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Note

THE VICARIOUS LIABILITY OF TRADE SHOW ORGANIZERS FOR THE COPYRIGHT INFRINGEMENTS OF EXHIBITORS

Tilman E. Self, III[a]

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I. Introduction

Consider the following hypothetical situations:
(1) A local department store located in a mall promotes and sponsors a fashion show displaying the latest line of clothing for the upcoming season. The models wear fashions while the department store plays copyrighted music without the copyright holder's permission. Both the copyright holders of the fashion design and the music sue the mall rather than the department store. Is the mall liable?

(2) Exhibitors or vendors at a local flea market rent a small space from the owners and play music in an effort to draw attention to themselves and their merchandise. The music is copyrighted and the exhibitors have failed to get a license for the recordings. Are the flea market owners liable for their rentors' infringement?

Under current copyright law, both the mall owner and the flea market owner are potentially liable for the infringements of the exhibitors at their shows, regardless of the owner's efforts to find out about the infringing conduct, the proportion of total vendors who actually infringe, or whether the owners receive a flat fee rather than a percentage of receipts for renting the space.

This state of affairs is of particular concern to trade show organizers. In today's economy and business climate, trade shows are a very effective way for manufacturers and business owners to get information out to their relevant markets ***82** in a short period of time.[1] It is estimated that there are over 75,000 trade shows annually.[2] As the use of trade shows and other such forums[3] escalates in popularity, it is vital that premises owners[4] and show organizers understand their potential liability.

Cases involving the third party liability of trade show organizers or flea market owners are very recent,[5] few in number, and follow a similar fact pattern. In each case, the owners of certain copyrights have sued a trade show organizer[6] or the owner of a flea market[7] for the copyright infringements committed by someone at the defendant's show. In each case, vendors paid a flat fee for their space or booth and the organizer[8] received an admission fee from customers.[9]

In the absence of express statutory language or precedent, courts have been forced to look to traditional tests of third party liability and have attempted to adapt them to the trade show situation. Predictably, the results have been contradictory and conflicting.[10] Trade show organizers can be liable for either direct or indirect copyright infringement.[11] In indirect liability cases, one is being charged with the ***83** infringement committed by another.[12] This Note will explore the two types of third party liability, vicarious liability and contributory infringement.[13]

Part II will generally discuss the concept of vicarious liability, explaining the different tests previously used to determine liability and how they were applied to the trade show setting. Part II will also review the recent cases on trade show liability, highlighting the courts' analyses and pointing out the inconsistencies between the cases. Part III will argue that the vicarious liability tests used in the *Polygram* and *Fonovisa* cases were wrongly applied and stretched to the point of absurdity in order to hold the defendants liable. It will justify adding a "practicality" component to the vicarious liability test as well as advocate a return to the original doctrine set forth in earlier case law. It will then conclude that courts should adopt an approach similar to that used in the parent-subsidiary context. Specifically, the test should be modified to require the copyright holder to show an ongoing relationship between the parties in the infringing activity and to separate the financial benefit derived from infringing sales and those legitimately received by the trade show organizer.

II. Vicarious Liability

The Copyright Act does not include any express language that allows someone to be held liable for the copyright infringements of another.[14] However, in *Sony Corp. of America v. Universal City Studios, Inc.* the Supreme Court noted: "The absence of such express language in the copyright statute does not preclude the imposition of liability for copyright infringements on certain parties who have not themselves engaged in the infringing activity. For vicarious liability is imposed in ***84** virtually all areas of the law ... ."[15] Thus, the Supreme Court officially authorized and endorsed the theory of vicarious liability in copyright cases.

The theory of vicarious liability is rooted in the common law tort doctrine of *respondeat superior*,[16] which holds the employer liable for the acts of its agents.[17] The most obvious and least problematic case of vicarious liability would occur if an agent of the employer, in this case an employee of the trade show organizer, is the direct infringer.[18] However, in *Shapiro, Bernstein & Co. v. H.L. Green Co.*,[19] vicarious liability was expanded beyond the employer-employee context.[20]

Shapiro, Bernstein involved a concessionaire, Jalen, who worked inside defendant H.L. Green's store, manufacturing and selling copies of plaintiff's musical compositions without the plaintiff's permission.[21] Shapiro, Bernstein & Co. sued both the direct infringer, Jalen, and the store owner, Green.[22] The lower court found Jalen liable for 23 counts of direct copyright infringement,[23] but dismissed the complaint against Green.[24] The Second Circuit reversed the lower court's dismissal and found Green liable for Jalen's infringements.[25] The court found two facts particularly important.[26] First, Green's licensing agreements with Jalen provided ***85** that Jalen's employees were to "abide by, observe and obey all rules and regulations promulgated ... by H.L. Green Company, Inc."[27] and gave Green the "unreviewable discretion ... to discharge any employee believed to be conducting himself improperly."[28] Second, Green received between 10% and 12% of Jalen's gross receipts as "full compensation as licensor."[29] Thus, the *Shapiro, Bernstein* court first articulated what has now become the oft-cited[30] standard for holding third parties liable for the copyright infringements of others:

> When the right and ability to supervise coalesce with an obvious and direct financial interest in the exploitation of copyrighted materials--even in the absence of actual knowledge that the copyright monopoly is being impaired ... the purposes of copyright law may be best effectuated by the imposition of liability upon the beneficiary of that exploitation.[31]

Focusing on the development of the case law in general and specifically on the application of these tests to the trade show cases, each prong of the test will now be examined.

A. The Right and Ability to Control and Supervise

Before a trade show organizer (or anyone else)[32] can be found liable for another's infringement, the copyright owner must prove that the third party had the ***86** right and ability to supervise or control the infringing party.[33] This right to control includes the legal and practical rights to control.[34] Although a party might have the legal ability or right to insist that another comply with copyright laws, courts have generally been unwilling to impose liability where that supervision or police power will be overburdensome or overtaxing on the defendant.[35]

The amount of control necessary to support a finding of vicarious liability is fact-specific and difficult to define in strict terms. Courts routinely refer to two distinct lines of precedents in analyzing the control prong of the vicarious liability test: the "landlord-tenant" cases and the "dance hall" cases.[36] These two lines of cases create a spectrum along which the courts have tried to fit factually different cases involving vicarious liability.

On one extreme of the spectrum are the landlord-tenant cases. As can readily be deduced, the plaintiffs in these cases tried to impute the copyright infringements of tenants to the landlord. This line of precedent has its roots in the cases of *Deutsch v. Arnold*[37] and *Fromont v. Aeolian Co.*[38] In these cases, the landlords received a flat rental fee from their tenants, knew nothing of the infringing activities of their tenants, derived no additional income from their infringing activities, and did not supervise their tenants.[39]

Although landlords may routinely enter into leases that theoretically allow them to supervise the tenant's activities and terminate the lease for any illegal activity, including copyright infringement, it is not likely that a normal landlord monitors every tenant sufficiently or closely enough to detect violations.[40] Therefore, courts have been unwilling to impose such a heavy burden on landlords, ***87** especially when the tenant's infringing activities are usually kept from the landlord.[41] Generally, landlords are not held responsible for the infringing conduct of their tenants solely because of their position as landlord.[42]

This principle was most recently upheld in *Childress v. Taylor*.[43] In *Childress*, a local theater owner leased his premises to a production company for the production of a play.[44] Unbeknownst to him, the performance of the play infringed the copyright of the playwright.[45] Taylor played no part in the advertising or publicity of the play and provided box office personnel, ushers, a porter, and a theater manager to the lessee.[46] The copyright holder asserted that as a matter of law, Taylor, as the landlord of the premises which housed an infringing work, should be liable.[47] The Southern District of New York rejected this argument and refused to find him liable based on his status as a landlord.[48]

A second line of cases involves the fate of entertainment business owners (including dance hall owners) who hire a band or orchestra that plays songs without the copyright owner's permission.[49] Originally, these cases dealt strictly with the internal employer-employee relationship of the dance hall owner.[50] The doctrine, however, later expanded to include independent contractors, such as band leaders or orchestras.[51]

***88** A leading case dealing with the traditional employer-employee relationship is *M. Witmark & Sons v. Calloway*.[52] In *Calloway*, the employer was held liable for the infringing actions of his employee, regardless of the fact that he had no knowledge of the infringement and did not give any consent for the employee's actions.[53] Specifically, the defendant, Calloway, owned a theater where he showed motion pictures for an audience.[54] In addition, he hired someone to operate a player piano that provided the music which accompanied the pictures.[55] The employee hired to place the rolls in the piano had exchanged some rolls at a local drug store and inadvertently played a copy of the plaintiff's composition without permission.[56] The court had little trouble in holding Mr. Calloway liable for his employee's infringing act.[57]

The courts allowed the employer-employee model to "cast a wider net" by interpreting it to include independent contractors as well as internal employees. *Irving Berlin v. Daigle*[58] marked the first time a dance hall owner was found liable for the infringing acts of an independent contractor. Daigle owned a dance pavilion where patrons paid an admission fee to dance to music provided by the dance hall.[59] Rather than hiring an entire band, Daigle hired the leader of an orchestra who in turn hired the individual musicians.[60] The orchestra played compositions without the permission of the copyright owner.[61] In holding Daigle liable, the court reiterated that it was no defense that the orchestra leader was an independent contractor and focused on Daigle's ownership and control of the premises.[62]

***89** *Gershwin Publishing Corp. v. Columbia Artists Management, Inc.*[63] made unmistakably clear that the requirement of some sort of employer-employee relationship had been abandoned.[64] In *Gershwin*, an artists management group (CAMI) procured audiences for artists under its management by establishing "Community Concert Associations."[65] One of the concert associations performed a play without the permission of the copyright owner and the owner sued CAMI, the organizer or manager of the group.[66] CAMI defended on the fact that it retained no control over the local groups and that it merely recruited the audiences.[67] The Second Circuit affirmed the lower court's finding that CAMI was liable due to its "pervasive participation in the formation and direction" of the association and that "the local association depended on CAMI for direction" and "CAMI was in a position to police the infringing conduct of its artists."[68]

As demonstrated above, the spectrum of practical control has at one end, the landlord-tenant model, usually representing minimal ability of the premises owner to control the infringing activities of someone using his premises, and the employer-employee model at the other end, which represents maximum control by the premises owner, through a master-servant relationship or "pervasive participation" in the business of infringing party. Typically, when cases are not easily pigeonholed into one of these two polar extremes, courts have attempted to determine, from the specific facts of a case, to which end of the spectrum the specific scenario lies closer.[69]

The most important fact to remember is that in virtually all cases, the owner of the premises, be it the dance hall owner or the landlord, has the *legal* ability to control the defendant's activity on the premises. Because the entire spectrum contains this common legal right to control, it should have no bearing on the analysis. Therefore, courts should focus their inquiries on the degree of *practical* control the owner exerts over the particular direct infringer rather than a theoretical right to control the entire premises.[70] Regardless of the amount of legal or potential right to control, if the owner cannot, as a practical matter, control or actively ***90** supervise the direct infringer, he should not be liable for any infringing conduct which takes place on his property.

The next issue to address is how the courts have applied the prong of the vicarious liability test to the situation of flea market owners and trade show organizers, or for lack of a better term, the "booth renters." Generally, courts have been forced to look at the factual situation of each case and attempt to place the owner more toward one end of the spectrum or the other. As might be expected, different courts have found different factors dispositive. The end result is legal confusion caused by parties in virtually identical situations not being treated in the same way. The following cases illustrate the point.[71]

In *Fonovisa, Inc. v. Cherry Auction, Inc.*,[72] a federal district court found that a flea market owner was not vicariously liable[73] for the infringing acts of someone who rented one of his booths.[74] The defendant owned a flea market where vendors could rent a space for a flat daily fee.[75] One independent vendor sold several counterfeit Fonovisa tapes to local customers.[76] In determining the control question, the Court looked to the *Shapiro* test and held that the defendant did not have the requisite control to be vicariously liable.[77] The court conceded that Cherry Auction had a *supervisory* role over the premises, but refused to find a practical ability to control the defendant's activities:

Defendants were not in the business of directing vendors' actions by telling them, or even suggesting to them, what and when and how and to whom to sell. ....

[T]he *Shapiro* court speaks of *a priori* supervisory power; that is, the power to supervise the direct infringers in the general course of business, ... Cherry Auction's sovereignty over its property does not liken it to being the vendors' employer in the respondeat superior sense.[78]

***91** The plaintiffs alleged that because Cherry Auction could supervise and evict a vendor for a number of reasons, Cherry Auction possessed the requisite control.[79] The court labeled this power "a *posteriori* supervision" and found it to be insufficient in the vicarious liability context.[80]

On appeal, the Ninth Circuit reversed.[81] The court found persuasive the argument that Cherry Auction had the right to terminate vendors for any reason and therefore had the right to control the activities of the defendant.[82] In addition Cherry Auction promoted the swap meet, controlled customer access to the area, and set the formal agreement between the vendor and Cherry Auction.[83] The court admitted that Cherry Auction did not have the "formal, contractual ability" to control, but cast the relationship with their vendors as "pervasive participation."[84] The court relied heavily on the similarity between Cherry Auction and the defendant in *Gershwin*, i.e., that they both created an audience for the infringer,[85] in finding that Cherry Auction possessed the right and ability to control the vendors.

Judge Keeton reached a similar conclusion in *Polygram Int'l Publishing, Inc. v. Nevada/TIG, Inc.*[86] The defendants were the organizers of the world's largest computer trade show "COMDEX/Fall," which was held in Las Vegas in October 1991.[87] The plaintiffs owned various copyrights in musical compositions and had granted the nonexclusive right to public performance of the compositions to the American Society of Composer, Authors and Publishers (ASCAP).[88] During the convention, ASCAP sent investigators to the trade show to search for possible infringements.[89] Of the 2,000 exhibitors at the trade show, the investigators heard ***92** unauthorized copyrighted music played at 5 booths.[90] The trade show earned money from admission fees, space rental and advertising revenues.[91]

Judge Keeton based his finding that the trade show had sufficient control over the vendors to be found vicariously liable[92] on three factors: (1) Interface could have changed its regulations to ban music altogether, but did not. (2) Interface had 10 to 12 employees canvassing the 2.5 million square feet area of the show to ensure "rules compliance." (3) Interface's rules provided an exhibit could be restricted for "noise, method of operation, materials or any other reason which became objectionable."[93] Based on these findings, he concluded that Interface had the requisite control over the exhibitors. He expressly rejected the idea that Interface acted as an absentee landlord because, in his opinion, Interface pervasively controlled the activities of its 2000 vendors and was in a position to carefully police the vendors.[94]

In *Artists Music Inc. v. Reed Publishing (USA), Inc.*,[95] however, a federal district court found no vicarious liability on very similar facts to the previously discussed cases. Reed organized an apartment and home trade show, and on January 27, 1991 rented space to 134 vendors, collecting a flat fee based on the amount of space rented.[96] ASCAP sent investigators to the show to discover any copyright ***93** violations.[97] ASCAP's investigators determined that four of the 134 vendors had infringed nineteen copyrighted songs and subsequently filed suit.[98]

Judge Keenan analyzed the case under the traditional tests of control and benefit and determined that Reed did not possess sufficient control to impose vicarious liability.[99] Interestingly, the court reached an almost opposite conclusion from other courts that had considered the issue of control in a trade show context:

> The Court finds that the relationship between trade show sponsors and trade show exhibitors is the legal and functional equivalent of the relationship between landlords and tenants. Like other landlords, trade show sponsors do not satisfy the supervision element of the *Shapiro, Bernstein* test. Although landlords have a limited ability to control a tenant's use of leased premises (for example, leases may prohibit tenants from disturbing other tenants), landlords generally lack the ability to supervise activities of their tenants such as the performance of music.[100]

Artists next argued that Reed could have easily policed the exhibitors for infringing conduct. However, the court strongly rejected this idea and held that Reed had no duty "to perform such extensive and costly analysis."[101]

B. Direct Financial Benefit

Even if a defendant possesses the requisite ability to control or supervise the infringing activity, courts will not impose vicarious liability unless the defendant benefits from the infringement.[102] Courts have traditionally defined this prong of the test as "an obvious and direct financial interest in the exploitation of copyrighted materials."[103] Furthermore, the financial benefit is often tied to the benefit that the *direct* infringer receives from the infringing activity.[104]

***94** The easiest scenario in which a direct and obvious benefit will be found is when the third party receives a percentage or portion of the direct infringer's income. For example, in *Shapiro, Bernstein*, defendant Green received ten to twelve percent of concessionaire Jalen's gross receipts on the sale of bootleg albums.[105] The court had little difficulty in finding that Green had a "most definite financial interest" and strong concern in the financial success of the direct infringer.[106] Therefore, Green easily met the requirement that a vicarious infringer have a direct financial benefit from the infringing activity.

Unfortunately, most cases are not so straightforward. As with the control portion of the test, courts usually look at the spectrum of cases, ranging from the landlord-tenant cases to the dance hall cases, and decide to which end the cases lies closer. As the *Polygram* court aptly stated, "As with determinations of 'control,' courts have not formulated an explicit test for determining whether a benefit to a defendant is 'direct,' perhaps in part because, as the case law demonstrates, it is difficult to define and measure the 'direct' financial benefit that a performance of music confers."[107]

Courts have rarely found a financial benefit in the landlord-tenant cases. Generally, this is true because the landlord has already profited from the lease of the property and has little more to gain from the lessee's infringing activities.[108] In a typical situation, a flat fee is charged for the lease regardless of the profitability of the business conducted by the lessee.[109] One might argue a landlord does have a financial interest in the business of his tenant because if his tenant is not profitable then he will not be able to pay the fixed amount of rent. Although certainly true in some sense, this level of financial interest.[110] Furthermore, it is highly unlikely that the landlord expects extra rent in the form of a cut of the extra profits made by infringing acts of the tenant.

As seen in the control part of the test, these cases should be contrasted with the dance hall cases. Courts have been much more willing to find financial benefit where the premises owner profits proportionately to the infringing performances. In ***95** a typical dance hall situation, the owner of the establishment will often receive a benefit from the infringing performances of those hired to perform for the dancers by giving the band a portion of the gate receipts. The higher quality the band or orchestra, the more patrons that are likely to attend the performance, thereby maximizing the profit for both band and owner.[111]

It should be noted that substance, rather than form, is important in these cases. For example, a landlord could establish a fee arrangement that provides the required direct financial interest, i.e., a percentage of gross revenues in addition to the fixed rent.[112] Likewise, a dance hall owner who rents the hall out to a band for a flat fee and allows the band to keep all of the gate receipts would not likely be found to have a direct financial interest.[113] In both cases, the owner would likely be found vicariously liable (assuming the control prong was satisfied).

Courts have reached different results on the issue of financial benefit in the booth rental cases. The district court in *Fonovisa* found that the defendant Cherry Auction did not possess the requisite financial benefit in the vendor's infringement.[114] The plaintiff asked the court to infer financial benefit from the alleged fact that the majority of the vendors at Cherry Auction sold counterfeit Latin music tapes.[115] The court found this inference unreasonable because there was no showing that there was a direct financial benefit to Cherry Auction from the infringing music sales, such as in the *Shapiro-Bernstein* case, and the court was not willing to infer that without counterfeit sales, Cherry Auction's rentals would have diminished.[116] The court refused to believe that Cherry Auction had nothing else to sell or no other reason to lease booth rental space other than counterfeit for tapes, and labeled such a premise extreme.[117]

On appeal, the Ninth Circuit made virtually opposite findings. That Court found substantive financial benefits from the infringing sales in several forms: ***96** payment of a daily rental fee from each infringing vendor, direct payment to Cherry Auction from customers' admissions fees and incidental revenues from parking, food and other services by customers seeking to purchase infringing recordings.[118] The court found support for its finding of financial benefit by analogizing Cherry Auction to an operator of a business where the "infringing performances enhance the attractiveness of the venue to potential customers".[119] Just as the infringing orchestra drew customers for the dance hall owner, the court concluded that the pirated recordings drew customers to Cherry Auction and therefore they should be liable.[120]

Likewise, the *Polygram* court also found that Interface (the trade show organizer) received a direct financial benefit from the infringing acts of four of its exhibitors because the music attracted attention to the exhibits and Interface derived a significant financial benefit from that attention.[121]

The court distinguished between the meaning of "direct" in general vicarious liability cases and cases that deal with music. Some of the music cases found an overall financial benefit to the establishment sufficient for imposing vicarious liability on the owner rather than attempting to discover a direct benefit received from the infringement.[122] After citing several examples of vicariously liability based on overall benefit,[123] the court attempted to justify the distinction by suggesting the ***97** benefit is different in the music context because of the difficulty in measuring a direct benefit.[124]

Judge Keeton found that the purpose of a trade show is to communicate with attendees and cultivate interest in one's product, and that when music aids in that goal, it provides the type of financial benefit that will satisfy the direct financial benefit prong of the vicarious liability test.[125] He concluded that Interface received a benefit from the unauthorized music played by its exhibitors similar to a benefit received by a restaurant owner who hired a band which played infringing music during a meal and should likewise be liable.[126]

The court also found Interface's financial benefit from the infringing act to be direct under an alternate test which had apparently been adopted by other courts.[127] The test relied on the legislative history of the 1976 amendments to the Copyright Act and required "commercial gain from the operation and either direct or indirect benefit from the infringing performance."[128] Interface's $44 million gross from the show satisfied the commercial gain prong and the fact that customers were drawn to the exhibits by the playing of unauthorized music, thereby making the show a success, satisfied the indirect benefit prong.[129]

The *Fonovisa* and *Polygram* courts allowed the copyright holder to satisfy the direct financial benefit prong of the test by showing that the playing of unauthorized copyright music provided an overall benefit or ambiance[130] to the show rather than forcing them to tackle the tricky and difficult problem of identifying a direct benefit to the trade show organizer. This loose standard can easily be met by copyright holders because nearly all trade show organizers charge some type of admissions fee and this would be seen as an indirect benefit. However, not all courts have relaxed the test so far.

***98** In *Artists Music, Inc. v. Reed Publishing Inc.*,[131] Judge Keenan interpreted the direct financial benefit test much more narrowly. He held that the copyright holders failed to show that the trade show organizer, Reed, derived any financial benefit from the exhibitors' performances because Reed's revenues in no way depended on whether or not the exhibitors played any music.[132] Since the organizer's revenue came from a fixed fee based on the size of the booth rather than a share of the profits received from infringing activities of an exhibitor, the trade show organizer was similar to a landlord who received only a fixed rent and was therefore not liable for a tenant's infringement.[133]

Judge Keenan did not believe the infringing performances of four of the exhibitors at the show in any way affected the gate receipts because the copyright holder failed to produce any evidence that a single attendee came to the show for the music played by those exhibitors.[134] As in *Polygram*, the copyright holder argued that the music created an ambiance necessary to the success of the show.[135] Expressly rejecting this argument, the Court noted that if music had really been necessary to the show's success, then Reed itself would have provided it, which it did not do.[136] Because neither a direct or indirect financial benefit to Reed could be shown, the court granted summary judgment to the trade show organizer.[137]

III. Analysis of the "Booth Rental" Cases

Thus far, this Note has discussed the development of the doctrine of vicarious liability and the tests courts traditionally use to determine liability. Furthermore, it also discussed the applicability of those tests to the three booth rental cases now on record, noting the direct conflict between the holdings in *Fonovisa* and *Polygram* and the holding in *Artists Music.*

This section rejects the loosening of the vicarious liability standard by the *Fonovisa* and *Polygram* courts, and advocates the approach to the trade show setting taken by the *Artists Music* court. The potential devastating effect of the former approach will be illustrated by providing examples of some situations in which a defendant would be held vicariously liable for copyright infringement.

***99** Neither prong of the current test is satisfactory when applied to the standard trade show organizer or flea market owner. The test should be modified so that a copyright holder must provide evidence of actual control or supervision before holding a trade show organizer liable. Furthermore, the test should also expressly require that only the direct benefits received from infringing acts be considered when determining financial benefit to the organizer.

The primary problem with the *Fonovisa* and *Polygram* holdings, is that they have loosened or relaxed the vicarious liability standard so that it now extends liability to virtually all organizers and flea market owners. Because the courts stretched the test to include defendants Cherry Auction and Interface, copyright holders will find it much easier to prove vicarious liability than before these cases.

Virtually all landlords and dance hall owners possess the legal right and ability to control their premises, yet the courts seemed to base their finding of control on this legal right rather than the practical right stressed in earlier cases. Because all landowners share this legal right, there is now nothing to distinguish a landowner who should be liable for the infringement of another from one who should not. Therefore, it is critical that the courts reshift their emphasis back to a practical rather than legal right to control.

In *Fonovisa* and *Polygram*, the courts ignored the organizer's practical inability to control the exhibitor and focused solely on a legal right, to control or supervise, regardless of the fact that it was largely theoretical and abstract. The *Fonovisa* court, noting the similarity to the defendant in *Shapiro, Bernstein*,[138] found it persuasive that Cherry Auction had broad contracts with its exhibitors that allowed it to terminate them for any reason. Likewise, the *Polygram* court noted the contractual relationship between Interface and its exhibitors.[139] The court's emphasis on this legal right is misplaced because it presupposes that the organizers also had a practical right to control. Furthermore, the *Fonovisa* court's analogy to the defendant in *Shapiro, Bernstein*, is inaccurate because the defendant only had one concessionaire to supervise. In the *Shapiro, Bernstein* case, the legal right to supervise included a practical ability to supervise as well. It is entirely reasonable to expect a store owner to actively supervise a single vendor. However, in the case of trade show organizers and flea market owners, a single organizer cannot practically or effectively supervise all vendors. The *Polygram* court thus saddled Interface with the responsibility of supervising 134 vendors as closely as Green supervised one. Clearly, this burden will be virtually impossible for the trade show organizer to meet.

***100** Moreover, both courts found the defendants possessed the ability to control because they were in a position to police the vendor's infringing conduct.[140] Once again, the defendant in *Gershwin* controlled only one infringer unlike the defendants in *Polygram* and *Fonovisa*, making the comparison inaccurate.[141] The *Polygram* court found support for this position because Interface hired several employees to walk the aisles and enforce its rules and regulations.[142] Again, this is an improper comparison because it places another undue burden on the organizers by requiring them to actively police all violations that may occur. The facts showed that the main focus of Interface's attempted enforcement of rules dealt with issues such as insuring that exhibitors did not expand into other exhibitors' spaces, proper design of booths, proper levels of music and the use of video cameras.[143] The employees were not looking for copyright violations.[144]

The court in *Artists Music* understood the difference between policing exhibitors for administrative violations and policing them for copyright violations. The court aptly noted:

> Policing the exhibitors, Reed [defendant trade show organizer] counters, would not have been simple. Reed would have had to hire several investigators with the expertise to identify music, to determine whether it was copyrighted, to determine whether the use was licensed, and finally to determine whether the use was a "fair use." Reed contends, and this Court agrees, that it certainly has no duty to perform such extensive and costly analysis ....[145]

The *Polygram* and *Fonovisa* holdings not only mischaracterize the control required as strictly a legal question, but it places the organizer in an impossible situation as regards his or her contract with the individual vendor or exhibitor. If the organizer retains the right to terminate for any reason, they automatically meet the control requirement for vicarious liability. If they do not retain this type of control, they risk not being able to act in the case of a dispute between two exhibitors,[146] thereby potentially exposing themselves to additional liability.

***101** It is imperative that courts use as the standard for determining vicarious liability a practical ability to control rather than a legal ability to control. Using a practical ability to control as the standard will insure the courts do not place on trade show organizers or flea market owners the impossible burden of policing hundreds of potential vendors for possible copyright violations while simultaneously preserving their right to administratively control their exhibitors.

If one were to think of the loosening of the control standard as a ripple in the law of vicarious liability, then the loosening of the financial benefit standard is properly considered a tidal wave. The courts have relaxed the standard from one requiring a direct financial benefit in the infringing activity, to merely requiring an indirect benefit derived from the overall ambiance of the infringing activity. The *Polygram* court expressly embraced a relaxed standard. Rather than attacking the difficult question of measuring a direct benefit, the *Polygram* court interpreted the other courts' decisions as imposing vicarious liability based on a determination that the defendants "expect commercial gain from the operation and either direct or indirect benefit from the infringing performance."[147] Using this standard, the court found that Interface received a direct financial benefit from the attention paid to the exhibits where infringing music was played.[148]

Similarly, the *Fonovisa* court found that a direct financial benefit was derived from the overall benefit of the infringing music.[149] The Ninth Circuit Court of Appeals looked to such "substantive benefits" as admission fees, parking fees, and concession sales in determining direct financial benefit.[150] The court found that these benefits flowed directly from the customers seeking to buy infringing recordings.[151]

***102** The main problem with allowing financial benefit to be shown from an alleged overall benefit is that it fails to separate the financial benefit derived from customers who would be there anyway from those who are strictly there to buy infringing products or to hear infringing performances. Such a failure to distinquish between customers would unfairly hold the organizer liable for a benefit that it would have otherwise received. For example, if a customer attends Cherry Auction just to browse, and while there buys an infringing recording, where is the direct benefit? Cherry Auction will receive no more from the customer than it would have in the first place.

Once again, the *Artists Music* court got it right when it held that there was no financial benefit without a showing that some customers were there expressly to hear the infringing performances.[152] Using the same line of reasoning, the court rejected the idea that admissions fees were a direct financial benefit.[153] Courts should follow this type of analysis and resist the temptation to find financial benefit from an overall benefit or ambiance created by the infringement. Courts must focus on the benefit received from the infringing activities exclusive of any benefit which may already be present.

In order to illustrate the far reaching effects of the new *Fonovisa-Polygram* standard, consider the following situation: a local singer attracts a crowd of tourists while performing unauthorized performances of copyrighted material while standing on a city street. Would the city be liable as a vicarious infringer?[154] Our initial reaction would certainly be "no" as this defies even common sense. Arguably the correct answer is "yes" under the recent standards set forth by the *Fonovisa* and *Polygram* courts.

Let us consider the new relaxed tests. Does the city have the right to control and the ability to supervise the singer? Unmistakably "yes". The singer is on a public street and the city's police have the right to remove from the street anyone who causes a disturbance of the law and order. Copyright infringement is a violation of another's rights and could be considered such a disturbance. The most important ***103** point here is that the city has the legal right to remove, not the practical ability to control.[155]

After reaching an affirmative answer on the first prong of the test, we now ask if the city received a direct financial benefit from the infringers. Once again, the answer under the relaxed test would be "yes". The city benefited from the overall ambiance of the infringing performance. Surely some of the listeners parked, bought food, or made other purchases while listening to the music. If they did, the city received parking fees and tax on sales, and that should satisfy the direct financial benefit prong[156] thereby making the city liable as a vicarious infringer.

One can only hope that this sort of situation would never occur, but it is quite clear that it could. In order to insure that we do not unduly punish trade show organizers, entrepreneurs, and landowners in general, certain changes to the test should be implemented and followed. These changes borrow from the related topic of vicarious liability of a parent company whose subsidiary directly infringed a copyright and were recently discussed in *Banff, Ltd. v. Limited, Inc.*[157]

In *Banff*, a copyright holder (Banff) of a sweater design sued the parent of the retail outlet store (Limited) for vicarious infringement of their copyright.[158] Banff alleged that Limited, by consolidating its subsidiaries' financial statements and tax returns with its own, received a direct financial benefit from the infringing sales.[159] Judge Haight noted that initially it would seem that Limited would be liable, but analyzed further due to the severe implications that would result from holding that a parent corporation is always liable for the infringing acts of its subsidiaries.[160] He ***104** noted that even though Judge Keenan had refused to hold Reed liable in *Artists Music* just because they "could have policed the exhibitors at great expense," the *Shapiro, Bernstein* test used in that case appeared to allow liability in the *Banff* situation.[161] He concluded that in order to hold a parent vicariously liable for the copyright infringement of its subsidiary, there should be evidence of some continuing connection between the two parties in regard to the infringing activities as well as a direct financial benefit in the infringement itself.[162]

Courts faced with vicarious liability in the trade show context should require the same type showing as in other contexts. That is, evidence that the trade show organizer and the infringing exhibitor have a substantial and continuous relationship in the infringing activity. This is the correct standard for several reasons. First, it acknowledges that the legal relationship is not the critical factor. This new standard will insure that before trade show organizers are held liable, they have exercised or have the genuine, practical ability to exercise some sort of control over the people responsible for the direct infringement.[163] Furthermore, by requiring a substantial and continuing relationship, this standard would destroy the inference that seems to be building that the acts of an exhibitor are intimately associated and easily attributable to the owner of the flea market or trade show organizer. This is not to say that such a close relationship could not be shown, however, it will now require more than a bare showing of some legal right to control. Finally, this new standard of control firmly establishes that the owners of copyrights must protect their copyrights rather than placing that burden on trade show organizers and flea market owners. As the standard for liability and financial benefit continues to recede, this burden is being shifted to the organizers. No one is in a better position to enforce copyrights than the owners themselves. Few have summarized this point better than the district court in *Fonovisa*:

> Like most flea markets, [Cherry Auction] does little more than avail to others a bare site to carry out their

own business transactions. It is not in the business of overseeing that market, ensuring the integrity of the goods sold, or otherwise pleasing customers. It is therefore ill-equipped to do those things, and imposing vicarious liability would force the Auction to take foreign measures, such as hiring an "Intellectual Property Patrol." Inevitably, these steps lead to perverse economic consequences, driving up the price of ***105** running a swap meet and renting a space, thereby depriving the public of a well-known cheap marketplace.[164]

IV. Conclusion

The *Polygram* and *Fonovisa* decisions have greatly relaxed the vicarious liability standard of copyright infringement so that virtually all trade show organizers can now be held liable for infringing acts committed by vendors at their trade shows. This Note highlights the inconsistencies between the courts on the subject, as well as the potential dangers of such holdings. Moreover, this Note offers as a solution a requirement that copyright holders prove a substantial and continuous relationship between the trade show organizer and exhibitor. It also justifies a requirement that the copyright holder prove the flea market owner or trade show organizer received a direct financial benefit, not an indirect benefit from the "overall ambiance" of the infringement. Through the application of these suggestions, courts will insure that copyright holders remain responsible for the enforcement and protection of their copyrights as well as guarantee that only deserving premises owners who have actively participated in infringing activities are punished.

Footnotes

a J.D. candidate, University of Georgia School of Law, May 1997.

1 Richard Foster, *Camp Sho-M-Sel-M Helps Potential Trade Show Vendors*, RICHMOND TIMES-DISPATCH, Oct. 11, 1993, at E5; *See also* Jeff Nash, *Let Your Goal Guide Your Choice of What to Hand Out at Trade Show*, SYRACUSE HERALD-J., Dec. 19, 1995, at B5 (identifying the reasons for doing a trade show).

2 Foster, *supra* note 1.

3 These other forums include fashion shows, flea markets, and "swap meets," and could even include vendors at rock concerts and sporting events. The analysis in this Note should be applied to situations where an exhibitor or vendor rents a relatively small amount of space for a short time or for a limited purpose.

4 Premises owners will generally apply only to flea market or swap meet owners.

5 The first case on record that dealt with the issue of vicarious liability of a trade show organizer was decided on March 21, 1994. *See* Fonovisa, Inc. v. Cherry Auction, Inc., 847 F. Supp. 1492 (E.D. Ca. 1994), *rev'd*, 76 F.3d 259, 37 U.S.P.Q.2d (BNA) 1590 (9th Cir. 1996).

6 *See* Polygram Int'l Publishing, Inc. v. Nevada/TIG, Inc., 855 F. Supp. 1314, 1317, 32 U.S.P.Q.2d (BNA) 1481, 1481 (D. Mass. 1994); Artists Music Inc. v. Reed Publishing (USA) Inc., 31 U.S.P.Q.2d (BNA) 1623, 1624 (S.D.N.Y. 1994).

7 *Fonovisa*, 76 F.3d at 259, 37 U.S.P.Q.2d at 1590.

8 Hereinafter "organizer" refers to both a trade show organizer and flea market owner.

9 *Fonovisa*, 847 F. Supp. at 1494; *Polygram*, 855 F. Supp. at 1319, 32 U.S.P.Q.2d at 1482; *Artists Music*, 31 U.S.P.Q.2d at 1624.

[10] Of the four cases on record, the courts have split 2-2 on the issue of vicarious liability. This becomes 2-1 for liability if you consider that the only appellate decision on the issue of vicarious liability reversed a lower court.

[11] Direct infringement occurs when a trade show owner himself infringes the copyright of another. *See* Copyright Act of 1976, 17 U.S.C.A. §§ 106, 501 (1994) (enumerating the rights of a copyright holder at § 106 and defining infringement at § 501); Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 433, 220 U.S.P.Q. (BNA) 665, 674 (1984) (explaining 17 U.S.C. § 501(a) as of 1982 the court stated: "'Anyone who violates any of the exclusive rights of the copyright owner,' that is, anyone who trespasses into his exclusive domain by using or authorizing the use of the copyrighted work in one of the five ways set forth in the statute, 'is an infringer of the copyright.'"); *See also Polygram*, 855 F. Supp. at 1320, 32 U.S.P.Q.2d at 1483 (identifying the necessary elements of a prima facie case of copyright infringement).

[12] *See* Gershwin Publishing Corp. v. Columbia Artists Management, Inc., 443 F.2d 1159, 1161-62, 170 U.S.P.Q. (BNA) 182, 184 (2d Cir. 1971) ("[I]t has long been held that one may be liable for copyright infringement even though he has not himself performed the protected composition.").

[13] The other type of third party liability for which a trade show organizer might be held liable is contributory infringement. Contributory infringement stems from the tort of enterprise liability. *See* Demetriades v. Kaufmann, 690 F. Supp. 289, 292 n.5 (S.D.N.Y. 1988) (emphasizing the difference between contributory infringement and vicarious liability). Contributory infringement occurs when "one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another." *Gershwin*, 443 F.2d at 1162, 170 U.S.P.Q. at 184-85 (footnotes omitted).

[14] *Sony*, 464 U.S. at 435, 220 U.S.P.Q. at 675. *See also* 3 DAVID NIMMER and MELVILLE B. NIMMER, NIMMER ON COPYRIGHT § 12-04[A] at 12-69, 70:
Moreover, the statute itself is not totally bereft of support for such liability. Among the rights granted to the copyright owner, is the exclusive right "to authorize" the exercise by others of the various other rights that arise under the copyright. Congress' use of the phrase "to authorize" establishes the liability, whether vicarious or as a contributory infringer, of one who does no more than cause or permit another to engage in an infringing act.
(footnotes omitted).

[15] 464 U.S. at 435, 220 U.S.P.Q. at 675 (footnote omitted).

[16] *Fonovisa*, 76 F.3d at 262, 37 U.S.P.Q.2d at 1593; *Gershwin*, 443 F.2d at 1162, 170 U.S.P.Q. at 185 (citing M. Witmark & Sons v. Calloway, 22 F.2d 412, 414 (E.D. Tenn. 1927)); Wihtol v. Crow, 309 F.2d 777, 783, 135 U.S.P.Q. (BNA) 385, 389 (8th Cir. 1962); Demetriades v. Kaufmann, 690 F. Supp. 289, 292 (S.D.N.Y. 1988); 2 PAUL GOLDSTEIN, COPYRIGHT: PRINCIPLES, LAW AND PRACTICE, § 6.2 at 6:17 (1996).

[17] *See e.g., Wihtol*, 309 F.2d at 782-83, 135 U.S.P.Q. at 389; *M. Witmark & Sons*, 22 F.2d at 414; *See generally*, W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 69, at 499 (5th ed. 1984) (explaining the imputed negligence concept under the label of "*respondeat superior*").

[18] F. E. L. Publications, Ltd. v. National Conference of Catholic Bishops, 466 F. Supp. 1034, 1040 (N.D. Ill.) (1978). "One may be liable as a vicarious infringer, if a special relationship such as agency or partnership exists." *Id.* (citing Shapiro, Bernstein & Co. v. H. L. Green Co., 316 F.2d 304, 137 U.S.P.Q. (BNA) 275 (2d Cir. 1963) and *Gershwin*, 443 F.2d 1159, 170 U.S.P.Q. 182 (2d Cir. 1981).

[19] 316 F.2d 304, 137 U.S.P.Q. (BNA) 275 (2d Cir. 1963).

[20] *Id.* at 307, 137 U.S.P.Q. at 277-78.

[21] *Id.* at 306, 137 U.S.P.Q. at 276.

[22] *Id.* at 305, 137 U.S.P.Q. at 275-76.

[23] It should also be noted that in order for a court to impose either type of third party liability on a trade show organizer, there must have been a direct infringement of the plaintiff's copyright. *See Polygram*, 855 F. Supp. at 1324, 32 U.S.P.Q.2d at 1487 ("Because plaintiffs have failed at trial to establish the fifth element [of a prima facie copyright infringement claim] ... defendants [trade show organizers] are entitled to judgment.").

[24] *Shapiro, Bernstein*, 316 F.2d at 306, 137 U.S.P.Q. at 276.

[25] *Id.* at 307, 137 U.S.P.Q. at 277.

[26] In his learned treatise, Professor Goldstein pointed out other facts which the court found significant, although not expressly mentioned:
The court ... did not expressly rely upon the facts that all of Jalen's daily proceeds went into Green's cash registers and that Green deducted its ten or twelve percent commission. Green also deducted salaries of Jalen's employees, ... and withheld Social Security and withholding taxes .... Further, customers purchasing records were given a receipt on a printed form marked 'H.L. Green Company, Inc.' and Jalen's name was wholly absent from the premises.
GOLDSTEIN, *supra*, note 16 at 6:18-19 n.7 (citing *Shapiro*, 316 F.2d at 306, 137 U.S.P.Q. at 276).

[27] *Shapiro*, 316 F.2d at 306, 137 U.S.P.Q. at 276.

[28] *Id.*

[29] *Id.*

[30] *See e.g.*, Pinkham v. Sara Lee Corp., 983 F.2d 824, 834, 25 U.S.P.Q.2d (BNA) 1336, 1343 (8th Cir. 1992); RCA/Ariola Int'l, Inc. v. Thomas & Grayston Co., 845 F.2d 773, 781, 6 U.S.P.Q.2d (BNA) 1692, 1697 (8th Cir. 1988); Casella v. Morris, 820 F.2d 362, 365 n.4, 3 U.S.P.Q.2d (BNA) 1340, 1343 n.4 (11th Cir. 1987); *Gershwin*, 443 F.2d at 1162; 170 U.S.P.Q. at 182; Religious Technology Ctr. v. Netcom On-Line Communication Serv., 907 F. Supp. 1361, 1375 (N.D. Cal. 1995); Banff Ltd. v. Limited, Inc., 869 F. Supp. 1103, 1107 (S.D.N.Y. 1994); *Polygram*, 855 F. Supp. at 1324, 32 U.S.P.Q.2d at 1487; *Artists Music*, 31 U.S.P.Q.2d at 1626; *Demetriades*, 690 F. Supp. at 292; *F. E. L. Publications*, 466 F. Supp. at 1040; Roy Export Co. v. Trustees of Columbia Univ., 344 F. Supp. 1350, 1352 (S.D.N.Y. 1972); GOLDSTEIN, *supra*, note 16, at 6:17; NIMMER, *supra*, note 14 at § 12-04[A] 12-70.

[31] *Shapiro, Bernstein*, 316 F.2d at 307, 137 U.S.P.Q. at 272. *See Demetriades*, 609 F. Supp. at 292 (stating financial benefit and ability to control are "signposts" of vicarious liability).

[32] The test for vicarious liability has been in other contexts in addition to landlords and dance hall owners, discussed *supra* Part II. *See generally*, Van Halen Music v. Palmer, 626 F. Supp. 1163, 1166-67 (W.D. Ark. 1986) (applying vicarious liability to corporate officers) *and* Warner Bros. v. Lobster Pot, Inc., 582 F. Supp. 478, 482, 233 U.S.P.Q. (BNA) 239, 241 (N.D. Ohio 1984) (same).

[33] *See Shapiro, Bernstein*, 316 F.2d at 306, 137 U.S.P.Q. at 276; *Artists Music*, 31 U.S.P.Q.2d at 1626-27 (finding no vicarious liability when defendant failed to have requisite control of infringer); Bevan v. Columbia Broadcasting System, Inc., 329 F. Supp. 601, 610, 171 U.S.P.Q. (BNA) 339, 346 (S.D.N.Y. 1971) (same).

[34] GOLDSTEIN, *supra* note 16, § 6.2.2 at 6:22; *See Artists Music*, 31 U.S.P.Q.2d at 1627 (refusing to find defendant vicariously

liable where it *could have* policed its exhibitors at great expense); *Fonovisa*, 847 F. Supp. 1492, 1497 (E.D. Cal. 1994), *rev'd*, 76 F.3d 258, 37 U.S.P.Q.2d 1592 (9th Cir. 1996) (finding defendant did not have the requisite amount of control because "[l]ike most flea markets, it [Cherry Auction] does little more than avail to others a bare site to carry out their own business transactions.").

35 *See* Fromont v. Aeolian Co., 254 F. 592 (D.C.N.Y. 1918) (holding a landlord not liable for contributory copyright infringement in leasing a concert hall for a public piano concert in which performers did not seek permission to play infringing arrangements).

36 *Fonovisa*, 76 F.3d 259, 262, 37 U.S.P.Q.2d 1590, 1592-93; See *Polygram*, 855 F. Supp. at 1324, 32 U.S.P.Q.2d at 1487.

37 98 F.2d 686 (2d Cir. 1938).

38 254 F. 592 (S.D.N.Y. 1918).

39 *See Polygram*, 855 F. Supp. at 1324, 32 U.S.P.Q. at 1487; *infra* notes, 41 & 42; *See also* GOLDSTEIN, *supra* note 16, at 6:22.

40 *See* M. David Dobbins, Note, *Computer Bulletin Board Operator Liability for User's Infringing Acts*, 94 MICH. L. REV. 217, 226 (1995); GOLDSTEIN, *supra* note 16, at 6:22.

41 *See* Dobbins at 226, *supra* note 40.

42 *See supra* note 40; *See* also Edward A. Cavazos & G. Chin Chao, *System Operator Liability for a User's Copyright Infringement*, 4 TEX. INTELL. PROP. L.J. 13, 23 (1995).

43 20 U.S.P.Q.2d (BNA) 1181 (S.D.N.Y. 1990).

44 *Id.* at 1189. However, the production company provided the stage crew and production crew. *Id.*

45 *Id.*

46 *Id.* at 1188.

47 *See id.*

48 *Id.* at 1190.

49 *See Shapiro, Bernstein*, 316 F.2d at 307, 137 U.S.P.Q. at 277.

50 *See e.g.*, Bradbury v. Columbia Broadcasting Sys., 287 F.2d 478, 128 U.S.P.Q. (BNA) 376 (9th Cir. 1961) (finding employer vicariously liable even though he did not intend to infringe nor knew of the actual infringement); M. Witmark & Sons v. Callaway, 22 F.2d 412 (E.D. Tenn. 1927) (holding employer's lack of direction, knowledge, or consent insufficient to preclude a finding of vicarious liability).

51 *See Shapiro, Bernstein*, 316 F.2d at 307, 173 U.S.P.Q. at 277.
[T]he cases are legion which hold the dance hall proprietor 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 enhanced income. He is liable whether the bandleader is considered, as a technical matter, an employee or an independent contractor ... .
Id.

52 22 F.2d 412 (E.D. Tenn. 1927).

53 *Id.* at 414.

54 *Id.* at 413.

55 *Id.*

56 *Id.*

57 *Id.* at 414. *See also* Shapiro, Bernstein & Co. v. Veltin, 47 F. Supp. 648, 649 (W.D. La. 1942).
The rule of the common law applies, to wit, that the master is civilly liable in damages for the wrongful act of his servant in the transaction of the business which he was employed to do, although the particular act may have been done without express authority from the master, or even against his orders.
Calloway 22 F.2d at 414 (citations omitted).

58 26 F.2d 149 (E.D. La. 1928).

59 *Id.* at 149-150.

60 *Id.* at 150.

61 *Id.*

62 *Id.* ("[T]he mere fact that he operated and controlled the place of public entertainment, charging admission and so operating for a profit, establishes his liability for permitting and authorizing the unlicensed use of plaintiff's musical compositions in and on the premises.").

63 443 F.2d 1159, 170 U.S.P.Q. (BNA) 182 (2d Cir. 1971).

64 *Id.* at 1162, 170 U.S.P.Q. at 184. "[T]his court recently held that even in the absence of an employer-employee relationship one may be vicariously liable if he has the right and ability to supervise the infringing activity and also has a direct financial interest in such activities." *Id.* (citing *Shapiro, Bernstein*, 316 F.2d at 307, 137 U.S.P.Q. at 277).

65 *Gershwin*, 443 F.2d at 1161, 170 U.S.P.Q. at 183.

66 *Id.* at 1160, 170 U.S.P.Q. at 183.

67 *Id.* at 1163, 170 U.S.P.Q. at 185.

[68] *Id.*

[69] *See Shapiro, Bernstein*, 316 F.2d at 308, 137 U.S.P.Q. at 277 ("Those [dance hall] cases and this one lie closer on the spectrum to the employer-employee model than to the landlord-tenant model.").

[70] *See supra* note 34 & accompanying text.

[71] As mentioned, *supra*, note 5 & 6, there are only three cases on record dealing with the trade show organizer or flea market owner. As a general matter, I plan to illustrate how the courts have applied the various tests to the trade show context by discussing the court's approach in these three cases.

[72] 847 F. Supp. 1492 (E.D. Ca. 1994), *rev'd*, 76 F.3d 259, 37 U.S.P.Q.2d (BNA) 1590 (9th Cir. 1996).

[73] It is important to note the procedural aspect of the case. The judge wrote the opinion as an answer to Cherry Auction's motion to dismiss for failure to state a reason upon which relief could be granted. *See* FED. R. CIV. P. 12(b)(6). At the district court level, Judge Coyle found that the plaintiffs had failed to allege facts necessary to establish the requirements for vicarious liability, contributory infringement or direct infringement. The Ninth Circuit reversed, holding the alleged facts to be sufficient.

[74] *Fonovisa*, 847 F. Supp. at 1496-97.

[75] *See id.* at 1497 ("Like most flea markets, it does little more than avail to others a bare site to carry out their own business transactions.").

[76] The facts of the case reveal that on December 12, 1991, the Fresno County Sheriff's Department raided Cherry Auction, seized 38,014 counterfeit tapes, confiscated 12 vehicles and arrested 27 people. *Id.* at 1494.

[77] *Id.*

[78] *Id.* at 1496-97.

[79] *Id.* at 1495.

[80] *Id.* at 1497.

[81] Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259, 37 U.S.P.Q.2d (BNA) 1590 (9th Cir. 1996).

[82] *Id.* at 262, 37 U.S.P.Q.2d at 1593.

[83] *Id.* at 262-63, 37 U.S.P.Q.2d at 1593 ("Nevertheless, H.L. Green's ability to police its concessionaire--which parallels Cherry Auction's ability to police its vendors under Cherry Auction's similarly broad contract with its vendors--was sufficient to satisfy the control requirement.").

[84] *Id.*

[85] *Id.* ("As the promoter and organizer of the swap meet, Cherry Auction wields the same level of control over the direct infringers as did the *Gershwin* defendant.").

[86] 855 F. Supp. 1314, 32 U.S.P.Q.2d (BNA) 1481 (D. Mass. 1994). (NEVADA/TIG was dismissed from the case by mutual agreement of the parties. Throughout the opinion, the defendants are known as "Interface," the company that actually organized the event.)

[87] *Id.* at 1318-19, 32 U.S.P.Q.2d at 1482.

[88] *Id.*, 32 U.S.P.Q.2d at 1482.

[89] *Id.*

[90] *Id.* at 1319, 32 U.S.P.Q.2d at 1483. This suit involved 10 songs played at five of 2000 booths, spread out over 2.5 million square feet. *Id.*

[91] *Polygram*, 855 F. Supp. at 1318, 32 U.S.P.Q.2d at 1483. Interface received $75 per person as an admission fee, $35.95 per square foot as a booth rental fee, as well as advertising revenues. Gross revenues for the event were in excess of $44 million. *Id.*

[92] It is helpful to consider the procedural aspect of this case also. The court entered judgment for the defendants on the basis that the plaintiffs had failed to show any *direct* infringement had occurred. As this was a case of first impression in the First Circuit, Judge Keeton felt that it would be helpful on possible appeal if he went further than necessary and explained what he would have concluded had the plaintiff shown someone infringed his copyright. *Polygram*, 855 F. Supp. at 1324, 32 U.S.P.Q.2d at 1490.

[93] *Polygram*, 855 F. Supp. at 1329, 32 U.S.P.Q.2d at 1491.

[94] *Id.* at 1329, 32 U.S.P.Q.2d at 1491 ("I am similarly persuaded that sufficient control over the infringers exists in this case, especially in light of Interface's contractual control over the exhibitors."). Earlier in the opinion, Judge Keeton concluded that the *Gershwin* court had been persuaded to find vicarious liability because the organizer created an audience for the infringer and "was in a position to police the infringing conduct" and this case seemed to be no different. *Id.* (quoting Gershwin Publishing Corp. v. Columbia Artists Management, Inc., 443 F.2d 1159, 1163, 170 U.S.P.Q. (BNA) 182, 185 (2nd Cir. 1971).

[95] 31 U.S.P.Q.2d (BNA) 1623 (S.D.N.Y. 1994). Hereinafter plaintiffs will be referred to as "Artists" and defendants as "Reed."

[96] *Id.* at 1624.

[97] *Id.* The opinion implies that the reason ASCAP sent the investigators was because negotiations between Reed and ASCAP for a blanket license for the entire event had broken down. The amount of the total license would have been $1350. *Id.*

[98] *Id.* at 1624-25.

[99] *Id.* at 1626-27.

[100] *Id.* at 1626.

[101] *Id.* at 1627.

[102] *Id.* at 1627 (holding defendant not vicariously liable because "plaintiffs have failed to establish that defendant derived any financial benefit, direct or otherwise").

[103] *Shapiro*, 316 F.2d at 307, 137 U.S.P.Q. at 277. *See generally* GOLDSTEIN, *supra* note 16, § 6.2.1 (describing financial interest prong of the vicarious liability test).

[104] *See* Vernon Music Corp. v. First Dev. Corp., 1983-84 Copyright L. Dec. (CCH) ¶ 25, 686 (D. Mass. 1984) (holding landlord not vicariously liable because landlord's benefit from charging rent not "tied to the profitability" of the direct infringer); Roy Export Co. Establishment v. Trustees of Columbia Univ., 344 F. Supp. 1350, 1353, 175 U.S.P.Q. (BNA) 349, 350 (S.D.N.Y. 1972) ("[P]laintiffs neither show benefit to the University, nor do they refute defendants Trustees' assertion that the University received no financial benefit from the two showings of the bootleg film [the directly infringing activity].").

[105] *Shapiro, Bernstein*, 316 F.2d at 306, 137 U.S.P.Q. at 276.

[106] *Id.* at 308, 137 U.S.P.Q. at 278.

[107] *Polygram*, 855 F. Supp. at 1330, 32 U.S.P.Q.2d at 1492.

[108] *See generally Vernon Music Corp.*, 1983-84 Copyright L. Dec. ¶ 25, 686.

[109] *See e.g., Artists Music*, 31 U.S.P.Q.2d at 1627. "The Second Circuit has held that a landlord that charged a fixed rent--rent not tied to the tenant's revenues or profits derived from the alleged copyright infringements--was not liable for the tenant's infringing activity." *Id.* (citing Deutsch v. Arnold, 98 F.2d 686, 39 U.S.P.Q. (BNA) 5 (2d Cir. 1938)); *See also Sony*, 464 U.S. at 437 n.18, 220 U.S.P.Q. at 676 n.18 (1984); Fremont, 254 F. at 594 (stating that an individual who rents property for a performance and does not reserve an interest in the business is analogous to a landlord).

[110] *See* GOLDSTEIN *supra* note 16, § 6.2.1, n. 15.

[111] *See* Famous Music Corp. v. Bay State Harness Horse Racing and Breeding Ass'n, 554 F.2d 1213, 1214, 194 U.S.P.Q. (BNA) 177, 177 (1st Cir. 1977) (holding defendant track owner vicariously liable for band that entertained patrons who were not "absorbed in watching the races"); *Shapiro*, 316 F.2d at 307, 137 U.S.P.Q. at 277 ("[T]he cases are legion which hold the dance hall proprietor 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 enhanced income.").

[112] *See, e.g., Shapiro*, 316 F.2d at 308, 137 U.S.P.Q. at 278 (stating landlord received 10-12% of gross sales of bootleg records in addition to normal rent).

[113] *See* Fromont v. Aeolin Co., 254 F. 592, 594 (S.D.N.Y. 1918).

[114] *See Fonovisa*, 847 F. Supp. at 1497. Procedurally speaking, the court first rejected the complaint's allegations that the defendant had a financial interest in the infringing sales of Fonovisa's records. After granting oral argument, the court heard the plaintiff's alternate positions on the issue of financial benefit. *Id.* at 1494.

[115] *Id.* at 1497.

[116] *Id.*

[117] *Id.* The court also refused to find the $10 admission charged by Cherry Auction a direct financial benefit because it was merely a modest fee. *Id.*

[118] *Fonovisa*, 76 F.3d at 262, 37 U.S.P.Q.2d at 1592.

[119] *Id.* at 263.

[120] *Id.* at 263, 37 U.S.P.Q.2d at 1594. The court also drew support from the *Polygram* case, holding that "the trade show participants 'derived a significant financial benefit from the attention' that attendees paid to the infringing music." *Id.* (quoting from *Polygram*, 855 F. Supp. at 1333, 32 U.S.P.Q.2d at 1495).

[121] *Polygram*, 855 F. Supp. at 1333, 32 U.S.P.Q.2d at 1494.

[122] *Id.* at 1330, 32 U.S.P.Q.2d at 1484-85. A Louisiana district court reached a similar finding in Realsongs v. Gulf Broadcasting Corp., 824 F. Supp. 89 (M.D. La. 1993). *Realsongs* involved a radio station that was held vicariously liable for the infringing performances of songs played on the air by a group of ministers that had rented air time from the station. *Id.* at 92. Rejecting the defendant's argument that they had no direct financial interest because they received a flat rental fee and nothing from the infringing performance itself, the court stated that "[t]he courts have not interpreted the 'direct financial interest' requirement so narrowly. Defendants still have a direct financial interest in the infringing activity if the station is a for-profit enterprise and defendants *benefit from its operation." Id.* (emphasis added).

[123] *Polygram*, 855 F. Supp. at 1331, 32 U.S.P.Q.2d at 1493 (citing Superhype Publishing, Inc. v. Vasiliou, 838 F. Supp. 1220, 1225 (S.D. Ohio 1993)) (finding restaurant owner derived benefit because he was sole owner); Swallow Turn Music v. Wilson, 831 F. Supp. 575, 579 (E.D. Tex. 1993) (same); Fermata Int'l Melodies v. Champion Golf Club, 712 F. Supp. 1257, 1262, 11 U.S.P.Q.2d (BNA) 1460, 1463 (relying on the defendant's [corporate officer's] salary from and status as majority stockholder in Golf Club in finding the requisite financial interest in the infringing activity); Sailor Music v. Mai Kai of Concord, Inc., 640 F. Supp. 629, 633, 230 U.S.P.Q. (BNA) 860, 862 (D.N.H. 1986) (holding restaurant owner's salary is a direct financial benefit from infringing performances that generated income for the restaurant).

[124] *Polygram*, 855 F. Supp. at 1331, 32 U.S.P.Q.2d at 1493. The court posed two hypothetical questions in order to illustrate its point: (1) How many minutes of infringing music during a meal at a restaurant would be necessary to constitute a "direct" benefit to the restaurant. (2) Would the plaintiff prove that benefit by the length of the performances or the number of patrons listening? *Id.*

[125] *Id.* at 1332, 32 U.S.P.Q.2d at 1493.

[126] *Id.*

[127] *Id.* at 1331, 32 U.S.P.Q.2d at 1493.

[128] *See* H.R. REP. NO. 94-1476 at 159-60 (1976), *reprinted in*, 1976 U.S.C.C.A.N. 5659, Q5775-76. The court noted that this test served two important functions: (1) Limiting vicarious infringement to those who in some part profit from the direct infringement. (2) Defining the benefit received from the infringing activity in such a way that the court could acknowledge the intangible and indirect benefits received from the performances. *Polygram*, 855 F. Supp. at 1331, 32 U.S.P.Q.2d at 1488.

[129] *Polygram*, 855 F. Supp. at 1331-32, 32 U.S.P.Q.2d at 1493.

[130] *Fonovisa*, 76 F.3d at 263, 37 U.S.P.Q.2d 1594; *Polygram*, 855 F. Supp. at 1330, 32 U.S.P.Q.2d at 1492.

[131] 31 U.S.P.Q.2d (BNA) 1623 (S.D.N.Y. 1994).

[132] *Id.* at 1627.

[133] *Id. See* Deutsch v. Arnold, 98 F.2d 686, 39 U.S.P.Q. (BNA) 5 (2d Cir. 1938) (holding that a landlord who charges a fixed rent that is not tied to infringing activities of tenant not liable for infringing activities of tenant). *See also Sony*, 464 U.S. at 437 n. 18, 220 U.S.P.Q. at 676 n.18 (same).

[134] *Artists Music*, 31 U.S.P.Q.2d at 1627.

[135] *Id.*

[136] *Id.*

[137] *Id.*

[138] *Fonovisa*, 76 F.3d at 263, 37 U.S.P.Q.2d at 1593.

[139] *Polygram*, 855 F. Supp. at 1329, 32 U.S.P.Q.2d at 1491.

[140] *See Fonovisa*, 76 F.3d at 263, 37 U.S.P.Q.2d at 1593 (stating that Cherry Auction's ability to police its vendors closely paralleled Green's ability to police the consessionaire, Jalen); *Polygram*, 855 F. Supp. at 1329, 32 U.S.P.Q.2d at 1491 (noting that Interface exercised sufficient control over its exhibitors because it was in "a position to police the infringing conduct").

[141] *See Gershwin*, 443 F.2d at 1160-61 (referring to "an association"). Earlier in the facts, the court noted that CAMI managed "hundreds" of local associations, however, each local association was managed separately by CAMI. Therefore, it is reasonable to assume that each local association was treated as a single unit rather than all associations together. *Id.*

[142] *Polygram*, 855 F. Supp. at 1328, 32 U.S.P.Q.2d at 1492.

[143] *Id.* at 1328-29, 32 U.S.P.Q.2d at 1492.

[144] *Id.*

[145] *Artists Music*, 31 U.S.P.Q.2d at 1627.

[146] For example, one exhibitor may encroach upon the space of another, leading to an argument and ultimately a fight. If the organizer has no power to control or terminate the encroaching vendor, he runs the risk of a breach of contract claim or a possible negligence suit from the vendor being encroached upon. Rather than forcing the organizer to think of every possible situation in which he might need to act, it should be acceptable that he have a blanket clause to terminate without automatically making him vulnerable to vicarious liability claims.

[147] *Polygram*, 855 F. Supp. at 1331, 32 U.S.P.Q.2d at 1493 (quoting H.R. REP. NO. 94-1476). The court viewed the case law as adopting the position of the 1976 amendments to the Copyright Act. *Polygram*, 855 F. Supp. at 1331, 32 U.S.P.Q.2d at 1493.

[148] *Id.* The actual language used by the court is extremely vague and confusing:
Having reviewed the case law, I find as an adjudicative fact that Interface derived a financial benefit from the infringing performances of its exhibitors, and that this benefit was of a kind that meets the requirement that it be "direct," in the sense in which that term appears in the cases that phrase the requirement as one of "direct financial benefit." I also find that Interface expected commercial gain from the COMDEX/Fall show and received from the performances by exhibitors a benefit of a kind called "direct" in some of the precedents, though more likely to be perceived as "indirect" by a person unfamiliar with the precedents.
Id.

[149] *Fonovisa*, 76 F.3d at 263, 37 U.S.P.Q.2d at 1594.

[150] *Id.*

[151] *Id.*

[152] *Artists Music*, 31 U.S.P.Q.2d at 1627. Similarly, the district court in *Fonovisa* rejected the "conclusory allegation that '[d]efendants ... also has [sic] a direct financial interest in the success of such infringing activities"' put forth in the complaint. *Fonovisa*, 847 F. Supp. at 1497 (alterations in original). Furthermore, the *Fonovisa* court rejected Fonovisa's alternate request to find direct financial benefit from the fact that Cherry Auction sold counterfeit tapes for two reasons. First, the plaintiff failed to show a direct percentage reserved by Cherry Auction from the infringing sales. Second, the court refused to believe that without the sales, Cherry Auction would have suffered diminished sales. *Fonovisa*, 847 F.Supp. at 1497.

[153] *Id. See also Fonovisa*, 847 F. Supp. at 1497 (finding no direct financial benefit although defendant charged $10 admission fee).

[154] Congress has expressly abrogated the sovereign immunity of states, depriving them of such a defense in a copyright infringement action. 17 U.S.C.A. §§ 501-511 (1994). For a recent case upholding the constitutionality of such legislation, *see* Chavez v. Arte Publico Press, 59 F.3d 539, 35 U.S.P.Q.2d (BNA) 1609 (5th Cir. 1995).

[155] In *Fonvisa* the Ninth Circuit held that an organizer's right to terminate vendors demonstrated the requisite control over those vendors. *See* notes 74-85 *infra* and acompanying text. By comparison with this hypothetical a city retains much more control over a loitering singer (who could in fact be arrested under the right circumstances).

[156] In *Polygram* the court allowed similarly attenuated benefits to be construed as significant financial benefits. *See* notes 121-27, *supra*.

[157] 869 F. Supp. 1103, 33 U.S.P.Q.2d (BNA) 1896 (S.D.N.Y. 1994). Although not expressly discussed in any material that I have found, it is an interesting question if the relaxed principles could be used in the parent subsidiary context. If they can be used, this could have a potentially devastating effect on parent companies as well. For a good discussion of the topic of vicarious liability in a parent-subsidiary situation, *see generally, id.* at 1109-11, 33 U.S.P.Q.2d at 1901-02.

[158] *Id.* at 1105, 33 U.S.P.Q.2d at 1897.

[159] *Id.* at 1106, 33 U.S.P.Q.2d at 1898.

[160] *Id.* at 1107, 33 U.S.P.Q.2d at 1899. *But see* Broadcast Music, Inc. v. Hartmax Corp., 9 U.S.P.Q.2d (BNA) 1561, 1562 (N.D. Ill. 1988) (stating that a parent is liable, as a matter of law, for the infringing acts of its subsidiaries). The *Broadcast Music* court also

stated:

We also find as a matter of law that [the parent] has the right and ability to supervise its subsidiaries -- that is, to guard against or police the allegedly infringing activity. Our conclusion rests in part on the legal relationship between [the parties]. ... Thus, it is clear to us that [the parent] has the *right* to supervise its subsidiaries' activities--down to a subsidiary's unlicensed use of copyrighted music--through its power to remove recalcitrant officers. It is the existence of the right to supervise, not whether [the parent] in fact chose to exercise that right, that is at issue.

Id. at 1563.

161 *Banff*, 869 F. Supp. at 1108, 33 U.S.P.Q.2d at 1900.

162 *Id.* at 1110, 33 U.S.P.Q.2d at 1902. *See also* Frank Music Corp. v. Metro Goldwyn-Mayer, Inc., 886 F.2d 1545, 1553, 12 U.S.P.Q.2d 1412, 1419 (9th Cir. 1989) ("[A] parent corporation cannot be held liable for the infringing actions of its subsidiary unless there is a substantial and continuing connection between the two with respect to the infringing acts."); Howard Johnson Co. v. Khimani, 892 F.2d 1512, 1518, 13 U.S.P.Q.2d (BNA) 1808, 1812 (11th Cir. 1990) (adopting the substantial and continuing connection standard).

163 *See Banff*, 869 F. Supp. at 1109, 33 U.S.P.Q.2d at 1901.

164 *Fonovisa*, 847 F. Supp. at 1497.