

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

ZAPPO MUSIC, INC., et al.,)
)
 Plaintiffs)
)
 v.) **Civil No. 89-0001 P**
)
 MONOPOLY, INC., et al.,)
)
 Defendants)

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

In this action the plaintiffs, copyright owners of specific musical compositions, allege that the defendants, the corporate owner (Monopoly, Inc.) and principal stockholder (Joseph Soley) of a Portland restaurant known as the Seamen's Club, publicly performed those compositions without a license and therefore infringed the plaintiffs' rights under 17 U.S.C. ' 106(4).¹ Before the court now is the plaintiffs' motion for summary judgment. Pursuant to Local Rule 19(b) and (c), both the plaintiffs and the defendants 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.

For purposes of this motion, the plaintiffs' statement of material facts and supporting materials² establish that the plaintiffs are the owners of the copyrighted musical compositions in question; that defendant Monopoly, Inc. owns and operates the restaurant known as the Seamen's Club; that defendant Joseph Soley is Monopoly's president, treasurer and principal stockholder and has primary responsibility for its operations; that Soley set up a home stereo in the lounge area of the restaurant for the use of his employees; that the lounge sound equipment consists of a tape player, a receiver and four speakers;³ and that the four musical compositions in question were mechanically performed in the lounge area during business hours on September 24, 1988.⁴ The defendants have submitted a "Statement of Disputed Facts" but have controverted none of the plaintiffs' facts as set forth above. The defendants' uncontroverted sworn assertions also establish for purposes of this motion that Soley's employees control the musical selections played on the lounge sound equipment; that there is no cover charge to patrons of the lounge; and that the lounge area covers approximately 1,000 square feet. *See* Affidavit of Joseph L. Soley.

The question, then, is whether the plaintiffs are entitled to summary judgment as a matter of law on the basis of these facts. The defendants insist that genuine issues of material fact remain

² *See* attachments to Memorandum in Support of Plaintiffs' Motion for Summary Judgment and affidavits of John A. Bonaccorso, Janet Brennan and Donald Wessels.

³ Because the plaintiffs' statement of material facts makes no assertion that performance of copyrighted musical works occurred in the *upstairs* restaurant, I do not consider as relevant any description of equipment in that area.

⁴ Relying on the affidavits of Janet Brennan and Donald Wessels, the plaintiffs assert that "[t]he music was played mechanically, *apparently* by means of tapes played through a sound system comprised of a cassette tape player" *See* Plaintiffs' Statement of Undisputed Material Facts & 6 (emphasis added). Although defendant Soley has stated that he does not know if this performance occurred, this statement does not adequately controvert the sworn assertions of both Janet Brennan and Donald Wessels regarding the *fact* of performance. *See Wow & Flutter Music v. Len's Tom Jones Tavern, Inc.*, 606 F. Supp. 554 (W.D.N.Y. 1985). These affidavits do not, however, establish the *method* of performance.

regarding whether the September 24, 1988 performance of copyrighted material was an exempted performance under 17 U.S.C. ' ' 110(4) or 110(5). These sections limit copyright owners' exclusive rights under ' 106 in the case of the

performance of a nondramatic . . . musical work otherwise than in a transmission to the public, without any purpose of direct or indirect commercial advantage and without payment of any fee or other compensation for the performance to any of its performers, promoters, or organizers, if --

(A) there is no direct or indirect admission charge,
17 U.S.C. ' 110(4)(A); and in the case of the

communication of a transmission embodying a performance or display or 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,

17 U.S.C. ' 110(5).

I first dispense with the defendants' argument that the September 24, 1988 performance is exempt under ' 110(4). The fact that the Seamen's Club does not charge admission to the lounge area is clearly not dispositive. As to this exemption, the House Judiciary Committee's Report states:

This provision expressly adopts the principle established by the court decisions construing the "for profit" limitation: that public performances given or sponsored in connection with any commercial or profit-making enterprises are subject to the exclusive rights of the copyright owner even though the public is not charged for seeing or hearing the performance.

H. Rep. No. 94-1476, 94th Cong., 2d Sess. 85 (1976), *reprinted in* 1976 U.S. Code Cong. & Admin. News 5699. Thus the test is whether the Seamen's Club is a profit-making enterprise. In a now-

famous response to a similar argument, Justice Holmes long ago decisively settled the issue raised by the performances of copyrighted musical compositions in a restaurant which had no cover charge:

[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.

Herbert v. Shanley, 242 U.S. 591, 594-95 (1917). See also *Bourne Co. v. Speeks*, 670 F. Supp. 777, 779 (E.D. Tenn. 1987). Defendant Soley does not deny that he operates the Seamen's Club for profit and thus his ' 110(4) argument must fail.⁵

The question whether the infringing performance in the lounge on September 24, 1988 is exempted by ' 110(5), however, cannot be resolved on the facts now before the court. The defendants argue that the lounge sound equipment is "a single receiving apparatus of a kind commonly used in private homes" and that the performance did not constitute a "further transmi[ssion] to the public." See ' 110(5)(B). The defendants further argue that playing an audiocassette is the same as the reception of a radio or television broadcast. Lastly, the defendants rely

⁵ The defendants also argue that *they* cannot be said to have derived commercial benefit from the playing of music because in fact employees of the restaurant controlled the selection of music. The defendants have nowhere asserted, however, that they do not have the power to control the conduct of the Seamen's Club employees, and in fact defendant Soley has admitted that he has primary responsibility for the operation of the restaurant. Thus I find this argument frivolous. See *Broadcast Music, Inc. v. Larkin*, 672 F. Supp. 531, 534 (D. Me. 1987).

on the plaintiffs' failure to show that the performance was actually communicated by means of a tape player. *See* n.4, *supra*.

The House Judiciary Committee's Report on the ' 110(5) exemption states that the purpose of this clause is

to exempt from copyright liability anyone who merely turns on, in a public place, an ordinary radio or television receiving apparatus of a kind commonly sold to members of the public for private use.

The basic rationale of this clause is that the secondary use of the transmission by turning on an ordinary receiver in public is so remote and minimal that no further liability should be imposed.

1976 U.S. Code Cong. & Admin. News, supra, at 5700. The Report states explicitly that the exemption was drafted in response to the Supreme Court's decision in *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151 (1975), and in an attempt to establish the fact situation in that case as the outer limit of the exemption. *1976 U.S. Code Cong. & Admin. News, supra*, at 5701.

The *Aiken* defendant was an owner and operator of a fast-service food shop with a total floor space of 1,055 square feet, of which 620 square feet were open to the public. *See Merrill v. County Stores, Inc.*, 669 F. Supp. 1164, 1168 (D.N.H. 1987). The operator regularly played his radio, which was hooked up to four ceiling speakers, during business hours. The Court held that in such a situation the defendant should be exempt from copyright licensing fees. The House Report states that ' 110(5)

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 consider 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.

1976 U.S. Code Cong. & Admin. News, supra, at 5700.

In *Merrill* the question was whether the broadcasting of radio station programs via 14 to 15 recessed ceiling speakers throughout a store with 13,000 square feet of floor area open to the public was exempted from the copyright laws under the ' 110(5) exemption. The court held that the intercommunication system, which permitted interruption for the paging of employees and was integrated into the store's telephone network, was not the kind of home system described in ' 110(5); the court also held that both the volume of business (approximately \$2.5 million in annual retail sales) and the size of the facility (13,000 square feet of floor space open to the public) put the fact situation well beyond the outer limit set in *Aiken*. *Id.*

Likewise, the Northern District of Illinois has determined that a restaurant with a 2,664 square foot area of public space which broadcast radio programs received in the office of the restaurant and transmitted via concealed speaker wire to eight speakers in the public area was subject to the copyright laws. *See International Korwin Corp. v. Kowalczyk*, 665 F. Supp. 652 (N.D. Ill. 1987). The *Korwin* court found that the sound equipment was clearly not the kind of equipment ``commonly found at home, even in today's high-tech world," and that the speaker wire connection between the office receiver and the eight restaurant speakers constituted a ``further transmission" within the meaning of ' 110(5). *Id.* at 657 (emphasis in original).

In this case I cannot say that the facts as established for purposes of this motion regarding the sound equipment and the operation of the Seamen's Club clearly place the September 24, 1988 performance either within or without the ' 110(5) exemption. The plaintiffs have not established that the music was played on the tape cassette player rather than via radio transmission. The physical area

of the restaurant is closer to the area of the food store in *Aiken*, and the number of speakers is also the same. Since summary judgment is appropriate only when the movant is so entitled as a matter of law on the basis of clearly established facts, I recommend that the plaintiffs' motion for summary judgment be *DENIED*.

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 11th day of August, 1989.

David M. Cohen
United States Magistrate