerequisite for the exercise of the public performance right in musical works.<sup>61</sup>

The distinction made between protecting dramatic or dramatico-musical works on the one hand and musical works on the other was challenged during the debates leading to the Additional Act of Paris 1896. France and Belgium proposed abolishing the formality requirement, which hitherto was a prerequisite for the application of the national treatment principle to the public performance of musical works. As a result of the objections raised by the United Kingdom and Germany, which at the time recognized such formality requirement under their national laws, the proposal was rejected.<sup>62</sup>

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<sup>58</sup> Berne Convention 1886 art. 9.

<sup>59</sup> Even in respect of dramatic and dramatico-musical works, it was still permissible for countries of the Union to retain the notice requirement, provided that such formality requirement applied equally to national and foreign authors of the Union.

<sup>60</sup> Thomas Wall, also known as Harry Wall, was a Common Informer, who took proceedings for infringements of certain statutes solely for the penalty, or share thereof, which by the Act fell to one who gave information of a breach. *See* Makeen, *supra* note 20, at 121.

<sup>61</sup> Musical Compositions Copyright Act 1882, 45 & 46 Vict., c. 40.

<sup>62</sup> ACTES DE LA CONFÉRENCE DE PARIS RÉUNIE A PARIS DU 15 AVRIL AU 4 MAI 1896, at 172 (Berne, Bureau International de l'Union 1897). However, upon the insistence of some delegates, the Records of the Conference included Resolution No. 11, or a *voeu* expressing hope, that national laws should abolish the formality requirement by the time of the next revision in Berlin. *See id.* at 229, *republished in* THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS 1886 TO 1986 (1986), [ftp://ftp.wipo.int/pub/library/ebooks/wipopublications/wipo\\_pub\\_877e.pdf](ftp://ftp.wipo.int/pub/library/ebooks/wipopublications/wipo_pub_877e.pdf).

Arguably, abolishing the notice requirement, as a prerequisite for the application of the national treatment principle to public performance of musical works under the Berne Convention, would not have prevented the UK and Germany from retaining that requirement under their national laws, provided that it would have applied to national and foreign authors equally. This is especially so, since at the time, the Convention said nothing about compliance with the formality requirements in the country where protection was claimed as a prerequisite for the application of the national treatment.<sup>63</sup> Even the binding effect of Article 1 of the 1896 Interpretative Declaration,<sup>64</sup> which stipulated that the application of the national treatment principle was subject solely to the compliance with the formalities in the country of origin and not where protection is claimed, was questionable. As Ricketson points out: “it was, of course, open to any state to refuse to sign the Declaration, and to apply a more restrictive interpretation of Article 2(2) to Convention works.”<sup>65</sup>

Be that as it may, by the time of the Berlin Revision Conference of 1908, judicial controversies had arisen as to the proper form of notice and whether it should be in the language of the country of origin or in that of the country where protection is sought and whether extracts of musical parts of dramatico-musical works should bear the notice.<sup>66</sup> As a result, the German delegation proposed the deletion of the formality requirement as a precondition for the application of the national treatment principle to public performance of musical works.<sup>67</sup> The proposal was received favorably, and there was general agreement that the time was ripe to abolish the notice requirement. Accordingly, the Berlin Act added a new paragraph to the public performance provision, which now became Article 11, and stipulated: “In order to enjoy the protection of this Article, authors in publishing their works are not obliged to prohibit the public presentation or public performance of them.”

This new paragraph of Article 11, combined with the new provision of Article 4 (later to become Article 5), which introduced a general prohibi-

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<sup>63</sup> For a different interpretation, see CHARLES SOLDAN, *L'UNION INTERNATIONALE POUR LA PROTECTION DES OEUVRES LITTÉRAIRES ET ARTISTIQUE* 407 (Paris, Thorin 1888).

<sup>64</sup> “Aux termes de l'article 2, alinéa 2, de la Convention, la protection assurée par les actes précités dépend uniquement de l'accomplissement dans le pays d'origine de l'oeuvre, des conditions et formalités qui peuvent être prescrites par la législation de ce pays.”

<sup>65</sup> SAM RICKETSON, *THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886–1986*, at 202 (1987).

<sup>66</sup> For the controversy that surrounded the language of the notice in the UK, see *Sarpy v. Holland*, (1908) L.T. 317 (Ct. App.).

<sup>67</sup> STEPHAN LADAS, *THE INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY* 397 (1938).

tion against formalities, finally abolished the odd distinction between the automatic application of the national treatment principle to public performance of dramatic and dramatico-musical works and the subjecting of that same principle to the formality requirement in respect of musical works. As a result, no country ratifying the 1908 Act of the Berne Convention could require a notice of reservation as a precondition for the application of the national treatment principle to the public performance of musical works.<sup>68</sup>

During the Rome Revision Conference of 1928, the Irish Free State insisted that the wording of Article 11 should be clarified to make it clear that the public performance right was one of the minimum rights specifically recognized under the Convention.<sup>69</sup> Upon the objection of Australia, Norway and New Zealand, which feared that such recognition would play into the hands of the monopolistic positions enjoyed by collecting societies, the wording of Article 11 was left unchanged.<sup>70</sup> As a result, under the 1928 Rome Act of the Convention, as it was the case with previous Acts, the public performance right was covered solely by the national treatment principle.

At the 1948 Brussels Conference, the Bureaux Internationaux Réunis pour la Protection de la Propriété Intellectuelle (“BIRPI”), through the Belgian government, proposed the recognition of the public performance right as one of the minimum rights specifically recognized under the Convention. For a group of countries, such as Belgium, no restrictions were to be recognized in the Convention to limit the scope of the proposed exclusive right. For another group of countries, the scope of the new right was best left to national legislation, which may prefer to exempt public festivals, religious and/or charitable performances from the scope of the public performance right. Accordingly, a compromise about the scope of the public performance right had to be reached.

The compromise took the form of recognizing public performance as one of the minimum rights in the text of the Convention, but simultane-

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<sup>68</sup> Strangely enough, whilst the Berlin Act of 1908 did not recognize a general public performance right as one of the minimum rights under the Convention, Articles 13(1) and 14(1) recognized the exclusive right of public performance of musical works by means of instruments, which reproduced them mechanically and by means of cinematography, respectively.

<sup>69</sup> CONFÉRENCE INTERNATIONALE POUR LA PROTECTION DES OEUVRES LITTÉRAIRES ET ARTISTIQUES; INTERNATIONAL UNION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS, ACTES DE LA CONFÉRENCE RÉUNIE À ROME, DU 7 MAI AU 2 JUIN 1928, at 222 (1929).

<sup>70</sup> *Id.* at 255. Australia and New Zealand felt that introducing public performance as one of the minimum rights specifically recognised under the Convention may hinder their ability to take measures against the abuse of dominant position enjoyed by collecting societies.

ously qualifying the scope of the general right by adding a statement to the Records of the Conference permitting national laws to subject that right to “minor exceptions.” Therefore, Article 11 was amended to read:

1. Authors of dramatic, dramatico-musical or musical works shall enjoy the exclusive right of authorising:
  - 1- the public presentation and public performance of their works;
  - 2- the public distribution by any means of the presentation and performance of their works.
2. Authors of dramatic or dramatico-musical works, during the full term of their rights over the original works, shall enjoy the same right with respect to translations thereof.
3. In order to enjoy the protection of this Article, authors shall not be bound, when publishing their works, to forbid the public presentation or performance thereof.

Had that provision stood alone, it would have been unlikely to be adopted. This is especially so, since some countries insisted on retaining their ability to maintain, or introduce, exceptions or limitations to restrict the scope of the new exclusive right. Therefore, upon the introduction of the public performance right, a statement was included in the General Report of the Brussels Conference, by Marcel Plaisant the General Rapporteur, concerning the minor exceptions doctrine and its application to the newly recognized right. This Statement read:

Your Rapporteur-General has been entrusted with making an express mention of the possibility available to national legislation to make what are commonly called minor reservations. The Delegates of Norway, Sweden, Denmark, and Finland, the Delegate of Switzerland and the Delegate of Hungary, have all mentioned these limited exceptions allowed for religious ceremonies, military bands and the needs of the child and adult education. These exceptional measures apply to articles 11*bis*, 11*ter*, 13 and 14. You will understand that these references are just lightly pencilled in here, in order to avoid damaging the principles of the right.<sup>71</sup>

Although the above statement was an integral part of the compromise, three factors seem to have undermined its value. First, while Marcel Plaisant’s statement was mainly concerned with the public performance right, the statement did not mention its applicability to the newly recognised general public performance right of Article 11 of the Berne

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<sup>71</sup> INTERNATIONAL UNION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS, DOCUMENTS DE LA CONFÉRENCE RÉUNIE À BRUXELLES, DU 5 AU 26 JUIN 1948, Berne, International Office 100 (1951) [hereinafter DOCUMENTS DE LA CONFÉRENCE]. Parts of the Records of the Brussels Conference were recently made available online in English. See *Records of the Conference Convened in Brussels June 5 to 26, 1948*, at 263, [http://keionline.org/sites/default/files/Records\\_of\\_the\\_Conference\\_1948\\_Brussels\\_Revisions.pdf](http://keionline.org/sites/default/files/Records_of_the_Conference_1948_Brussels_Revisions.pdf); see also WORLD INTELLECTUAL PROPERTY ORG., THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS 1886 TO 1986, at 181 (1986), [ftp://ftp.wipo.int/pub/library/ebooks/wipopublications/wipo\\_pub\\_877\(e\).pdf](ftp://ftp.wipo.int/pub/library/ebooks/wipopublications/wipo_pub_877(e).pdf).

Convention. Second, the wording of the minor exceptions doctrine did not make it clear whether Plaisant's statement reflected a general agreement among delegates or only the views of those countries specifically mentioned, which could automatically undermine its binding effect. Third, for a long time, this minor exception doctrine was dormant at the international level.<sup>72</sup> However, all doubt surrounding Plaisant's statement was removed with the WTO Panel Report of 2000, on § 110(5) of the U.S. Copyright Act, which confirmed the existence and binding effect of the minor exceptions doctrine.<sup>73</sup> Furthermore, the WTO Panel Report gave a wide interpretation to the minor exceptions doctrine, as it applies to the public performance right, so as to cover commercial as well as non-commercial use.<sup>74</sup>

Under the Stockholm Act of 1967, the spirit of Article 11 remained substantially the same as was under the 1948 Brussels Act. However, in order to make it absolutely clear that the public performance right under the Convention covers not only performances by human performers but also those given through electric or mechanical devices, the Stockholm Act amended the wording of Article 11 by adding "including such public performance by any means or process." Furthermore, by the time of the Stockholm Act, automatic protection was a well-established concept under Article 5 of the Convention, and therefore it was felt unnecessary to maintain the declaratory paragraph of Article 11, which prohibited the compliance with formalities as a prerequisite for the application of the national treatment principle to cover the public performance right.

The wording adopted in Stockholm was left intact by the 1971 Paris Act and therefore Article 11, as it stands today, states:

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<sup>72</sup> Also known as the "minor reservation doctrine."

<sup>73</sup> The Final Report was made available to all parties on May 5, 2000, and in accordance with the WTO rules, was circulated unrestrictedly on June 15, 2000. For the Panel report, see WORLD TRADE ORGANIZATION, UNITED STATES – SECTION 110(5) OF THE U.S. COPYRIGHT ACT paras. 6.45, 6.53, 6.60, 6.63 (2000), [http://www.wto.org/english/tratop\\_e/dispu\\_e/1234da.pdf](http://www.wto.org/english/tratop_e/dispu_e/1234da.pdf) [hereinafter PANEL REPORT]. For a detailed analysis of the Panel's approach, see Makeen F. Makeen, *The Reception in Public Dilemma Under U.S. Copyright Law*, 58 J. COPYRIGHT SOC'Y 355, 396-419 (2011).

<sup>74</sup> The Panel stated "At any rate, in our view, a non-commercial character of the use in question is not determinative provided that the exception contained in national law is indeed *minor*." PANEL REPORT, *supra* note 73, para. 6.57. For the history of the minor exceptions doctrine, see SAM RICKETSON, WIPO STUDY ON LIMITATIONS AND EXCEPTIONS OF COPYRIGHT AND RELATED RIGHTS IN THE DIGITAL ENVIRONMENT 33-37 (2003), [http://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=16805](http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=16805) (submitted to the Ninth Session of the Standing Committee on Copyright and Related Rights, Geneva, 23-27 June, 2003, Document No. SCCR/9/7).



(1) Authors of dramatic, dramatico-musical and musical works shall enjoy the exclusive right of authorizing:

(i) the public performance of their works, including such public performance by any means or process;

(ii) any communication to the public of the performance of their works.

(2) Authors of dramatic or dramatico-musical works shall enjoy, during the full term of their rights in the original works, the same rights with respect to translations thereof.

It is regrettable that the text of the Berne Convention failed to deal with the public performance right in a coherent manner. As the text stands today, there are five different provisions, four of which are subject matter-specific, governing the public performance right. The four subject matter-specific provisions are: Article 11(1)(i) which covers dramatic, dramatico-musical, and musical works; Article 11*ter*(1)(i) which covers the public recitation of literary works; Article 14(1)(ii) which covers works adapted or reproduced by cinematography; and Article 14 *bis*(1) which covers the public performance of cinematographic works. In addition to the subject matter-specific provisions, Article 11*bis*(1)(iii) covers the reception in public of all literary and artistic works.

It is worth noting that under the Berne Convention, a distinction is maintained between communication in public, i.e., a public performance before a gathered audience, and communication to the public, i.e., a communication of the work to people geographically dispersed by broadcasting, cabling and simultaneous cable retransmission or rebroadcasting. Whilst the communication to the public rights of Article 11*bis* may be subject to a compulsory licensing mechanism, no such restriction is permitted under the communication in public provisions of Articles 11(1)(i), 11*ter*(1)(i), 14(1)(ii), and 14*bis*(1). Unfortunately, the Berne Convention failed to be consistent throughout and wrongly placed the reception in public provision under Article 11*bis*, which is mainly concerned with the communication to the public.<sup>75</sup>

Unlike all other rights recognized under Article 11*bis*, the reception in public does not involve the communication of works to people geographically dispersed or the communication of works between two distant points. Similar to playing a vinyl record or a CD in public where the performance takes place through a record or CD player, in regard of the reception in public, the performance originates from the receiving set. As such, the reception in public is a performance before a gathered audience, i.e., communication in public.<sup>76</sup> Not only does this interpretation reflect the approach of most national laws at the time of adopting that provision

<sup>75</sup> MAKEEN, *supra* note 38, at 77-78.

<sup>76</sup> Unfortunately, as a result of the CJEU decision in *FAPL v. QC Leisure*, the EU communication to the public right was unnecessarily extended to cover the

in 1948,<sup>77</sup> but it is also supported by Masouyé's *WIPO Guide to the Berne Convention*.<sup>78</sup>

Moreover, the WIPO Copyright Treaty 1996 provides support to this interpretation. While enumerating all the communication to the public provisions of the Berne Convention, the "without prejudice clause" of Article 8 of the WIPO Copyright Treaty left out the reception in public provision of Article 11*bis*(1)(iii).<sup>79</sup> Therefore, the wording of Article 8 of the WIPO Copyright Treaty makes it absolutely clear that the reception in public is a type of communication in public that falls outside the scope of the general communication to the public right of that Treaty.

It could be argued that the natural place for the reception in public provision should have been under Article 11(1)(i) of the Berne Convention. There are a number of reasons why this was not the case. First, as mentioned above, Article 11 is a subject matter-specific provision and therefore introducing the reception in public under that provision would not have covered all works. Accordingly, a similar provision would have been required to be inserted under Articles 11*ter*(1)(i), 14(1)(ii), and 14*bis*(1).

Secondly, at the time of introducing the reception in public provision in 1948, the wording of Article 11(1)(i) of the Convention was slightly inadequate, since it failed to explicitly cover performances by mechanical or electronic devices. As discussed above, it was not until the 1967 Stockholm Act that the wording was changed to include "such public performance by any means or process." Thirdly, introducing the reception in public provision under Article 11*bis* was probably to reflect the wish of the delegates at the Brussels Conference to have all issues relating to broadcasting under a single provision. This is especially so, since unlike all other

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reception in public of copyright works. See joined cases C-403/08 and C-429/08 (2011) E.C.R. I-9083; (2012) 1 C.M.L.R. 29.

<sup>77</sup> For an example of a contemporary copyright law that classifies the reception in public as a type of public performance, as opposed to communication to the public, see UK Copyright, Designs and Patents Act 1988 § 19.

<sup>78</sup> CLAUDE MASOUYÉ, *WIPO GUIDE TO THE BERNE CONVENTION* 69 (William Wallace trans., 1978) ("Once this reception is done in order to entertain a wider circle, often for profit, an additional section of the public is enabled to enjoy the work and it ceases to be merely a matter of broadcasting. The author is given control over this *new public performance* of his work." (emphasis added)).

<sup>79</sup> Article 8 of the WIPO Copyright Treaty states:

Without prejudice to the provisions of Articles 11(1)(ii), 11*bis*(1)(i) and (ii), 11*ter*(1)(ii), 14(1)(ii) and 14*bis*(1) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorising any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.

provisions that deal with the dissemination of works in non-material form, Article 11*bis* is subject matter-neutral and therefore covers all types of literary and artistic works.

Notwithstanding the existence of five different Articles to cover the communication in public or the public performance right under the Berne Convention, not a single provision defines the term “public,” or even provides national laws with guidelines on how to distinguish between public and private performances. Similarly, with the exception of a single paragraph in the 1948 Brussels Documents, which makes it clear that: “it did not suffice that the performance, representation or recitation was ‘without the aim of profit’ for it to escape the exclusive right of the author,” records of the Revision Conferences do not offer any assistance.<sup>80</sup> Therefore, it is left for national laws to define the term “public” and to identify the different criteria upon which such determination is made.

#### IV. THE PUBLIC REQUIREMENT UNDER U.S. AND EGYPTIAN LAWS

While under the U.S. Copyright Act of 1909 the term “performance” was left undefined, § 101 of the 1976 Act defines the term “to perform a work” as “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.” Therefore, unlike Egyptian law, as will be discussed below, this definition makes it clear that a performance may be accomplished either directly or by means of any device or process, including all kinds of equipment for reproducing or amplifying sounds or visual images.<sup>81</sup>

It was widely accepted under the U.S. Copyright Act of 1909 that a performance open to the public at large constituted a public performance. Similarly, it was widely accepted that a performance within a family circle fell outside the scope of the public performance right.<sup>82</sup> However, the controversial issue under that Act concerned performances given in so-

<sup>80</sup> Sur la proposition du rapporteur de la Sous-Commission, M. Walckiers, la Conférence marqua toutefois que les limitations avaient un caractère restreint et qu’en particulier, il ne suffisait pas que l’exécution, représentation, récitation fussent “sans but de lucre” pour qu’elles échappassent au droit exclusif de l’auteur.

DOCUMENTS DE LA CONFERENCE, *supra* note 71, at 264.

<sup>81</sup> S. REP. NO. 93-983, at 113 (1974); H. R. REP. NO., 94-1476, at 63 (1976).

<sup>82</sup> MELVILLE NIMMER, NIMMER ON COPYRIGHT § 107.21, at 400 (1966). In explaining the exemption of private performances from copyright liability, Drone states, “[t]he purpose of the law is to protect the lawful owner of a dramatic composition from injury. Ordinarily, no injury will arise from the strictly private representation of a play. EATON S. DRONE, A TREATISE ON THE LAW OF PROPERTY IN

called “semi-public places,” such as private clubs or factories, where admission is given only to a segment of the public.

The controversy stemmed mainly from the failure of the 1909 Act to define the term “public.” In the absence of a statutory definition of the term “public,” courts were saddled with the burden of construing the term; they did so inconsistently. In *Metro-Goldwyn-Mayer Distribution Corp. v. Wyatt*, where a performance was given at a yacht club for members and their guests, it was held that the performance was not in public.<sup>83</sup> This decision seems to have defined the term “public place” to mean a place which offers entrance to anyone without restriction.<sup>84</sup> However, in *Porter v. Marriott Motor Hotels*<sup>85</sup> and *Lerner v. Schectman*, the opposite conclusion was reached.<sup>86</sup>

As a result of the courts’ difficulty in defining the term “public” under the 1909 Act, the 1976 Act endeavoured to provide a uniform standard. Accordingly, § 101 states that:

To perform or display 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 receiv-

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INTELLECTUAL PRODUCTIONS IN GREAT BRITAIN AND THE UNITED STATES 627 (Boston, Little, Brown & Co. 1879).

<sup>83</sup> 21 C.O. Bull. 203 (D.C. Md. 1932). In France, the Court of Cassation reached a similar decision and extended the meaning of the term private to include not only members of the same society, but also their guests provided that the performance was: gratuitous; organized by the society; and the guests were nominated by name and identified in advance. See Cass. Req., 23 jan. 1907, Gaz. Pal. 1907. 1. 473.

<sup>84</sup> Adam Barrett Townshend, Note, *Crashing by Design: Toward a Uniform Standard for Public Place Analysis Under Federal Copyright Law*, 79 NOTRE DAME L. REV. 2045, 2051 (2004).

<sup>85</sup> 137 U.S.P.Q. 473 (N.D. Tex. 1962). This case concerned the unauthorised performance of a musical work in the Sirloin & Saddle Club at the Marriot Hotel, where only people staying in the hotel and their guests could attend.

<sup>86</sup> 228 F. Supp. 354 (D. Minn. 1964). This case concerned the unauthorized performance of *September Song*, *How High the Moon*, and *My Funny Valentine* in The Apartment night club, where only members and their guests were allowed to attend. In reaching its conclusion that such a performance amounted to a public performance, the court stated that: “[I]t is not necessary that the performance be made to the general public in order that the statute be violated. Nor do we read the law to require that the performance be theoretically accessible to the entire general public.” *Id.* at 355.

ing the performance or display receive it in the same place or in separate places and at the same time or at different times.<sup>87</sup>

According to this definition, the public requirement is governed by three criteria: a place open to the public (hereinafter referred to as the nature of the place); any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered (hereinafter referred to as the nature of the gathering); and the transmission clause. Since this article is solely concerned with the communication in public, the transmission clause, which comes into play only in the context of communication to the public, falls outside the scope of this study. Thus, only the nature of the place and the nature of the gathering will be discussed here.

From the outset, it should be noted that the two components of the nature of the place and the nature of the gathering are disjunctive. As such, they need not apply cumulatively for the performance to be considered “public.” Put differently, falling within the scope of either criterion makes the performance a public one that requires the authorization of the copyright owner.

In adopting the criterion of “a place open to the public,” Congress clearly intended the nature of the place to be determinative. Unfortunately, however, Congress failed to define the term “place open to the public,” which led one commentator to argue that the “1976 Act leaves us in the same position as the 1909 Act.”<sup>88</sup> Accordingly, it was left to courts to define the term “place open to the public” and to determine its scope.

In *Columbia Pictures Industries v. Redd Horne, Inc.*,<sup>89</sup> the defendant operated a store containing a small showroom area at the front and small private booths at the rear. The different booths had space for two to four people and each had a nineteen-inch color television. A customer wishing to use one of the viewing booths would select a film from the store’s catalogue and pay the appropriate fee. An employee of the store would then place the chosen cassette in the VCR player located at the front of the store and the film would be transmitted to the customer’s viewing booth.

While the store was open to any member of the public, access to each booth was restricted to the individual or individuals who rented it. Although no restriction was placed on the composition of a group, strangers were not grouped together in order to fill the capacity of a particular booth. The plaintiff argued that the showing of the films in the private booths amounted to an unauthorized public performance.

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<sup>87</sup> 17 U.S.C. § 101 (2012).

<sup>88</sup> Townshend, *supra* note 84, at 2056.

<sup>89</sup> 749 F.2d 154 (3d Cir. 1984).

In reaching its decision that the defendant's activities constituted a public performance of the plaintiff's motion pictures, the court made it clear that the relevant "place" was the store as a whole and not each individual booth. The court went further and stated that "simply because the cassettes can be viewed in private does not mitigate the essential fact that Maxwell's [the store] is unquestionably open to the public."<sup>90</sup> Since any member of the public could view a film in the store by paying the required fee, the court concluded that the services provided by the defendant were essentially the same as a movie theatre. Although the court did not define the term "place open to the public," it seems to have used it to mean a place to which the public have "access" or a place accessible to the public.

Shortly after its decision in *Redd Horne*, the Third Circuit had to tackle the same question again in *Columbia Pictures Industries, Inc. v. Aveco, Inc.*<sup>91</sup> The facts were very similar to those of *Redd Horne*, save that in *Aveco* (a) the VCR players were located in the individual rooms (booths) and not at the front of the store, which allowed the customer to have complete control over the process without any intervention from the store's employees; and (b) customers could either rent a video cassette from the store or bring a video cassette obtained elsewhere to play in the private room.<sup>92</sup>

*Aveco* pointed to the above two differences to distinguish *Redd Horne* from its own factual context. In rejecting the defendant's argument, the court stated that: "[t]he necessary implication of *Aveco*'s analysis is that *Redd Horne* would have been decided differently had Maxwell's [the store] located its video cassette players in a locked closet in the back of the store. We do not read *Redd Horne* to adopt such an analysis."<sup>93</sup> The court went on to say that "our opinion in *Redd Horne* turned not on the precise whereabouts of the video cassette player, but on the nature of Maxwell's stores,"<sup>94</sup> i.e., the nature of the place.

The court made it clear that while the Copyright Act speaks of performances at a place open to the public, it does not require that the public place be crowded with people. The court employed analogical reasoning and referred to telephone booths, taxi cabs, and pay toilets, which are commonly regarded as places open to the public, notwithstanding that they are normally occupied by only one party at a time. Since *Aveco* was willing to make its viewing rooms available to any member of the public, this availability made the store a public place. Accordingly, the court held

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<sup>90</sup> *Id.* at 159.

<sup>91</sup> 800 F.2d 59 (3d Cir. 1986).

<sup>92</sup> *Id.* at 61.

<sup>93</sup> *Id.* at 63.

<sup>94</sup> *Id.*

that Aveco's operations constituted infringement by authorizing the public performance of the plaintiff's motion pictures.

While a similar reasoning was adopted by the Fourth Circuit in *Red Baron-Franklin Park, Inc. v. Taito Corp.*,<sup>95</sup> a different approach seems to have been adopted by the Ninth Circuit in *Columbia Pictures Industries v. Professional Real Estate*.<sup>96</sup> The question before the court was whether a hotel was unlawfully authorizing the public performance of the plaintiff's motion pictures when it rented videodiscs to guests to view on the video players installed in the hotel rooms. The court gave answer in the negative and ruled that the viewing of videodiscs in hotel rooms was private performance, exempted from copyright liability.

While acknowledging that a hotel may indeed be a place "open to the public," the Ninth Circuit pointed out that "a guest's hotel room, once rented, is not."<sup>97</sup> The court seems to have based its reasoning on U.S. constitutional law, namely that the Fourth Amendment protection from unreasonable search and seizure extends to a guest's hotel room. Further, the court remarked that guest rooms are places where individuals enjoy a substantial degree of privacy, not unlike their own homes.

Strangely enough, the Ninth Circuit distinguished *Professional Real Estate* from *Redd Horne* and *Aveco* using the nature of the business or the primary source of revenue as a criterion.<sup>98</sup> While in *Redd Horne* and *Aveco* the businesses were established to rent video cassettes, equipment and rooms in which the customers could watch the motion pictures, in *Professional Real Estate*, the main business was providing accommodation and hotel services. Thus, the court concluded that rental of videodiscs to interested guests for viewing in guest rooms was incidental to the main activities of the hotel. The reasoning of the Ninth Circuit is difficult to follow.<sup>99</sup> This is especially so, since it seems to have introduced the "nature of the business" as an additional criterion, which cannot be supported by the plain language of the Act or its legislative history.

Shortly after the decisions of the Third, Fourth and Ninth Circuits, it was the Seventh Circuit's turn to voice its opinion on the matter. In *Video Views, Inc. v. Studio 21, Ltd.*, the defendant owned and operated an adult bookstore, with six video arcade booths.<sup>100</sup> Each booth could accommo-

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<sup>95</sup> 883 F.2d 275 (4th Cir. 1989).

<sup>96</sup> 866 F.2d 278 (9th Cir. 1989).

<sup>97</sup> *Id.* at 281.

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

<sup>99</sup> For the same meaning, see Roger W. Wallach, *Not in Public! The Ninth Circuit Devises a Two-Step Test for Public Performances Under the Copyright Act*, *Columbia Pictures Industries v. Professional Real Estate Investors*, 68 WASH. U. L.Q. 203, 210 (1990).

<sup>100</sup> 925 F.2d 1010 (7th Cir. 1991)

date a maximum of six people and in which customers, after purchasing tokens, could view segments of selected adult films. The defendant argued that *Professional Real Estate* had changed the law and that the approach adopted by the Third Circuit in *Redd Horne* and *Aveco* should not be followed.

Although the Seventh Circuit's decision in *Studio 21* covered a number of issues, the scope of the public performance right was dealt with briefly in two short paragraphs. The Court opined that the 1976 Copyright Act contemplated a broad interpretation of the concept of public performance. Accordingly, it adopted the Third Circuit's approach and followed its analysis of the nature of the place. While rejecting the defendant's proposition that *Professional Real Estate* had changed the law, the Court went further and made it clear that "to the extent that *Professional Real Estate* may be viewed to contradict the rule established by *Redd Horne* and *Aveco*, we decline to follow it."<sup>101</sup>

Notwithstanding the Seventh Circuit's statement: "[w]e find that *Professional Real Estate Investors* did not change the law,"<sup>102</sup> it is difficult to reconcile the approach adopted by the Third, Fourth and Seventh Circuits with that of the Ninth Circuit.<sup>103</sup> While the holdings of the Third, Fourth and Seventh Circuits make it clear that no private spaces can exist in places open to the public, the Ninth Circuit reached the opposite conclusion in respect to hotel rooms. As such, the latter's approach seems to be in direct conflict with the approach adopted by the other three circuits.

It could be argued that in today's world, the importance of the Ninth Circuit decision in *Professional Real Estate* is fading away. At present, video on demand, where the signals carrying copyrighted works are distributed by wire or wireless means to individual recipients, has replaced the renting of video cassettes or discs to hotel guests. Such a distribution amounts to a communication to the public, which although falls outside the scope of this article, comes within the scope of the transmission clause

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<sup>101</sup> *Id.* at 1020.

<sup>102</sup> *Id.*

<sup>103</sup> Attempting to reconcile these decisions, Adam Barrett Townshend suggested a three-pronged public place standard:

- (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.

Townsend, *supra* note 84, at 2063.



of the definition of “public performance.”<sup>104</sup> Thus, in *On Command Video v. Columbia Pictures*,<sup>105</sup> where a hotel delivered unlicensed movies electronically to hotel rooms upon the occupants’ request, it was held that the hotel’s actions constituted an unauthorized public performance under the transmission clause.<sup>106</sup>

It is submitted that the advent of electronic delivery or video on demand seems to have rendered the holding in *Professional Real Estate* of little relevance. Therefore, in assessing the nature of the place, the accessibility of the place to the public, or the “availability” as the *Aveco* court put it, seems to be decisive. As such, the term “public place” is not synonymous with the statutory language of “a place open to the public.” This is mainly because a place could be public by nature, yet inaccessible to members of the public at the time of the performance. This interpretation is supported by the decision of the Eighth Circuit in *National Football League v. McBee & Bruno’s, Inc.*,<sup>107</sup> where it was held that a performance before the owner of a bar and his three friends during hours in which the bar was closed to the public did not constitute a public performance.

In addition to the nature of the place, the 1976 Act adopted the nature of the gathering as a separate and independent criterion for the application of the public performance right. If the place is accessible to the public, then the nature of the gathering criterion is otiose. However, if the place is not accessible to the public, the nature of the gathering is determinative.

The criterion of the nature of the gathering was introduced specifically to expand the concept of public performance by including places that, although not open to the public, are accessible to a significant number of people. The legislative history indicates that in adopting this criterion, Congress’ aim was to make clear that, contrary to the decision in *Metro-Goldwyn Mayer Distributing Corp. v. Wyatt* (discussed above), performances in “semi-public” places, such as clubs, lodges, factories, summer camps, and schools are public performances subject to copyright control.<sup>108</sup>

The statutory language “at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered” indicates that the nature of the gathering comprises size and composition. Accordingly, the nature of the gathering seems to incorpo-

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<sup>104</sup> See *supra* note 87 and accompanying text.

<sup>105</sup> 777 F. Supp. 787 (N.D. Cal. 1991).

<sup>106</sup> The court added that the insertion of “at the same time or at different times” in the definition of public performance was to cover precisely the sort of single-viewer system used by the hotel. *Id.* at 790.

<sup>107</sup> 792 F.2d 726, 733 (8th Cir. 1986).

<sup>108</sup> H.R. REP. NO. 94-1476, at 64 (1976); S. REP. NO., 93-983, at 114 (1974).

rate a quantitative and a qualitative standard. The qualitative standard invites courts to assess the nature of the relationships among those attending the performance. Unsurprisingly, the 1976 Act, as with most modern laws, adopted the qualitative standard of the family as the demarcation line between private and public performance. Thus, it could be argued that a family exception is recognized *a contrario* under the 1976 Copyright Act.

Apart from making it clear that the term family includes an individual living alone,<sup>109</sup> neither the Act nor its legislative history clarifies the scope of the term “normal circle of a family.” Daniel Cantor argues that this term could be subject to two different interpretations: the first indicates a family circle and therefore only encompasses those individuals living under one roof as a family. An alternative interpretation could be based on the literal approach to ascertain the true intention of the legislature: since Congress did not use the term family circle, but rather “a normal circle of a family,” it may have intended the term to encompass the family circle plus all relatives normally invited into that circle.<sup>110</sup> This latter interpretation could find further support from the statutory language of “social acquaintances,” which seems to have been inserted intentionally to expand the scope of exempted performance beyond those living under the same roof.

The quantitative standard seems to invite courts to engage in a numerical exercise. In *St. Nicholas Music, Inc. v. D.V.W., Inc.*, the court found the quantitative standard to have been satisfied where twenty-three patrons attended a performance in a private club.<sup>111</sup> Similarly, in *Fermata International Melodies v. Champions Golf Club*, it was held that a performance before twenty-one members plus guests in a private golf club amounted to a public performance.<sup>112</sup> Although neither case is indicative of the maximum number beyond which the performance could be classified as public, it was argued that twenty-one “strangers” should be the outer limit.<sup>113</sup>

It is worth noting that while the statutory language of “any place” does not restrict the applicability of the nature of the gathering criterion to any particular place or places, it has only been applied to semi-public

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<sup>109</sup> H.R. REP. NO. 94-1476, at 64 (1976).

<sup>110</sup> 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, 97-99 (2003).

<sup>111</sup> CIV No. C-84-0307W, 1985 WL 9624 (D. Utah Feb. 20, 1985).

<sup>112</sup> 712 F. Supp. 1257, 1260 (S.D. Tex. 1989).

<sup>113</sup> Cantor, *supra* note 110, at 80.

places. As yet, it has not been applied to private homes.<sup>114</sup> This approach seems to reflect the intention of Congress, which as discussed above was to extend the scope of the Act to capture performances in semi-public places, and may also explain why this criterion is often referred to in the U.S. as the “semi-public place clause” rather than the “nature of the gathering.”

In an ideal world, any recognized copyright exception to an exclusive right should help clarify the criteria governing the application of that right. Unfortunately, this is not the case under the 1976 U.S. Copyright Act. In addition to the open-ended fair use exception of § 107, by virtue of § 110 (1)–(11) the 1976 Act recognized a number of specific public performance exceptions to exempt certain acts of communication in public from any copyright liability.<sup>115</sup> The main reason for recognizing such a great number of exceptions is the unique political environment in which Congress operates, which does not always provide solutions to copyright dilemmas based on sound copyright policy. It is an intensely political body, loath to impose one-sided losses on any interest group, even if sound copyright policy dictates that result.<sup>116</sup>

In following this approach, Congress failed to maintain any common causality between the criteria governing the application of the public performance right, i.e., nature of the place and nature of the gathering, and the numerous exceptions recognised. As a result, neither any individual exception nor all the exceptions could be of any assistance in clarifying the scope of the term “public,” and therefore will not be further discussed here.

Unlike under U.S. copyright law, the Egyptian legislature did not define the terms “performance” and “public” separately. Under Egyptian law, public performance is defined as “any act through which the work is made available to the public in any form, such as acting, declaiming, playing or transmission, so as to bring the public in direct contact with the work through performance, sound recording, visual or aural means.”<sup>117</sup> For three reasons, it is submitted that this definition is defective.

First, using direct contact or direct communication as the decisive criterion for the application of the public performance right is absurd. Al-

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<sup>114</sup> It is not implausible, at least in theory, for the “nature of the gathering” to capture performances in private homes. However, since such performances are difficult to monitor in a non-intrusive manner, any attempt to extend the application of the public performance right to private homes may raise privacy concerns.

<sup>115</sup> The most controversial of which, at least at the international level, seems to be the notorious reception in public exception of § 110(5). For the scope of that exception, see Makeen, *supra* note 73, at 361-95.

<sup>116</sup> Thomas P. Olson, *The Iron Law of Consensus: Congressional Responses to Proposed Copyright Reforms Since the 1909 Act*, 36 J. COPYRIGHT SOC'Y 109, 111, 116 (1988).

<sup>117</sup> Intellectual Property Code art. 138(15) (Egypt).

though this criterion was adopted under the old French Author's Rights Law of 1957, it had come under heavy criticism and consequently was abolished in 1985.<sup>118</sup> Every performance is in fact an indirect communication, especially since it necessitates the existence of an agent or intermediary third party (i.e., performer or CD player) between the work and the public addressed by the performance.<sup>119</sup> As Andre Kerever once put it in the context of French law, the performance of a dramatic work always necessitated the use of some equipment or decoration,<sup>120</sup> yet such communication was always governed by the public performance right.

Secondly, in countries that recognize both the public performance right and the communication to the public right, a clear distinction is maintained between these two rights. The distinction normally lies in whether the performance is given before a gathered audience, i.e., in public, or to people geographically and/or chronologically dispersed, i.e., to the public.<sup>121</sup> By including "transmission" as part of the definition, the Egyptian legislature seems to have committed a teleological error that blurs the demarcation line between communication *in* public or public performance and communication *to* the public.<sup>122</sup>

With the recognition of the communication to the public right in the IP Code of 2002,<sup>123</sup> the scope of the public performance right ought to have been restricted to communication in public. Accordingly, the public performance right should only cover performances given before a gathered audience, whether through live rendition, pre-recorded medium, or by the reception of a broadcast or webcast carrying musical, dramatic or

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<sup>118</sup> Loi No. 85-660 du 3 juillet 1985 relative au droit d'auteur et aux droits des artistes-interprètes, des producteurs de phonogrammes et de vidéogrammes et des entreprises de communication audiovisuelle, J. OFFICIEL DE LA RÉPUBLIQUE FRANÇAIS [JO], 4 juillet 1985, at 7495.

<sup>119</sup> For the same meaning, see Alphonse Tournier, *Can One Acquire the Ownership of an Intellectual Work According to the French Law of the 11 March 1957*, 20 REV. INT'L DU DROIT D'AUTEUR 3, 16 (1958).

<sup>120</sup> Andre Kéréver, *La Distribution par Cable et le Droit d'Auteur en Droit Français et dans les Conventions Internationales*, DROIT D'AUTEUR 48 (1977).

<sup>121</sup> See UK Copyright, Designs and Patents Act 1988 §§ 19, 20.

<sup>122</sup> For the evolution of the distinction between "communication in public" and "communication to the public" in France, the UK, and the U.S., see Makeen, *supra* note 73, at 33-174.

<sup>123</sup> Article 138 poorly defines communication to the public as:

Transmission by wire or wireless means of images, sounds, images and sounds, of a work, performance, sound recording, broadcast in such a way that, where such transmission is the only means of reception, any person other than family members and close friends can receive in any place different from where the transmission originates, irrespective of time and place of reception, including time and place individually chosen by means of a computer or any other means.

musico-dramatic works in public.<sup>124</sup> Conversely, the term transmission as used in the IP Code necessitates the existence of two distinct points, one for emission and another for potential reception. In extending the scope of the public performance right to cover transmissions, the definition provision seems to have confused communication in public with communication to the public and rendered a major part of the communication to the public right otiose. It is hoped that any future amendment to the IP Code will abolish the direct contact/communication criterion and omit the term “transmission” from the definition of public performance.

Thirdly, while this definition was intended to define “performance” and “public,” the latter term seems to have been completely overlooked by the legislature and therefore left undefined. Given the poor drafting of the Author’s Right Chapter of the IP Code, it is unsurprising that the definition provision of Article 138, which was specifically inserted to define all the significant terms used by the legislature, failed to clarify the meaning and scope of the term “public.”<sup>125</sup>

Notwithstanding the absence of a statutory definition, it is submitted that in attempting to come up with a criterion to delimit the scope of the term public, Egyptian law seems to have progressed through two stages. During the first stage, the Mixed Courts focused mainly on the nature of the place. In a case before the Mixed Court of Cairo in 1935, where the performance took place in a nightclub, it was held that the nature of the place was decisive. The Court went on to state: “[I]t is a settled issue that a nightclub is a public place from which copyright royalties should be collected.”<sup>126</sup> National Courts followed in the footsteps of the Mixed Courts and held that since a café is a public place, this on its own is sufficient to trigger the application of the public performance right.<sup>127</sup>

The second stage began with the enactment of the 1954 Author’s Right Law. Although the 1954 Law did not attempt to define the term public, it recognized a specific exception to cover “gratuitous performances within the family circle.”<sup>128</sup> This exception was recognized to re-

<sup>124</sup> In countries that recognize the communication in public and the communication to the public as separate and independent prohibited acts, the reception in public is normally considered a type of communication in public. This is mainly because the performance is considered to originate from the receiving set. *See* UK Copyright, Designs and Patents Act 1988 § 19.

<sup>125</sup> In adopting a definition provision, the Egyptian legislature arguably broke with its legislative drafting tradition and followed a structure that is commonly used in the copyright systems of the U.S., and the UK.

<sup>126</sup> Decision of May 15, 1935, confirmed by the Mixed Court of Appeal on Dec. 18, 1935, Bull. SACEM No. 87, at 262.

<sup>127</sup> Ct. of First Instance, 5th Cir. Nov. 7, 1961 (unpublished), *cited in* LOUTFI, *supra* note 49, at 48.

<sup>128</sup> Author’s Right Law of 1954 art 11(1).

spect the privacy of individuals and to comply with the general principle of law that prohibits unnecessary interference by the government or its agencies in the domestic life of citizens. For its application, this exception seems to have explicitly invited courts to assess the composition of the audience, or the nature of the relationships among those attending the performance. As such, this exception seems to have encouraged courts to abandon the nature of the place and instead to adopt the nature of the gathering as the sole criterion governing the application of the public performance right.

Using the nature of the gathering under the 1954 Law to distinguish prohibited public performances from exempted private performances was supported by scholars and the Court of Cassation. While commenting on the scope of the term “public” under the 1954 Law, Professor Sanhuri, among others, expressed the view that the nature of the place was completely irrelevant: a private place may become a public place if the public is permitted to attend. Similarly, a public place may become private if rented out for a family gathering.<sup>129</sup> Accordingly, he concluded that the nature of the gathering is determinative.

The same approach was adopted by the Court of Cassation in *BEDA v. San Stefano Hotel*, where a number of musical works were performed in a private members’ club within the hotel.<sup>130</sup> The defendant argued that since the private club was only open to members and their personal friends, no performance within the club could be classified as a public performance. The Court of Cassation rejected the defendant’s argument and held that in deciding on whether a performance is given in public, the nature of the place can be misleading and is therefore irrelevant.<sup>131</sup> According to the Court, the sole decisive factor is the nature of the gathering.<sup>132</sup>

Similar to its predecessor, the IP Code of 2002 did not define the term “public.” Nevertheless, it adopted the “gratuitous family circle” exception.<sup>133</sup> Undoubtedly, while adopting this exception and notwithstanding its poor drafting technique, the legislature was aware of the approach adopted by the Court of Cassation and the prevailing view among scholars discussed above. Therefore, it is submitted that the IP Code did not

<sup>129</sup> 8 MOSTAFA MOHAMED EL FEQY, SANHURI, EL WASEET FI SHARH EL QUANON EL MADNY 472 (1991); see also AB EL HAMID EL MENSRAWY, HEMAIT AL MILKIA AL FIKRIAH 39 (2000); LOUTFI, *supra* note 49, at 39.

<sup>130</sup> Cassation Civil, No. 244 Year 30, Feb. 25, 1965.

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

<sup>132</sup> For the same meaning, see *EPRS v. Egyptair*, Ct. of First Instance, North Cairo, Case No. 867 for 1989, Oct. 28, 1991; *Mashrabia* case, Ct. of First Instance Gizza, Case No. 8610 for 1989, May 22, 1991.

<sup>133</sup> Intellectual Property Code art. 171(1) (Egypt).

change the criterion upon which the public performance is based and therefore the nature of the gathering remains determinative.<sup>134</sup>

Generally, the term “public” is often used in contradistinction to the term “family circle,” or as Loutfi puts it, “it is settled among scholars and courts that the term public performance is a synonym to ‘non family performance.’”<sup>135</sup> Had the family circle been the sole exception recognized under Egyptian law, then the above phraseology would have been correct and it would have been possible to refer to all exempted performances as domestic performances; as opposed to private performances. Similarly, had the family circle been the sole exception recognized, the Egyptian legislature would have succeeded where most others fail, namely to maintain a strict common causality between the criterion governing the public performance right and the statutory exceptions thereto.

However, in addition to the family circle exception, the second sentence of Article 171(1) exempts gratuitous performances by students at an educational establishment from any copyright liability.<sup>136</sup> Therefore, unlike in the U.S. where numerous exceptions are recognized, in Egypt exempted private performances fall into only two categories: domestic performances and educational establishment performances.

The domestic or family exception, which is based on the nature of the gathering, should be interpreted in a manner that conforms to general cultural norms. Accordingly, it may cover not only family members living under the same roof, but also all relatives and friends with whom the family shares strong ties. As for the educational establishment exception, it is restricted to performances by students within an educational establishment. Curiously, unlike in the UK,<sup>137</sup> this educational establishment exception did not restrict the composition of the audience to any specific group.<sup>138</sup> For this reason, the nature of the gathering seems to be of little relevance in assessing the scope of that exception. Instead, this exception seems to be based on two cumulative criteria: the identity of the performer, which must be a student, and the nature of the place, which must be an educational establishment.

While both exceptions require the performance to be gratuitous, this requirement seems to be overlooked in the literature. This could be be-

<sup>134</sup> YOUSRIA ABD EL GELIL, EL HEMAYAH EL MADANIA WA EL GINA'IA LEHAQ EL MOUA'LEF 52 (2005).

<sup>135</sup> LOUTFI, *supra* note 49, at 39.

<sup>136</sup> For a similar exception under UK law, see Copyright, Designs and Patents Act 1988 §. 34(1).

<sup>137</sup> *Id.*

<sup>138</sup> This puzzling omission seems to have been copied by the UAE, which based its author's rights law on that of Egypt. See Law No. 7 of 2002 (Author's Rights and Neighbouring Rights Act art. 22(6)), 383 *Al-Jarida Al-Rasmiyya*, Year 22 (July 4, 2002).

cause the lack of gratuitousness was never found to be a cause for which the application of either exception was denied. Unfortunately, the wording of the gratuitous requirement provision under the 1954 Law seems to have used the term “gratuitous” in contradistinction to “direct financial payment by the audience.”<sup>139</sup> Accordingly, similar to the position adopted in relation to the “for profit” requirement by the U.S. Second Circuit Court of Appeal in *John Church Co. v. Hilliard Hotel Co.* discussed above, under the 1954 Law only unauthorised performances where a direct financial payment was made, such as those that required the purchase of tickets, would fall outside the scope of the family, educational establishment, and the now repealed military bands and private association exceptions.

The drafting committee of the IP Code 2002 noticed that error and appropriately changed the wording to disqualify “direct and indirect payments” from the scope of the family and educational establishment exceptions.<sup>140</sup> In doing so, the committee not only narrowed the scope of both exceptions, but also correctly followed the general rule of legislative drafting in commercial and civil matters, which requires exceptions to be narrowly and precisely drafted.

In summary, although the family and educational establishment exceptions have the gratuitous requirement in common, each follows a different governing criterion. While the family exception follows the nature of the gathering, the educational establishment exception follows the identity of the performer and the nature of the place. Thus, it could be argued that the Egyptian legislature was only partly successful in maintaining a common causality between the criterion governing the application of the public performance right, i.e., the nature of the gathering, and the statutory exceptions thereto.

### CONCLUSION

Compared to France, the U.S. and Egypt recognized the authors’ exclusive right to authorize the public performance of their musical works relatively late. Shortly after it had been recognized as one of the exclusive economic rights in the U.S., the 1909 Copyright Act restricted its scope to performances for profit. The curious approach adopted by that Act created an unwarranted distinction between dramatic and musical works. While any authorized public performance of a dramatic work would trigger the application of copyright law, an unauthorized performance of a musical work had to take place in public and to satisfy the peculiar “for profit” requirement, in order to constitute infringement. Although the

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<sup>139</sup> Author’s Right Law of 1954 art. 11(1) (Egypt).

<sup>140</sup> Intellectual Property Code art. 171(1) (Egypt).



1976 Copyright Act abolished this distinction, the Act seems to have failed to adopt a public performance right that is subject matter-neutral. Accordingly, some of the numerous exceptions of § 110 are subject matter-specific.

In Egypt, apart from the terminological distinction between representation of dramatic works and performance of musical works, the public performance right is subject matter-neutral. However, in drafting the public performance provisions of the 2002 IP Code, the legislature seems to have lacked consistency. While the economic rights provision seems to approach public performance merely as a mode of exploitation, the definition provision seems to recognize public performance as an economic right. Furthermore, the definition given to the term “public performance” is absurd. Not only does it define the term “performance” in a way that confuses communication in public with communication to the public, but the definition seems to overlook the term “public” altogether.

Similarly, while recognizing the public performance as one of the minimum exclusive rights, the Berne Convention failed to deal with the right in a coherent manner. Under the Convention, there are five different provisions governing the public performance right, four of which are subject matter-specific. Regrettably, not a single provision attempts to define the term public or provides guidance on where the line should be drawn between public and private performances. Accordingly, it is left to each national law to adopt its own demarcation lines.

Although the U.S. is a copyright system and Egypt is a *droit d'auteur* system, both countries seem to reject the concept of “public place” per se as the criterion upon which the distinction is made between public and private performances. This is mainly because a place can be public in nature, but inaccessible to members of the public at the time of the performance, e.g., rehearsal of a band in a concert hall. After several contradictory decisions under the 1909 U.S. Copyright Act, the 1976 Act settled for the nature of the place and the nature of the gathering as disjunctive criteria to distinguish between public and private performances. In assessing the nature of the place, the accessibility of the place to the public, or the “availability” as one court put it, seems determinative. Therefore, under U.S. law, the nature of the place criterion seeks to ascertain whether the place is accessible to the public.

The nature of the gathering, on the other hand, is based on a qualitative and a quantitative standard. The qualitative standard adopts the family circle as the demarcation line between prohibited public performances and exempted private performances. Oddly, the quantitative standard seems to require courts to take the size of the audience into consideration.

In clarifying the scope of the term “public,” Egyptian law had initially adopted the nature of the place to mean public place and followed it as a

decisive criterion. Later, however, the Court of Cassation rejected that criterion as misleading and irrelevant. Instead, the nature of the gathering was adopted as the sole determinative criterion. Similar to the U.S., the nature of the gathering is based on the qualitative standard of family circle. However, unlike in the U.S., Egyptian courts are not required to make any quantitative assessment when applying the public performance right. As for the nature of the place, although it is normally dismissed by Egyptian scholars, this article has demonstrated that it may still be relevant in respect of the educational establishment exception.

In conclusion, under both systems, an event that is accessible to the public without discrimination would be classified as a public performance. Similarly, notwithstanding that the public indiscriminately is not admitted, a performance may still be regarded as a public one if admission is extended to persons beyond the family circle. In both systems, calling an event a private performance does not necessarily make it so. Thus, while belonging to two different families of law, the U.S. copyright law and Egypt's *droit d'auteur* seem to follow the same two criteria to distinguish public from private performances. Under U.S. copyright law, the nature of the place is the primary criterion and the nature of the gathering is the secondary criterion, under Egyptian law the order is reversed.