



**Broadcast Music, Inc. v. 84-88 Broadway, Inc. 942 F. Supp. 225
(3rd Cir. 1996)**

David S. Kerpel

Follow this and additional works at: <https://via.library.depaul.edu/jatip>

Recommended Citation

David S. Kerpel, *Broadcast Music, Inc. v. 84-88 Broadway, Inc. 942 F. Supp. 225 (3rd Cir. 1996)*, 7 DePaul J. Art, Tech. & Intell. Prop. L. 384 (1997)

Available at: <https://via.library.depaul.edu/jatip/vol7/iss2/10>

This Case Summaries is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Journal of Art, Technology & Intellectual Property Law by an authorized editor of Via Sapientiae. For more information, please contact digitalservices@depaul.edu.

Broadcast Music, Inc. v. 84-88 Broadway, Inc.

942 F. Supp. 225 (3rd Cir. 1996)

INTRODUCTION

Broadcast Music, Inc. ("BMI"), owner of the copyright at issue, brought suit against 84-88 Broadway, Inc. d/b/a J.P. Anthony's ("Anthony's"), operator of a nightclub business establishment, for allegedly allowing infringing performances of copyrighted works to be played at their premises.¹ BMI requested an award of statutory damages pursuant to 17 U.S.C. §504(c)(1).²

On cross motions for summary judgment, the United States District Court for New Jersey held that: (1) the sub-licensing agreement to provide background music which contained copyrighted compositions did not authorize Anthony's to host live or disc jockey performances of the copyrighted compositions; (2) an issue of fact existed as to whether the majority shareholder, John Schepisi, had the right and ability to supervise the infringing activity on Anthony's premises; (3) a question of fact existed as to whether holding a shareholder vicariously liable for infringement precluded summary judgment; and (4) an issue of fact existed as to whether infringement of copyrighted songs played at Anthony's was willful or innocent, thus precluding summary judgment on the issue of statutory damages.³

The United States District Court for New Jersey held that the live and disc jockey performances of compositions licensed by BMI which were played at Anthony's infringed upon BMI's copyrights.⁴ The court granted BMI's motion for summary judgment, denied Anthony's cross-motion for summary judgment as to liability, denied

1. Broadcast Music, Inc., v. 84-88 Broadway, Inc. d/b/a J.P. Anthony's and John A. Schepisi, 942 F. Supp. 225, 227 (3rd Cir. 1996).

2. *Id.* at 232.

3. *Id.* at 225.

4. *Id.* at 226.

BMI's motion for summary judgment against John Schepisi and denied both parties' motions for summary judgment as to damages and attorneys' fees and costs.⁵

FACTS

BMI is a performing rights society which purchases copyrighted songs and the rights to perform these songs from the original owners.⁶ After BMI purchases these songs and the rights to perform them, BMI then licenses the right to perform the songs to third parties.⁷ In August 1993, Anthony's entered into a Sub-Licensing Agreement ("Agreement") with Digital Music Service ("Digital"). Digital is a music service which provides background music to third parties for their desired use via the "service."⁸ Anthony's then uses the music in whatever venue it desires. The Agreement provided, in relevant part, that for a designated fee, Digital "shall provide subscription music programming to Anthony's at the premises discussed."⁹

BMI did not issue Anthony's a license to offer such live and disc jockey performances, nor did Anthony's obtain permission from the copyright owners whose music was being publicly performed.¹⁰ In response, Anthony's wrote to BMI on February 9, 1994, stating that "any fees for music at J.P. Anthony's are being paid pursuant to a licensing agreement with Digital which is presently servicing the subject premises."¹¹ BMI replied that the Agreement with Digital only granted Anthony's the right to broadcast the copyrighted music over the Digital cable system, and it did not give Anthony's the right to host live performances or to play any compact discs or tapes of the copyrighted music licensed by BMI.¹²

BMI offered to provide Anthony's with a license to host live and

5. *Id.*

6. *Id.*

7. *Id.* at 227.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Broadcast Music Inc.*, 942 F. Supp. at 227.

disc jockey performances of the BMI-licensed copyrighted music.¹³ Anthony's refused to enter into such an agreement, contending that to do so would simply be paying BMI for music they already had the right to play.¹⁴ In an effort to confirm that Anthony's continued to host such live performances, BMI sent investigators to Anthony's on May 11 and 13, 1994.¹⁵ At Anthony's, the BMI investigators observed the performances of at least ten musical compositions licensed by BMI.¹⁶

After Anthony's refused to cease hosting the public performances of the BMI-licensed works, BMI filed its first complaint for copyright infringement on November 23, 1994. BMI alleged that, in at least ten instances, Anthony's and its stockholder and officer John Schepisi hosted public performances of its copyrighted musical compositions without authorization.¹⁷ On February 1 and 5, 1995, subsequent to the filing of the original complaint, BMI investigators discovered that Anthony's continued to host the public performances of at least seventeen BMI-licensed works.¹⁸ As a result, BMI filed an amended complaint on April 25, 1995, incorporating its earlier claims and including seventeen additional instances of alleged infringement.¹⁹ BMI and Anthony's cross-moved for summary judgment on BMI's amended complaint.²⁰

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* at 228 (citing the following songs which were alleged to have been publicly performed at Anthony's: "Diamond Girl," "Angel in the Morning," "She's a Bad Mama Jama," "Little Help from My Friends," "We Can Work it Out," "Layla," "Takin' Care of Business," "Stand," "Fields of Gold," "Midnight Blue," "Rocky Raccoon," "Let it Be," "Bad to the Bone," "Ob-la-di Ob-la-da," "I Honestly Love You," "Only the Lonely," "Walk Like an Egyptian," "Johnny B. Goode," "I Got You Babe," "Oh Pretty Woman," "Good-bye Yellow Brick Road," "Me and Bobby McGee," "Just my Imagination Running Away with Me," "Back in the USSR," "I Think I Love You," "Wonder of You," and "Rose.")

17. *Broadcast Music, Inc.*, 942 F. Supp. at 227

18. *Id.* at 228.

19. *Id.*

20. *Id.*

LEGAL ANALYSIS

The primary issue presented before the court on the parties' cross motions is whether a sub-licensing agreement entered into between Digital and Anthony's to provide background music containing copyrighted compositions vests Anthony's with the right to host live or disc jockey performances of the same copyrighted compositions licensed by BMI.²¹ In order to prevail on a claim of copyright infringement in a musical composition, a plaintiff must show: (1) originality and authorship of the composition; (2) compliance with the formalities of the Copyright Act;²² (3) proprietary rights in the work involved; (4) public performance of the composition involved for profit; and (5) lack of authorization for public performance.²³ BMI must establish each of the five elements in order to succeed on its claim for copyright infringement.²⁴

Anthony's and John Schepisi do not contest that BMI is able to establish the first three elements of a copyright infringement: (1) originality; (2) registration; and (3) propriety interest elements.²⁵ As Anthony's provided no evidence to the contrary, the court found that BMI established the first two elements of copyright infringement.²⁶ With respect to the third element, propriety interest, the court stated that "where the plaintiff is also the author of [the] musical compositions, the certificates are prima facie evidence of proprietorship."²⁷ However, where a plaintiff, such as BMI, is not an

21. *Id.* at 226.

22. *Id.* at 228 (citing *Broadcast Music, Inc. v. Hampton Beach Casino Ballroom Inc.*, No. 94-248, 1995 WL 803570) (holding: "Compliance with the formalities of the Copyright Act" entails incorporating the names and authors and publishers of each of the subject compositions, the date of copyright registration and the registration number. A registration certificate establishes the originality and authorship of compositions, as well as compliance with the formalities of the Copyright Act").

23. *Broadcast Music Inc.*, 942 F. Supp. at 228 (citing *Broadcast Music Inc. v. WPBK, Inc.*, 922 F. Supp. 803, 805 (W.D.N.Y. 1996).

24. *Broadcast Music Inc.*, 942 F. Supp. at 228.

25. *Id.* (citing *BMI v. Pine Belt Investment Developers, Inc.*, 657 F. Supp. 1016, 1020 (S.D. Miss. 1987).

26. *Broadcast Music Inc.*, 942 F. Supp. at 229.

27. *Id.*

author but an assignee of previously registered copyrights, "the plaintiff must show evidence beyond the registration certificate to show proprietary rights in the compositions."²⁸ Because Anthony's and Schepisi did not challenge the evidence presented concerning BMI's assertions regarding their proprietary interests, the court found that BMI had proprietary rights in each of the subject compositions.²⁹

The court found that the fourth element, public performance, was established by the uncontroverted evidence contained in the Licensing Infringement Reports of Joanne Lepko and the Certified Infringement Reports of Ross Schneider.³⁰ Ms. Lepko and Mr. Schneider were both hired by BMI for the purpose of visiting Anthony's and preparing written reports of musical compositions that were publicly performed at the establishment.³¹ The Infringement Reports indicated that all of the BMI-licensed compositions allegedly performed were, in fact, performed.³² The court explained that "it is well settled that investigators' affidavits can constitute sufficient proof of live public performance."³³ Although Anthony's argued that the information contained in the Infringement Reports was inaccurate and incomplete, Anthony's presented no evidence in support of its contention.³⁴ According to the court, the defendants "must do no more than simply show that there is some metaphysical doubt as to material facts" in order to defend successfully against BMI's motion for summary judgment.³⁵ As a result, the court held that the undisputed evidence contained in the summary judgment record reflected that the twenty-seven songs BMI alleged were publicly performed at Anthony's were, in fact, publicly performed.³⁶

In addition to proving that the songs were publicly performed, BMI

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* at 230.

35. *Id.* (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)).

36. *Broadcast Music Inc.*, 942 F. Supp. at 230.

must also demonstrate that the public performance was used for profit.³⁷ Although BMI did not present any evidence of profit, in the absence of such evidence, a court may infer that Anthony's derived some pecuniary benefit from the public performance.³⁸ Because the court found it only logical to assume that Anthony's hosted such public performances in order to attract customers whose patronage enabled Anthony's to make a profit, the court inferred that Anthony's derived pecuniary benefit from the public performances.³⁹ The court stated that "[i]f music did not pay, it would be given up."⁴⁰

Lastly, in order to succeed on its copyright infringement claim, BMI must show that Anthony's lacked proper authorization to host the public performances of the BMI-licensed works.⁴¹ BMI relied on the Declaration of Lawrence Stevens, BMI's Assistant Vice-President, in order to satisfy this element.⁴² In his declaration, Mr. Stevens stated that Anthony's did not enter into a BMI license agreement, nor were the performances otherwise authorized.⁴³ However, Anthony's argued that the Agreement entered into between Digital and Anthony's for the provision of a background music subscription authorized both live and disc jockey performances.⁴⁴ The court disagreed with this reasoning and explained that a review of the provisions of the Agreement revealed that it was merely a subscription contract between Anthony's and Digital requiring Digital to provide Anthony's with access to and permission to broadcast the "Digital Music Service."⁴⁵

Although the plain language of the Agreement neither explicitly nor implicitly vested Anthony's with the right to host live or disc jockey performances of any of the BMI-licensed musical compositions, the purpose of the Agreement was to clearly set forth

37. *Id.* (citing *Broadcast Music Inc. v. Larkin*, 672 F. Supp. 531, 534 (D.Me. 1987)).

38. *Broadcast Music Inc.*, 942 F. Supp. at 230..

39. *Id.*

40. *Id.* (citing *Herbert v. Stanley Co.*, 242 U.S. 591, 595 (1917)).

41. *Broadcast Music Inc.*, 942 F. Supp. at 230.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

to provide its music service.⁴⁶ The Agreement expressly limited the use of Digital's services to the extent that Anthony's could not record the music for other broadcasts, could not interrupt the programming for commercial announcements and could not use the programming to replace live music or could not be used as an accompaniment for dancing, skating, or similar entertainment.⁴⁷ Given these express limitations, the court concluded that the Agreement was not intended to allow Anthony's to host live or disc jockey performances of the compositions contained in the Digital Music Service subscription.⁴⁸ The court explained that Anthony's interpretations of this unambiguous document "stretched the Agreement's four corners farther than they were intended to reach."⁴⁹ The court also held that Anthony's erroneous belief that the Agreement authorized such live and disc jockey performances, even if bona fide, did not exonerate it from liability for copyright infringement.⁵⁰

In *Broadcast Music, Inc. v. WPBK, Inc.*, the defendants contended that a licensing agreement entered into by the owner of a jukebox located on defendants' premises and BMI, authorizing BMI-licensed songs to be played publicly via the jukebox, permitted the same songs to be performed on the defendants' premises by means of any other medium.⁵¹ The defendants further argued that they did not believe that they needed to obtain an additional license in order to play the BMI-licensed songs on a record machine on karaoke nights.⁵² The court disagreed and found the defendants liable for copyright infringement.⁵³ The court reasoned that if it were to hold otherwise, defendants would be permitted to play, without a license, any type of recorded music, whether through a karaoke machine or by hiring a disc jockey, so long as they played the music through the same sound

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* (citing MELVILLE B. NIMMER AND DAVID NIMMER, 3 NIMMER ON COPYRIGHT, §13.08 at 13-280 (1996 ed.)).

51. *Broadcast Music Inc.*, 942 F. Supp. at 250 (citing *Broadcast Music Inc. v. WPBK, Inc.*, 922 F. Supp. 803, 805 (W.D.N.Y. 1996)).

52. *Broadcast Music Inc.*, 942 F. Supp. at 231.

53. *Id.*

recorded music, whether through a karaoke machine or by hiring a disc jockey, so long as they played the music through the same sound system which was utilized by a properly licensed machine.⁵⁴ The court found such an argument unconvincing, as defendants had failed to support their position with any case authority.⁵⁵

As applied to this case, the court found Anthony's contention that the Sub-Licensing Agreement granted it the authority to host live and disc jockey performances of BMI-licensed songs equally unconvincing and untenable.⁵⁶ The court reasoned that to hold otherwise, any proprietor wishing to avoid the licensing fees charged by licensing companies could simply obtain a subscription for background music service from an intermediary such as Digital and pay a substantially lower sum for the same rights.⁵⁷ The court determined that such a result would be both anomalous and inequitable.⁵⁸

The Agreement between Digital and Anthony's gave Anthony's the right to play the background music provided in the "Digital Music Service" subscription.⁵⁹ The court held that the fact that Digital's background musical service may have contained BMI-licensed works is legally irrelevant.⁶⁰ Moreover, the court reasoned that the separate licensing of protected works by BMI for live performances did not constitute the payment of an additional licensing fee to BMI.⁶¹ Having concluded that the Sub-Licensing Agreement entered into between Anthony's and Digital did not authorize the public performance of the BMI-licensed songs, the court held that the undisputed evidence contained in the summary judgment record reflects that Anthony's lacked authorization for such public performances.⁶²

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

Having held that Anthony's infringed on BMI's copyrighted material, the court determined whether the Anthony's could be held liable for its actions.⁶³ Although neither Anthony's nor John Schepisi actually performed the infringing works, courts have long held that one may be liable for copyright infringement even though he has not performed the protected composition.⁶⁴ The court reasoned that Anthony's liability for the performance of the infringing works at the establishment stemmed from the principle that "a proprietor [is] liable for the infringement of copyright resulting from the performance of a musical composition by a band or orchestra whose activities provide the proprietor with a source of customers and enhances income."⁶⁵ The proprietor is liable whether the band is considered, as a technical matter, an employee or an independent contractor.⁶⁶ Thus, according to the court, Anthony's is vicariously liable for the performance of any infringing work at the establishment.⁶⁷ Consequently, summary judgment was granted with respect to liability in favor of BMI and against Anthony's.

In its decision regarding John Schepisi's liability, the court explained that an officer of the proprietor-corporation may be liable for the performance of the infringing activity.⁶⁸ Although the uncontroverted evidence contained in the summary judgment record demonstrated that John Schepisi was the majority shareholder of Anthony's and had a direct financial interest in Anthony's, BMI failed to present the court with any evidence that Mr. Schepisi possessed the right and ability to supervise the infringing activity.⁶⁹ For this reason, BMI's motion for summary judgment against Mr. Schepisi was

63. *Id.*

64. *Id.* (citing *Gershwin Publishing Corp. v. Columbia Artists Management, Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971)).

65. *Broadcast Music Inc.*, 942 F. Supp. at 231.

66. *Id.*

67. *Id.*

68. *Broadcast Music, Inc.*, 942 F. Supp. at 232 (citing *Warner Bros., Inc. v. Lobster Pot, Inc.*, 582 F. Supp. 478, 482 (N.D. Ohio 1984) (citing *Famous Music Corp. v. Bay State Harness Horse Racing and Breeding Assoc., Inc.*, 554 F.2d 1213, 1215 (1st Cir. 1977)).

69. *Broadcast Music Inc.*, 942 F. Supp. at 232.

denied.⁷⁰ Anthony's cross motion for summary judgment was also denied.⁷¹

Having granted summary judgment regarding liability in favor of BMI, the court next determined the relief to which BMI was entitled.⁷² BMI moved for an order permanently enjoining Anthony's from any further acts of infringement.⁷³ The Copyright Act empowers a court to grant injunctions in order "to prevent or restrain infringement of a copyright."⁷⁴ After establishing the fact that copyright infringement occurred, the court enjoined Anthony's from hosting future public performances of any BMI-licensed songs.⁷⁵ However, the court held that Anthony's is not enjoined from continuing to receive and broadcast the Digital Music Service pursuant to the Sub-Licensing Agreement with Digital.⁷⁶ In addition, the injunction did not preclude Anthony's from hosting public performances of the BMI-licensed works without obtaining BMI's permission.⁷⁷

BMI also sought an award of statutory damages of \$1000 for each of the nine acts of copyright infringement which occurred prior to the filing of their original complaint and \$5000 for each of the eighteen acts of infringement which it alleged were willful because those acts occurred after the filing of their original complaint.⁷⁸ Within the range set by section 504(c)(1), the court has discretion to grant an award of damages to a plaintiff.⁷⁹ Whether to award statutory damages in the high or low end of the range depends largely upon whether a defendant's infringement was "willful, knowing, or merely innocent."⁸⁰ In light of the parties' conflicting contentions regarding

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

this issue, the court found that there was a genuine issue of material fact regarding whether the infringements were willful, knowing or merely innocent, thus precluding the entry of summary judgment in favor of BMI with regard to statutory damages. Accordingly, BMI's motion for summary judgment was denied as to damages.⁸¹

CONCLUSION

The United States District Court for New Jersey held that the live and disc jockey performances played at a business establishment which were licensed by a separate company infringed upon that company's copyrights. Having refused to enter into a legal licensing agreement with BMI, Anthony's decided to continue hosting live performances. As holder of the copyrights of a number of songs played at Anthony's, BMI was entitled to be compensated for the use of the songs. As a result of Anthony's failure to compensate BMI for the use of its products, the court granted summary judgment against Anthony's as to liability and ordered injunctive relief, but denied BMI's motion for damages and attorney's fees and costs. The court also ordered that Anthony's be permanently enjoined from hosting the public performance of any compositions licensed or copyrighted by BMI.

David S. Kerpel

81. *Id.*

