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Edison Brothers Stores, Inc. v. Broadcast Music, Inc. 954 F.2d 1419 (8th Cir. 1992)

Brent Von Horn

Edison Brothers Stores, Inc. v. Broadcast Music, Inc.,

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Introduction

The Eighth Circuit recently held that the unlicensed use of radio broadcasts in retail stores is not an infringement of the copyrights of the music played. The court of appeals held that use of one radio per store comes under the homestyle exception to copyright enforcement in the Copyright Act,[1] no matter how many stores are owned by a single retailer, how large each store is, or how easily the retailer can afford to pay for the use of the music.

Facts

Broadcast Music, Inc. (BMI) licensed the use of copyrighted lyrical material. Edison Brothers Stores, Inc. (Edison) owned a chain of approximately 2500 retail clothing and shoe stores doing business as Chandlers, Jeans West, Fashion Conspiracy, Size 5-7-9 Shops, J. Riggins, Bakers, the Wild Pair, and others. Most of Edison's stores played radio broadcasts for the enjoyment of employees and customers. Edison's radio usage policy limited the stores to using simple and inexpensive equipment. The policy provided that only simple, radio-only receivers with portable speakers placed within fifteen feet could be used.

About 220 of Edison's stores had more sophisticated sound systems than allowed by this policy. Edison paid for the licenses for these stores through BMI and other commercial music services. BMI wanted Edison to pay to license all 2,500 of its stores. On appeal, after considering BMI's arguments requiring licensing, this court affirmed the lower court's summary judgment in favor of Edison.

Legal Analysis

The so-called homestyle exception of the Copyright Act [section 110(5)] provides exemptions from copyright enforcement for certain performances. The public display of a copyrighted work on a "single receiving apparatus of a kind commonly used in private homes" does not infringe the copyright unless a separate charge is made for the music.[2]

The first argument presented by BMI's appeal concerned Edison's multiple locations. BMI wanted the court to interpret the homestyle exception of the Copyright Act in such a way that Edison lost its protection as soon as it installed the second radio in the second store. The court held that the number of stores involved did not matter.[3] The court did not accept BMI's reading of section 110(5); instead it held that the homestyle exception is to be applied to each separate location of performance independent of other uses elsewhere.[4] Thus, Edison's radio usage policy fits the homestyle exception, because the equipment allowed each store by Edison's policy conforms to that described by the statute.

BMI's second argument was that the size of a store affects its qualification under the homestyle exception. BMI bases this argument on the legislative history of the homestyle exception, claiming that Congress passed the homestyle exception in response to the Supreme Court's decision in *Twentieth Century Music Corp. v. Aiken.*[5] BMI argued that the size of Aiken's store represented the maximum size of a store which qualified under the homestyle exception. Edison's stores on average were approximately two to three times larger than Aiken's store. The court found that the type of equipment used is a more probative factor than the size of the store, because the Copyright Act focuses on the equipment being used and therefore the size of the store is moot.[6]

BMI's third argument pointed again to legislative history to support its contention that a section 110(5) exemption is available only if the store is unable to pay for its use of music or is not of sufficient size to justify, as a practical matter, a subscription to a commercial music service. As with the square footage requirement, the court refused to read into the Copyright Act what clearly was not there. The court stated that Congress did not intend that a size-and-financial-means test be part of the statute. It held that the focus of the Copyright Act is on the equipment in use, regardless of the size of the store or its ability to pay for the use of the music.[7]

Conclusion

The *Edison* court held that the unlicensed use of music broadcast by radio in retail stores is not infringement of the copyrights involved, according to the homestyle exception to the Copyright Act, and in accord with treaty obligations of the United States under Article 11 of the Berne Convention.[8] The exception applies only when the equipment used is such that might be found in a typical private home. In applying the exception, neither the size of