
Broadcast Music, Inc. v. Claire's Boutiques, Inc., 949 F.2d 1482 (7th Cir. 1991)

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CASE SUMMARIES

Broadcast Music, Inc. v. Claire's Boutiques, Inc.,

949 F.2d 1482 (7th Cir. 1991).

INTRODUCTION

Broadcast Music, Inc., a musical composition copyright holder, filed a copyright infringement action against Claire's Boutiques, Inc., owner of a chain of retail stores, for playing radio broadcasts in its stores without first obtaining a license from Broadcast Music, Inc. The District Court for the Northern District of Illinois found that Claire's Boutique was exempt from copyright infringement under the home-type exemption of 17 U.S.C. § 110(5), and granted its Motion for Summary Judgment. In affirming the district court's holding, the United States Court of Appeals for the Seventh Circuit held that the home-type exemption was properly applied to each individual retail store as opposed to the chain as a whole regardless of the retailer's financial status, and that under the statute the "receiving apparatus" included not just the stereo receiver but all the system components.¹

FACTS

The plaintiff, Broadcast Music, Inc. ("BMI") is a performing rights organization. BMI is authorized by individual publishers, authors and composers to license public performance rights in their musical compositions.

The defendant, Claire's Boutiques, Inc. ("Claire's") owns and operates over 700 retail stores throughout the United States. Claire's provides stereo equipment to each of its stores. This includes a Radio Shack Optimus STA-20 5-watt stereo receiver, two Realistic Minimus 7 speakers, an indoor antenna, and speaker wire.

Each of the stores uses the stereo equipment to broadcast music during business hours. The speakers are ordinarily hung from the ceiling, one in the front of the store, and one in the back. The speaker wire is concealed by running it above a dropped ceiling.

BMI asked Claire's to purchase a public performance license for its stores. Claire's counter-offered to license only its stores which exceed 1055 square feet. BMI rejected the counter-offer and commenced this litigation, claiming that Claire's violated the Copyright Act by playing radio broadcasts in its stores during business hours. Claire's responded that it was exempt from liability under the home-type exemption of section 110(5) of the Copyright Act and sought a Declaratory Judgment. Section 110(5) exempts persons or institutions who play their radio or television in a public place if their radio or television is of a

kind commonly used in private homes.²

Both parties moved for summary judgment. The district court granted Claire's Motion for Summary Judgment, and BMI appealed.

LEGAL ANALYSIS

The issue before the appellate court was whether Claire's qualified for exemption from copyright licensing requirements for broadcasting music in its stores under the home-type exemption, section 110(5) of the Copyright Act of 1976 ("the Act").³ In resolving the issue the court looked to the language of the section 110(5) in conjunction with other applicable sections of the Act, the legislative history of the exemption,⁴ and other circuits and districts.

Before determining if Claire's sound system fell under section 110(5), the court first looked to whether or not Claire's transmission could be defined as a public performance. Prior to the Act, U.S. Supreme Court case law defined public performance as, *inter alia*,⁵ an initial broadcast by a television or radio station.⁶ Under this definition, the viewer or listener was considered a mere "passive viewer."⁷ Congress, however, rejected this definition in the Act. To perform publicly under the Act now means (1) to perform works at a place open to the public, or at a place where a substantial number of persons gathered other than family or friends; or (2) to transmit this performance in public or to the public through a device.⁸ The court thus determined that Claire's clearly fell under the Act's definition of public performance through the actions of its store managers playing the radio during normal business hours.

Since Claire's act of playing radio music in its stores was determined a public performance, unless the court could find an exemption, Claire's would be liable for infringement. A home-type exemption is available if (1) a single receiving apparatus is used, (2) the single receiving apparatus is of a kind commonly used in private homes, (3) the transmission is provided free of charge, and (4) the transmission is not "further transmitted" to the public.⁹ The parties stipulated that Claire's did not charge to listen to the broadcasts in its stores.

The court then turned to addressing the "single receiving apparatus" issue. BMI contended that Claire's could not claim that it used a "single receiving apparatus" because, on a corporate-wide basis, it used 669 receivers. Claire's responded that its activities must be viewed on a store-by-store basis. In examining the statutory language, the court held the language "strongly suggests that the proper analysis should be limited to the area where a single work is performed."¹⁰ According to the court, Congress in its legislative history when discussing the exemption

uses the word “proprietor,” indicating companies with one location or storefront. Congress did not address in either the statute or legislative history whether all receivers used commonly by an organization are to be counted collectively for purposes of the exemption. The plain language of the exemption does not describe the individuals or groups entitled to the exemption. The exemption asks whether or not a single apparatus was used.¹¹ The statute does not ask how many receiving apparatus are used, and it speaks of one performance or work. Thus, the court determined congressional intent was to focus on the type of single receiver used within a single area, not the infringing entity, here Claire’s corporation collectively.

After determining that the exemption applied to a single system in a single location, the court examined the requirement that the receiving apparatus be of the kind commonly used in private homes, a home-type system. The court concluded that it should examine the entire receiving apparatus, not just the single receiving unit.¹² In examining the entire stereo system, the court enunciated two ways a company could fall out of the 110(5) home-type exemption: (1) if the company used any non-home-type components in its stereo system; or (2) if it arranged the home-type components in a way not commonly found in a home.

Under the first exclusion, the court found that the components used by Claire’s were home-type. The receivers were small, delivering only 5 watts of power, and were capable of driving only two speakers. The speakers also were small and had limited power. Under the second exclusion, the court held that the configuration of Claire’s home-type components was in a way commonly found in a home. To determine this, the court examined the following factors relating to the system’s configuration: number of speakers used, manner in which the speakers were installed, use of concealed wiring, distance of speakers from the receiver, and integration of the stereo system with other technologies.

In this case, these factors did not all support the same conclusion: the dropped speakers and concealed wiring weighed toward denying the exemption, whereas the limited number of speakers used, the relative closeness of the speakers to the receiver, and the lack of integration of the system to other technologies weighed toward allowing the exemption. The court accorded minimal weight to the dropped speakers and concealed wiring. They felt that the important considerations in determining whether a system is home-type are the type and sophistication of the equipment used, the size of the area in which the broadcast is audible, and whether the equipment has been altered or integrated. The court noted that when Congress created this exemption, it intended to exempt the type of stereo system used by the restaurant owner in *Twentieth Century*

Music Corp. v. Aiken.¹³ That system also used dropped speakers and concealed wiring. The court concluded that Claire’s component configuration was sufficiently home-type to come within the exemption.

The court then focused on the requirement that the broadcast not be “further transmitted to the public.” BMI argued that Claire’s systems initially received the transmission at the receiver, and then further transmitted it via wires to other areas. The court rejected this argument for three reasons. First, the court determined that in its legislative history, Congress intended the sound system in *Aiken*, a radio presumably connected by wires to four speakers, to be exempt under section 110(5). Second, the term “receiving apparatus” in the Act encompasses not just the receiver but all the components of a music system.¹⁴ Third, the court believed that to further transmit a performance entails using some device or process to expand the normal limits of the receiver’s capabilities. In so reasoning, the court rejected BMI’s contention that Claire’s further transmitted the radio broadcast because the speaker wires passed through a wall separating the receiver, in the backroom, from the speakers, in the main store area. Therefore, the court concluded that Claire’s systems did not further transmit to the public the radio broadcasts received in their stores merely by sending the music to other areas within the individual store.

Last, the court addressed the issue whether the financial size of the alleged infringer’s establishment affects the section 110(5) exemption. BMI interpreted the legislative history for the proposition that section 110(5) cannot apply to a large profitable business such as Claire’s. Here is where the Seventh Circuit broke away from other circuits and district courts on this same issue.

BMI asserted that the terminology in legislative history—“small commercial establishment[s] ... not of sufficient size to justify, as a practical matter, a subscription to a commercial background music service”—sets forth two requirements.¹⁵ First, it requires Claire’s be a small business, and second, that it not be of the size and nature that could practically justify a subscription to background music. While the terminology, “small commercial establishment,” is repeated in several places throughout the history, the court found unclear whether that terminology refers to the financial size or physical size of the establishment.

Because the statute itself does not address the financial strength of the alleged infringer’s establishment, the court determined that a rule could not be invented that was “totally unrelated to the language of the statute.”¹⁶ But, the court further recognized that to hold the financial strength of the establishment irrelevant was contrary to several other cases. The court distinguished the other cases finding that none relied solely on the financial size or ability of the defendant when denying the 110(5) exemption. The courts also