Congress, in §101 of the 1976 Act, promptly overturned the *Aiken* Court's interpretation of "performance":

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

17 U.S.C. §101. Thus, turning on a radio or a television constitutes a "performance" of the works being broadcast.

While a wide range of actions constitute performance under the definition given in the Act, only public performances are within the control of the copyright owner. While we all may agree that a radio station performs a work, is that performance a "public" performance if the radio station is only broadcast into private homes? The Act provides the following definition:

> 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 receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.

Id. Thus, the radio station is engaged in a public performance, but the person who turns on the radio in the privacy of her home is not. The next two cases consider the two clauses of the statutory definition in greater detail: What attributes must a place, or a transmission, possess to render a performance "public"?

Columbia Pictures Indus. v. Redd Horne, Inc.

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

Re, C.J.: . . . Maxwell's Video Showcase, Ltd., operates two stores in Erie, Pennsylvania. At these two facilities, Maxwell's sells and rents video cassette recorders and prerecorded video cassettes, and sells blank video cassette cartridges. These activities are not the subject of the plaintiffs' complaint. The copyright infringement issue in this case arises from defendants' *exhibition* of video cassettes of the plaintiffs' films, or what defendants euphemistically refer to as their "showcasing" or "in-store rental" concept.

Each store contains a small showroom area in the front of the store, and a "showcase" or exhibition area in the rear. The front showroom contains video equipment and materials for sale or rent, as well as dispensing machines for popcorn and carbonated beverages. Movie posters are also displayed in this front area. In the rear "showcase" area, patrons may view any of an assortment of video cassettes in small, private booths with space for two to four people. There are a total of eighty-five booths in the two stores. Each booth or room is approximately four feet by six feet and is carpeted on the floor and walls. In the front there is a nineteen inch color television and an upholstered bench in the back.

The procedure followed by a patron wishing to utilize one of the viewing booths or rooms is the same at both facilities. The customer selects a film from a catalogue which contains the titles of available films. The fee charged by Maxwell's depends on the number of people in the

viewing room, and the time of day. The price is $5.00 for one or two people before 6 p.m., and $6.00 for two people after 6 p.m. There is at all times a $1.00 surcharge for the third and fourth person. The fee also entitles patrons to help themselves to popcorn and soft drinks before entering their assigned rooms. Closing the door of the viewing room activates a signal in the counter area at the front of the store. An employee of Maxwell's then places the cassette of the motion picture chosen by the viewer into one of the video cassette machines in the front of the store and the picture is transmitted to the patron's viewing room. The viewer may adjust the light in the room, as well as the volume, brightness, and color levels on the television set.

Access to each room is limited to the individuals who rent it as a group. Although no restriction is placed on the composition of a group, strangers are not grouped in order to fill a particular room to capacity. Maxwell's is open to any member of the public who wishes to utilize its facilities or services.

Maxwell's advertises on Erie radio stations and on the theatre pages of the local newspapers. Typically, each advertisement features one or more motion pictures, and emphasizes Maxwell's selection of films, low prices, and free refreshments. The advertisements do not state that these motion pictures are video cassette copies. At the entrance to the two Maxwell's facilities, there are also advertisements for individual films, which resemble movie posters.

Infringement of Plaintiffs' Copyright

It may be stated at the outset that this is not a case of unauthorized taping or video cassette piracy. The defendants obtained the video cassette copies of plaintiffs' copyrighted motion pictures by purchasing them from either the plaintiffs or their authorized distributors. The sale or rental of these cassettes to individuals for home viewing is also not an issue. Plaintiffs do not contend that in-home use infringes their copyright.

The plaintiffs' complaint is based on their contention that the exhibition or showing of the video cassettes in the private booths on defendants' premises constitutes an unauthorized public performance in violation of plaintiffs' exclusive rights under the federal copyright laws. . . .

"To perform a work means . . . 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." 17 U.S.C. §101 (1982). Clearly, playing a video cassette results in a sequential showing of a motion picture's images and in making the sounds accompanying it audible. Thus, Maxwell's activities constitute a performance under section 101.

The remaining question is whether these performances are public. Section 101 also states that to perform a work "publicly" means "[t]o perform . . . 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." *Id*. The statute is written in the disjunctive, and thus two categories of places can satisfy the definition of "to perform a work publicly." The first category is self-evident; it is "a place open to the public." The second category, commonly referred to as a semi-public place, is determined by the size and composition of the audience.

The legislative history indicates that this second category was added to expand the concept of public performance by including those places that, although not open to the public at large, are accessible to a significant number of people. *See* H.R. Rep. No. 1476, 94th Cong., 2d Sess. 64, *reprinted in* 1976 U.S. Code Cong. & Ad. News 5659, 5677-78 (hereinafter cited as *House Report*). Clearly, if a place is public, the size and composition of the audience are irrelevant. However, if the place is not public, the size and composition of the audience will be determinative.

We find it unnecessary to examine the second part of the statutory definition because we agree with the district court's conclusion that Maxwell's was open to the public. On the composition of the audience, the district court noted that "the showcasing operation is not distinguishable in any significant manner from the exhibition of films at a conventional movie theater." 568 F. Supp. at 500. Any member of the public can view a motion picture by paying the appropriate fee. The services provided by Maxwell's are essentially the same as a movie theatre, with the additional feature of privacy. The relevant "place" within the meaning of section 101 is each of Maxwell's two stores, not each individual booth within each store. Simply because the cassettes can be viewed in private does not mitigate the essential fact that Maxwell's is unquestionably open to the public.

The conclusion that Maxwell's activities constitute public performances is fully supported by subsection (2) of the statutory definition of public performance:

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

17 U.S.C. §101 (1982). As explained in the House Report which accompanies the Copyright Revision Act of 1976, "a performance made available by transmission to the public at large is 'public' even though the recipients are not gathered in a single place. . . . The same principles apply whenever the potential recipients of the transmission represent a limited segment of the public, such as the occupants of hotel rooms . . . ." *House Report, supra*, at 64-65, U.S. Code Cong. & Admin. News, p. 5678. Thus, the transmission of a performance to members of the public, even in private settings such as hotel rooms or Maxwell's viewing rooms, constitutes a public performance. As the statutory language and legislative history clearly indicate, the fact that members of the public view the performance at different times does not alter this legal consequence.

Professor Nimmer's examination of this definition is particularly pertinent: "*if the same copy* . . . of a given work is repeatedly played (*i.e.*, 'performed') by different members of the public, albeit at different times, this constitutes a 'public' performance." 2 M. Nimmer, §8.14[C][3], at 8-142 (emphasis in original). Indeed, Professor Nimmer would seem to have envisaged Maxwell's when he wrote:

> [O]ne may anticipate the possibility of theaters in which patrons occupy separate screening rooms, for greater privacy, and in order not to have to await a given hour for commencement of a given film. These too should obviously be regarded as public performances within the underlying rationale of the Copyright Act.

Id. at 8-142. Although Maxwell's has only one copy of each film, it shows each copy repeatedly to different members of the public. This constitutes a public performance.

The First Sale Doctrine

The defendants also contend that their activities are protected by the first sale doctrine. . . . Section 109(a) is an extension of the principle that ownership of the material object is distinct from ownership of the copyright in this material. The first sale doctrine prevents the copyright owner from controlling the future transfer of a particular copy once its material ownership has been transferred. The transfer of the video cassettes to the