

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

GNOSSOS MUSIC, et al.,)
)
 Plaintiffs)
)
 v.) ***Civil No. 89-0051 P***
)
 QUIDO DiPOMPO,)
)
 Defendant)

***RECOMMENDED DECISION ON THE PLAINTIFFS' MOTION
FOR SUMMARY JUDGMENT***

In this action the plaintiffs, copyright owners of specific musical compositions, allege that the defendant, owner of an Auburn eatery known as Jimmy's Restaurant, publicly performed those compositions without a license and therefore infringed the plaintiffs' rights under 17 U.S.C. ' 106(4).¹ The plaintiffs seek injunctive relief, damages and attorney's fees.² Before the court now is the plaintiffs' motion for summary judgment. Pursuant to Local Rule 19(b) and (c), both the plaintiffs and the defendant have submitted statements of material facts.

¹ Section 106 and subsection 4 state in relevant part:

Subject to sections 107 through 118, the owner of copyright under this title has the exclusive rights . . . in the case of . . . musical . . . works . . . to perform the copyrighted work publicly.

² In this recommended decision, I address only the issue of the defendant's liability.

Pursuant to Fed. R. Civ. P. 56(c) the court shall render summary judgment if there remains "no genuine issue as to any material fact" and if "the moving is entitled to a judgment as a matter of law."

The material facts, viewed in the light most favorable to the defendant, *see Kauffman v. Puerto Rico Telephone Co.*, 841 F.2d 1169, 1171 (1st Cir. 1988); *Ismert and Associates, Inc. v. New England Mutual Life Insurance Co.*, 801 F.2d 536, 537 (1st Cir. 1986), may be summarized as follows. The restaurant, owned, controlled, managed and operated by the defendant, Quido DiPompo, contains 1,824 square feet of space which is open to the public. Answer & 4; Defendant's Answers to Interrogatories Propounded by the Plaintiffs & 11. The public area also consists of a lobby, lounge, banquet room, and two dining rooms with a combined seating capacity of 172 at 43 tables. Exhibit A to Affidavit of Donald Wessels; Exhibit A to Affidavit of Janet Brennan. The sound system installed in the restaurant consists of a Sanyo portable am/fm radio/cassette player which is located in the lobby and which is connected to eight to ten 10-inch recessed ceiling speakers located in the restaurant dining rooms and lobby. Affidavit of Quido DiPompo & 4; Defendant's Answers to Interrogatories Propounded by the Plaintiffs & 5. The establishment contains a total of 21 recessed ceiling speakers, but they are not all presently used. Affidavit of Quido DiPompo & 4.

When the defendant acquired the restaurant, it was then a subscriber to Muzak, a commercial background music service. Affidavit of Don Hartley && 3-5; Affidavit of Quido DiPompo & 2. The defendant subsequently terminated the subscription service. Affidavit of Quido DiPompo & 2. Although the service's equipment was removed, the recessed speakers, which had been installed at an earlier time, were left in place and are the same speakers presently used as part of the restaurant's radio/cassette player system. Affidavit of Don Hartley && 4-5; Affidavit of Quido DiPompo & 2; Defendant's Answers to Interrogatories Propounded by the Plaintiffs & 5. The speakers are of at least

70-volt capacity, the kind required for a commercial background music system. Affidavit of Don Hartley & 4.

The defendant has stipulated that the plaintiffs are the owners of valid copyrights in the compositions in question and otherwise does not dispute that the four songs were broadcast over the radio and transmitted through the recessed speakers in the restaurant's dining room and lobby and that he derives financial benefit from the operation of Jimmy's Restaurant. The defendant claims, however, that summary judgment is not appropriate because genuine issues of material fact remain as to whether he is entitled to the exemption provided by 17 U.S.C. ' 110(5). The defendant further argues that genuine issues of material fact remain as to whether the defendant publicly performed the compositions in question for profit and thus whether the plaintiff has established one of the essential elements of copyright infringement.

I first dispose of the defendant's claim that the plaintiffs have failed to establish one of the essential elements of copyright infringement. Relying on *Milene Music, Inc. v. Gotauco*, 551 F. Supp. 1288, 1292 (D.R.I. 1982), the defendant asserts that the plaintiffs must establish that the copyrighted works were publicly performed *for profit*. See also *Broadcast Music, Inc. v. Larkin*, 672 F. Supp. 531, 533 (D. Me. 1987). He argues that the radio broadcasts at issue here ``are not a factor in the dollar volume of his business" and further observes that ``it is difficult to imagine that a local radio station's commercial programming which serves as background noise contributes to the restaurant's profits." Defendant's Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment p. 4. The argument is without merit.

At least two courts have determined, after examining the language of the statute and the accompanying legislative history, that, contrary to *Milene*, the statute does not require the plaintiff in a copyright infringement action to establish that copyrighted works were performed for profit. See *Almo*

Music Corp. v. 77 East Adams, Inc., 647 F. Supp.. 123 (N.D. Ill. 1986); *LaSalle Music Publishers, Inc. v. Highfill*, 622 F. Supp.. 168 (W.D. Mo. 1985). I need not determine which interpretation of the statute is correct, however, because it is well established that a profit-making enterprise which publicly performs copyrighted musical compositions is deemed to do so for profit. In *Herbert v. Shanley*, 242 U.S. 591 (1917), Justice Holmes articulated the rationale as follows:

[The defendants' performances] 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.

Id. at 594-95. See also *Merrill v. County Stores, Inc.*, 669 F. Supp 1164, 1170 (D.N.H. 1987).³

Because the defendant has admitted that Jimmy's Restaurant is a profit-making enterprise, his "for profit" argument fails.

The defendant's ' 110(5) exemption argument also must fail. Section 110(5) of the Act exempts from infringement liability:

communication of a transmission embodying a performance or display of a work by the public reception of the transmission on a single receiving apparatus of a kind commonly used in private homes, unless --

- (A) a direct charge is made to see or hear the transmission; or
- (B) the transmission thus received is further transmitted to the public.

³ Although in *Larkin* this court cited approvingly *Milene's* catalog of elements essential to the establishment of copyright infringement, including public performance *for profit*, the court nevertheless inferred the existence of pecuniary benefit notwithstanding the absence of any such evidence and, in doing so, effectively applied Justice Holmes' rationale. *Larkin*, 672 F. Supp. at 534.

17 U.S.C. ' 110(5). Congress enacted this section in response to the Supreme Court's decision in *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151 (1975). In *Aiken*, the alleged copyright infringement occurred in a fast food establishment. Of the approximately 1,055 square feet of floor space, only 620 square feet were open to the public. See *Merrill v. County Stores, Inc.*, 669 F. Supp. at 1168. The sound equipment consisted of a radio receiver with four ceiling speakers. The defendant regularly played the radio during business hours.

The House Judiciary Committee's Report on the ' 110(5) exemption states, with reference to the facts of *Aiken*, that:

[T]he Committee considers this fact situation to represent the outer limit of the exemption, and believes that the line should be drawn at that point. Thus, the clause would exempt small commercial establishments whose proprietors merely bring onto their premises standard radio or television equipment and turn it on for their customers' enjoyment, but it would impose liability where the proprietor has a commercial "sound system" installed or converts a standard home receiving apparatus (by augmenting it with sophisticated or extensive amplification equipment) into the equivalent of a commercial sound system. Factors to be considered in particular cases would include the size, physical arrangement, and noise level of the areas within the establishment where the transmissions are made audible or visible, and the extent to which the receiving apparatus is altered or augmented for the purpose of improving the aural or visual quality of the performance for individual members of the public using those areas.

H. Rep. No. 94-1476 [hereinafter "House Report"], 94th Cong., 2d Sess. 87 (1976), *reprinted in* 1976 U. S. Code Cong. & Admin. News 5701. The House Conference Report states:

It is the intent of the conferees that a small commercial establishment of the type involved in *Twentieth Century Music Corp v. Aiken*, which merely augmented a home-type receiver and which was not of sufficient size to justify, as a practical matter, a subscription to a commercial background music service, would be exempt.

H. Rep. No. 94-1733 [hereinafter "Conference Report"], 94th Cong., 2d Sess. 75 (1976), *reprinted in* 1976 U.S. Code Cong. & Admin. News 5816 (citations omitted).

Since the enactment of the § 110 (5) exemption, courts have examined the factors specified in the House Report to determine whether or not a particular establishment fits within the exemption. In *Merrill v. Bill Miller's Bar-B-Q Enterprises, Inc.*, 688 F. Supp. 1172 (W.D. Tex. 1988), the court concluded that the defendants, who owned a chain of restaurants each with 1,000 to 1,500 square feet of public dining area and each with a sound system consisting of a "home-type" receiver connected by concealed wiring to two 8-inch recessed ceiling speakers, did not qualify for the § 110(5) exemption. The finding that the defendants did not employ a "single receiving apparatus of a kind commonly used in private homes," *id.* at 1175, served as the first of three independent grounds for the court's conclusion. The court in making this finding stated:

The fact that individual components of the entire apparatus may be "home-type" does not make the entire apparatus "home-type". Rather, all the features of the complete apparatus must be considered in determining whether it is "home-type", including, for example, whether the wiring is hidden, the distance between the speakers, and the mounting of the speakers.

Id. The court's remaining grounds were based on findings that the radio broadcasts were "further transmitted" and that the defendant's chain operation was large enough to justify a subscription to a commercial background music service. The court based the latter finding not only on the fact that the defendant ran a chain of restaurants with substantial revenues, but also on the fact that the defendant previously had subscribed to a commercial background music service. *Id.* at 1176.

In *International Korwin Corp. v. Kowalczyk*, 665 F. Supp. 652 (N.D. Ill. 1987), *aff'd* 855 F.2d 375 (7th Cir. 1988), the court determined that the restaurant owned by the defendant was not the type of small commercial establishment that Congress sought to exempt from copyright infringement

liability. There, the defendant owned a restaurant which contained 2,664 square feet of space open to the public. The defendant's establishment, which seated a total of approximately 200 persons, included a coffee shop, small dining room and bar. The sound system consisted of a commercial-type radio receiver which was attached by built-in concealed wiring to eight remote ceiling-mounted speakers. The court, in comparing the defendant's establishment to that of the defendant in *Aiken*, noted that:

With 2,640 square feet of space, the Orbit is more than four times the size of the small fastfood store in *Aiken* and hence too large an establishment to qualify under ' 110(5). In addition, defendant used eight speakers which were dispersed throughout the Orbit; twice the number found in *Aiken* where the speakers narrowly circumscribed the receiver. Further, given both its physical size and substantial revenues, the Orbit is a large enough establishment to accommodate a background music service.

Kowalczyk, 665 F. Supp at 658 (citations omitted). The court also noted that the performances which originated in the defendant's office at one end of the establishment and were transmitted by concealed wiring to the speakers in the areas open to the public were "further transmitted to the public," within the meaning of 17 U.S.C. ' 110(5)(B). *Id.* at 657.

A number of other courts have also addressed the issue of the ' 110(5) exemption and determined that the establishments in question exceeded the outer limit of the exemption represented by the facts in *Aiken*. Many of these courts have granted summary judgment on the issue of liability. *See, e.g., Merrill v. County Stores, Inc.*, 669 F. Supp. 1164 (D.N.H. 1987); *Rodgers v. Eighty Four Lumber Co.*, 617 F. Supp. 1021 (W.D. Pa. 1985); *Broadcast Music, Inc. v. United States Shoe Corp.*, 211 USPQ 43 (C.D. Ca. 1980), *aff'd* 678 F.2d 816 (9th Cir. 1982); *Sailor Music v. Gap Stores, Inc.*,

516 F. Supp. 923 (S.D.N.Y.), *aff'd* 668 F.2d 84 (2d Cir. 1981), *cert. denied*, 456 U.S. 945 (1982).⁴

Viewing the facts in the light most favorable to the defendant for purposes of this motion, I conclude that the defendant is not entitled to the ' 110(5) exemption for the following reasons: (1) the defendant is not a small commercial establishment within the *Aiken* framework; (2) the defendant's sound system cannot be classified as a single receiving apparatus of a kind commonly used in private homes; and (3) the defendant further transmitted the radio broadcasts to the public.

The defendant's restaurant is not a small commercial establishment of the kind which qualifies for ' 110(5) exemption protection. With 1,824 square feet of space open to the public, the defendant's restaurant contains almost three times the public square footage of the fast food store in *Aiken*. With two dining rooms seating 172 people, a lobby, lounge and banquet room, Jimmy's is a far more sophisticated operation than *Aiken's* small fast food business. Clearly it is of ` sufficient size to justify . . . a subscription to a commercial background music service." Conference Report, 1976 U.S. Code Cong. & Adm. News 5816. Indeed, the fact that the restaurant once subscribed to a commercial background music service is further evidence of its disqualification for protection under ' 110(5). *Merrill v. Bill Miller's Bar-B-Q Enterprises, Inc.*, 688 F. Supp. at 1176.

It is likewise clear that the sound system employed in Jimmy's Restaurant cannot be described as a ` single receiving apparatus of a kind commonly used in private homes." 17 U.S.C. ' 110(5). The fact that the Sanyo radio/cassette player which serves as a receiver of the radio music broadcasts played throughout the lobby and dining rooms of the restaurant is itself of the kind one might purchase for

⁴ It is worth noting that in *Kowalczyk* the trial court stated that ` it is clear that had the defendant accurately presented the facts, the case could have been resolved at summary judgment." *Kowalczyk*, 665 F. Supp. at 659.

home use is not determinative. When all the features of the system are considered, including the eight to ten 10-inch commercial power recessed ceiling speakers, concealed wiring and its breadth of coverage, the system can only be characterized as the kind of commercial system specifically excluded from the coverage of ' 110(5).

Finally, since the radio broadcasts received on the defendant's radio/cassette player located in the lobby were sent to the dining rooms over the several previously described speakers, they were transmissions ``further transmitted to the public" and, as such, outside the scope of the exemption. 17 U.S.C. ' 110(5)(B); *see Merrill v. Bill Miller's Bar-B-Q Enterprises, Inc.*, 688 F. Supp. at 1176.

Accordingly, I recommend that the plaintiffs' motion for summary judgment on the issue of the defendant's liability for copyright infringement be GRANTED.

NOTICE

A party may file objections to those specified portions of a magistrate's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. ' 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 14th day of September, 1989.

***David M. Cohen
United States Magistrate***