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Doe v. Small, 964 F.2d 611 (7th Cir. 1992)

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relied upon an independent analysis of the stereo system involved.[17]

CONCLUSION

In holding that the sound systems used by Claire's fall within the home-type exemption, the Seventh Circuit cautioned that congressional intent to limit the exemption to a financially small establishment is unclear. While finding the financial size of an establishment irrelevant to a definition of "small commercial establishment," the court concluded that physical size is a factor to be considered when determining a home-type system.[18] In the court's view, the language of the section 110(5) exemption is concerned with the quantity and quality of the receiving equipment used, not the financial status of the alleged infringing establishment.

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

2. Copyright Act, 17 U.S.C. § 110(5) (1988).

3. *Id.* at § 110(5) provides:

> (5) communication of a transmission embodying a performance or display of a work by a 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).

4. *See generally,* 949 F.2d at 1488-89.

5. A live musical performance before a substantial paying audience is an obvious public performance. *Id.* at 1486.

6. *Id.* at 1489 (*citing* Buck v. Jewell-LaSalle Realty Co., 283 U.S. 191 (1931) (doctrine of multiple performance developed holding both a hotel and broadcasting station liable for infringement)).

7. *Id.* (*citing* Fortnightly Corp. v. United Artist Television, Inc., 392 U.S. 390 (1968) (limiting the Jewel-LaSalle case to its facts and finding broadcasting stations the public performer, but the reciever and transmitting cable company a passive viewer); Twentieth Century Music Corp. v. Aiken, 422 U.S. 151 (1975) (Held chain restuarant playing radio music for its patrons is largely a passive act)).

8. The statute provides in pertinent part:

> To "perform" a work means to recite, render, play, dance, or act it, either directly or by means of a device or process...
> To perform or display a work "publicly" means... (1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or (2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times. 17 U.S.C. § 101 (1988).

9. 949 F.2d at 1489.

10. *Id.* at 1490.

11. In dicta the court stated that this would be a different case if Claire's instructed all of their stores to broadcast identical works or turn to the same radio station. *Id.*

12. The court looked to the statutory language "recieving apparatus" and determined that by using the word "apparatus," which means "the totality of means by which a designated function is performed...," congress meant the entire stereo system. *Id.* at 1493 (*quoting* American Heritage Dictionary 120 (2d ed. 1982)).

13. 422 U.S. 151 (1975) (Defendant's stereo system included dropped speakers and concealed wiring).

14. 949 F.2d at 1495.

15. *Id.* at 1491 (*citing* Conference Report at 75, 1976 U.S.C.C.A.N. at 5816).

16. *Id.*

17. *See generally, Id.* at 1492.

18. Physical size of the establishment is indictive of the reach of the stereo system. The fact that a system audibly reaches only a small area indicates a stereo system commonly used in homes. *Id.* at 1494.

Doe v. Small,

964 F.2d 611 (7th Cir. 1992).

INTRODUCTION

The original plaintiff, Richard Rohrer, brought suit against the defendants, the mayor of the City of Ottawa, members of the City Council, and the City of Ottawa, to enjoin the display of religious paintings in a public park. The District Court granted the plaintiff's motion for summary judgment, permanently barring the display of the paintings in the park. On appeal, the United States Court of Appeals for the Seventh Circuit affirmed. However, after petition for a rehearing en banc, the appellate court reversed, holding that the injunction was overbroad.

FACTS

In 1956, the Ottawa Retail Merchants Association, a private organization, sponsored the production of sixteen paintings which depicted the life of Jesus. The paintings were displayed in Ottawa's Washington Park during the Christmas season from 1957-1969 and from 1980-1988. The City of Ottawa was involved in the display of the paintings from 1964-1967; otherwise, the artwork has been maintained by private organizations. In 1980, the Ottawa Jaycees, a private organization, took control of the paintings.

The paintings were displayed in Washington Park, a public park. Even though the City of Ottawa maintains Washington Park, no city buildings are located in or on the border of the park, and City Hall is almost three blocks away. The City allows groups to utilize the park on a first-come, first-served basis. The park has been the site for assorted community and private functions, including various religious activities, such as church services, vigils and concerts. A sign was erected in front of the paintings declaring the Jaycees maintained the artwork without the use of public funds.

In 1986, Mr. Rohrer wrote a letter to the Ottawa City Council requesting the paintings be removed from Washington Park because they "represent an unacceptable endorsement of Christianity by the city

and violate the constitutional rights of all Ottawans who are not Christians."[1] On December 2, 1986, the City Council then passed a resolution which endorsed the Ottawa Jaycees' maintenance, erection, and dismantling and storing of the paintings. In support of their endorsement, they found that the paintings erected by the Jaycees were an integral part of community spirit and cooperation by both the private and public sectors of Ottawa which, for the past twenty years, had worked together to provide the city with an appropriate yuletide spirit. In 1989, Jane Doe was substituted as plaintiff, since Mr. Rohrer moved out of Ottawa.

In granting summary judgment to the plaintiff, the district court found a violation of the Establishment Clause of the First Amendment and permanently enjoined the display of the paintings in Washington Park by any future party.

LEGAL ANALYSIS

The issue on appeal was whether private persons could be enjoined from engaging in religious speech in a public forum based on the content of the speech. The plaintiff argued that the paintings in Washington Park signified the City of Ottawa's endorsement of Christianity and was in violation of the Establishment Clause of the First Amendment. The City of Ottawa and the other defendants asserted that the paintings represent private religious speech which is protected by the Free Speech Clause of the First Amendment.

The appellate court concluded that the district court's injunction was overbroad because its ruling restrained the religious speech of all future parties. There is a distinction between religious speech by private parties and that by the government. Private religious speech is protected by the Free Speech Clause.[2] The crucial difference is between government speech endorsing religion, which is in violation of the Establishment Clause, and private speech endorsing religion, which is protected by the Free Speech and Free Exercise Clauses.[3]

The appellate court found that Washington Park was a public forum. In public forums the government is severely limited in restricting speech based on its content.[4] In order for the government to restrict speech in such a forum, the regulation must be necessary to serve a compelling government interest and narrowly tailored to achieve that end.[5] The court held that the Establishment Clause did not give the government a compelling interest in restricting, based on its content, the religious speech of a private person in a public forum.

The Constitution mandates that "religious speakers may not be discriminated against in a public forum on the basis of their speech".[6] However, the mere presence of a religious symbol in a public forum does not violate the Establishment Clause since the government is not presumed to endorse every speaker it fails to censor.[7] This is consistent with the U.S. Supreme Court's view that, in a public forum, government may not discriminate against religious speech in situations where non-religious speech would be permitted. If the government opens a public forum to all, it cannot close it to religious speech.[8] Since Washington Park has historically been accessible to private groups, the City must give equal access to private religious groups.

The court next addressed whether the district court's remedy was narrowly tailored. A content-based exclusion is permissible if it is narrowly tailored to achieve a compelling state interest.[9] In *Widmar v. Vincent,* the U.S. Supreme court refused to find the Establishment Clause a sufficiently compelling reason to exclude private religious speech from a public forum.[10] Even if a compelling state interest could be found, the remedy was not narrowly tailored because it sought to prohibit the display of religious paintings by any party, present or future, rather than enjoin the City's alleged endorsement of the paintings.

A court's remedy should be fashioned in such a manner as not to infringe the Free Speech rights of the private party.[11] If, as the plaintiff alleged, there was an appearance of governmental endorsement of the religious speech, the government could take steps to remove the indicia of that endorsement. The court suggested the City Council could withdraw its endorsement of the displays or erect a more visible sign in front of the displays, specifically stating the City's disclaimer of endorsement of the religious speech. The City must treat all expression in the park equally, and not exclude private persons from Washington Park merely because of their religious speech.

In their concurrences, both Justice Cudahy and Justice Flaum focused on the appellate court's refusal to address the issue of whether the City did in fact endorse the Jaycees' religious expression. Justice Cudahy proffered that a violation of the Establishment Clause had occurred since the effect of the displays was an appearance of city endorsement. Justice Flaum asserted that the history of the City's endorsement of Christianity suggests that the appropriate remedy would seek to eliminate such past endorsement. Using a different approach, Justice Easterbrook's concurrence found that religious speech can never be excluded from public forums simply because private persons wrongly infer government endorsement of free speech.

CONCLUSION

The Seventh Circuit held that no conflict exists between the Free Speech and the Establishment Clause if private persons engage in religious speech in a public forum. The City can impose content-neutral restrictions, but cannot engage in a content-based restriction since the Constitution mandates that reli-