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HIGHLIGHTS

SPECIAL REPORT: *"May Trade Show Sponsors Be Held Liable for the Copyright Infringement of their Exhibitors?: Two Courts Offer Two Opinions,"* by Todd E. Marlette, Esq. of Keck, Mahin & Cate, Washington, DC *(pages 5-7)*

COMMENTS ON: *"Court Holds that Parent Association Cannot Legally Conspire with Regional Section,"* by Ross B. Bricker, Esq. and Jonathan B. Levy, Esq. of Jenner & Block, Miami, FL *(page 4)*

IRS OFFICIAL SAYS MOST EXEMPTS NEED NOT BE CONCERNED ABOUT ASSOCIATE MEMBER DUES AUDIT GUIDELINES, ACTIONS REFLECT OTHERWISE: Speaking to the Institute of Management Accountants on Sept. 15, Jay Rotz, Assistant to the Director, IRS Exempt Organizations Technical Division, said that despite two recent TAMs which found associate member dues to be subject to UBIT, most potentially affected exempt organizations are "needlessly concerned." At the same time, however, the IRS' brief filed in a pending U.S. Tax Court case leaves no doubt that the IRS is taking this issue very seriously, and is not about to treat the association community with "kid gloves." *(pages 2-3)*

ASAE SEEKS TO FILE *AMICUS* BRIEF IN ASSOCIATE MEMBER DUES TAX COURT CASE: On Sept. 23, ASAE filed a motion with the U.S. Tax Court seeking permission to file an *amicus* brief in *National League of Postmasters v. Commissioner.* The motion points out the serious and adverse impact a decision in favor of the IRS in this case would have on the association community, and specifically objects to two contentions which underly the IRS' brief. If the IRS prevails in this case, it would provide the Service with the first court decision to date to find that even where associate members have voting rights and related (to exempt purposes) rights and benefits, their dues can still be taxed as UBTI. The IRS would surely rely on such a decision in targeting associate member dues for tax. *(pages 2-3)*

COURT DENIES ASCAP'S MOTION TO RE-OPEN *INTERFACE* MUSIC LICENSING CASE: Details. *(page 8)*

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SPECIAL REPORT

May Trade Show Sponsors Be Held Liable for the Copyright Infringemenet of their Exhibitors?: Two Courts Offer Two Opinions

by Todd E. Marlette, Esq. of Keck, Mahin & Cate, Washington, DC

Like an Indian flutist with a cobra, trade show exhibitors often play copyrighted music as a means of enticing participants to their exhibits. If you organize a trade show, you should be aware that organizations such as **ASCAP (the American Society of Composers, Authors, and Publishers)** have sought licenses from trade show organizers for the infringing acts of their exhibitors. Two recent court decisions have examined this issue of vicarious trade show sponsor liability.

Background

The ***Federal Copyright Act*** grants to the owners of copyrights in musical works the exclusive right, with express limitations, to authorize public performances of their work. 17 U.S.C. § 106(4). Anyone violating the exclusive rights of the copyright holder is an infringer, for whose acts the copyright holder may seek actual or statutory damages, id. § 504(a); injunctive relief, id. § 502(a); and reimbursement of the costs of the suit, including a reasonable attorney's fee, id. § 505. The purpose of the *Copyright Act* is to protect the interests of composers and authors by granting them a limited, legal monopoly over the publication and performance of their artistic works. ***See Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984).**

If copyright infringement is proven, the copyright holder may request a court to impose liability on a third party, such as a trade show organizer, rather than the direct infringer. While this derivative liability is not expressly provided for in the statute, the Supreme Court has stated that "the absence of such express language in the copyright statute does not preclude the imposition of liability on third parties." *Sony* at 435.

In order to establish liability for copyright infringement based upon a public performance, the plaintiff must prove: (1) the originality and authorship of the material involved; (2) compliance with the formalities required to secure a copyright under the copyright law; (3) ownership of the copyright for the material at issue; (4) the defendant's public performance of the material; and (5) the defendant's failure to obtain permission from the copyright owner or their representative for such performance. 17 U.S.C. §§ 101-106, 501.

The first three elements, due to the benefits provided by copyright registration, are rarely disputed, while the fourth element, a "public performance," is well defined. A "public performance" is a performance in any place where a substantial number of persons outside the normal circle of a family and its social acquaintances is gathered. 17 U.S.C. § 101. Thus, the dispute generally centers on the fifth element, *i.e.*, the lack of authorization to perform the work.

The relationship of "authorization" to vicarious liability for copyright infringement was articulated in ***Shapiro, Bernstein & Co. v. H.L. Green Co.*, 316 F.2d 304 (2d Cir. 1963).** "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." *Id.* at 307. Thus it is well settled that third parties *may* be vicariously liable for the infringing acts of others.

Artists Music Inc. v. Reed Publishing

The earlier of the recent two cases to address vicarious liability was decided by the **United States District Court for the Southern District of New York. *Artists Music, Inv. v. Reed Publishing*, 63 USLW 2015, 1994 Copr.L.Dec. P27,265, 31 U.S.P.Q.2d 1623, 1994 WL 191643 (May 17, 1994).**

In that case, ASCAP brought an infringement action on behalf of the owners of 19 copyrighted songs against **Reed Publishing, Inc.**, a corporation that organizes trade and consumer shows in the United States. The Court in *Artists Music* followed the rule of *Shapiro, Bernstein, supra*, and held that an alleged

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vicarious infringer must have both the right and ability to supervise and control the infringer, *and* must also derive a direct financial benefit from the violator's infringement.

Under the first prong of *Shapiro, Bernstein*, the Court *in Artists Music* held that a *trade show organizer* has no right and ability to supervise and control the actions of the *exhibitors*. The Court compared the relationship to that of a landlord and tenant.

While the Court noted that a landlord may have a limited ability to control a tenant's use of a leased premises (for example, a lease may prohibit the disturbing of other tenants), landlords generally lack the ability to supervise the activities of their tenants. ***See Vernon Music Corn v. First Development Corp.*, 1984 WL 8146 (D. Mass. June 19, 1984)** (granting summary judgment in favor of building owner who leased space to a store where background music was regularly played); ***Buck v. Crescent Gardens Operating Co., 28 F.Supp. 576* (D. Mass. 1939)** (dismissing as a defendant the owner of a premises that leased space to a tenant operating a dance hall).

Defendant Reed Publishing, as the trade show organizer, signed a contract with the **New York Convention Center Operating Corp.** stating that "Licensee [Reed] shall be *solely* responsible for any copyright or royalty payments due in connection with any broadcast, performance or publication of music or other publication of music arising from the center."

However, the Court held that this provision merely allocated responsibility between the parties and did not constitute an admission of liability for royalties. Further, the Court held that the plaintiff, Artists Music, had misplaced their reliance upon this contract since they were neither a party to the agreement nor an intended beneficiary.

Applying the second prong of *Shapiro, Bernstein*, the Court held that the trade show organizer did not receive any financial benefit from the exhibitor's performance of copyrighted music.

The Court noted that the rent was not tied in any way to profits derived from the alleged copyright infringement. Further, the Court held that the alleged copyright infringements did not affect the gate receipts at the show.

The Court rejected the argument that music was essential to the success of the show reasoning that, if essential, Defendant Reed would have undertaken to provide music itself.

Polygram International Publishing, Inc. v. Nevada/TIG, Inc.

The second court to address the issue of vicarious liability was the **United States District Court for the District of Massachusetts. *Polygram International Publishing, Inc. v. Nevada/TIG, Inc.*, 1994 WL 289337 (June 20, 1994).**

In that case, ASCAP brought an infringement action on behalf of numerous copyright holders against **NEVADA/TIG, f/k/a Interface Group, Inc., et al. Interface Group, Inc.** organizes and promotes trade shows and major conventions. Through stipulation of the parties, NEVADA/TIG was dismissed from the suit. The Court in *Polygram* followed the same criteria and two-pronged analysis as set forth in *Shapiro, Bernstein*. However, the Court arrived at very different conclusions.

Under the first prong of *Shapiro, Bernstein*, the Court found that Defendant Interface Group, Inc. had the ability to supervise and control the exhibitors through the terms of their contract.

In part, the Court based its finding on defendant Interface's authority and control over its exhibitors through its rules and regulations. In doing so, the Court shifted from a landlord/tenant analysis to a nightclub/performer analysis.

The Court relied upon the legislative record of the amendments to the ***Copyright Act of 1976***, part IV(C), wherein a party "controls" a performance if it "actively operates or supervises the operation of the place wherein the performance occurs, or controls the content of the infringing program." **House Report of the Judiciary Committee, No. 94-1476, 159-60.** The Court found that the trade show organizer created an audience for the infringing performances and was thus in a position to police the infringing conduct.

The second prong of *Shapiro, Bernstein requires* a direct financial interest in the exploitation of the copyrighted materials. However, the Court noted that in some cases involving the performance of music, courts have relied upon an inferred, overall benefit that a performance of music confers.

The Court once again relied upon the legislative history of the 1976 amendments to the *Copyright Act*

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in asserting that the defendants "expected commercial gain from the operation and either direct or indirect benefit from the infringing performance." House Report, *supra*, at 159-160. The Court based its finding of "direct financial benefit" on deposition testimony stating that music is an integral part of many trade shows, and that banning music would be a drastic change from standard operating procedure. The Court also found that music assists in communication with the attendees at the trade show.

Conclusion

A court following the analysis of *Artists Music* would generally avoid finding liability for the trade show sponsor absent direct participation in the performance of the copyrighted material. However, a court following *Polygram* would generally find liability for the performance of copyrighted material regardless of action taken by the organizer. Even so, absent a complete ban on all music, a trade show organizer may take steps to minimize liability for the copyright infringements of its exhibitors.

A trade show organizer should draft contracts and enact rules and regulations for exhibitors which are more closely related to landlord/tenant agreements rather than performance agreements. Care should be taken to regulate common areas of the trade show while minimizing authority and control over the four corners of the exhibitor's space.

A distinction may be drawn between activities which provide a detriment to the trade show as a whole, such as the playing of loud music, and activities which provide for freedom of expression, such as the design of an exhibit. In this regard, the option to play music may be regarded as "freedom of expression" which would be outside of the authority and control of the trade show organizer.

Any policy or procedural manual regarding the trade show should unambiguously state that music is not integral to the trade show and that the playing of music is not considered part of the trade show's standard operating procedure. Accordingly, even under the restrictive interpretation of *Polygram*, the trade show organizer would not "actively supervise the operation of the place (the individual exhibit) wherein the performance occurs," thereby minimizing its liability to the copyright owners under theories of vicarious liability.

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PARENT CANNOT LEGALLY CONSPIRE (CONT.)

Judge Garbis discounted the fact that the MAPGA and other regional sections maintain their own-by-laws, elect their own officers, and conduct programs for themselves only. Judge Garbis considered these matters part of the day-to-day aspects of each section's operations. Judge Garbis' analysis focused more broadly on the degree of supremacy exercised by the parent PGA.

He concluded that although the PGA did not control all aspects of the MAPGA's and the other section's activities, the PGA has the right to approve, and, in fact only approved policies and activities by the sections that were in the best interests of the association as a whole. For example, he noted that at one time the MAPGA wanted to create a credit card program for its members, but the PGA rejected it because it would have conflicted with an existing PGA program to benefit the entire organization. In sum, Judge Garbis held that the PGA and the MAPGA acted as one because the PGA and MAPGA have a unity of interest, and because the PGA exercises ultimate control over the MAPGA.

Seabury is a difficult case because the Supreme Court's guidance on the issue is not very clear. It is very difficult to determine whether a parent association exercises sufficient control over its regional or local sections to be considered a single economic entity, and, therefore incapable of conspiring with them.

Association executives should not blithely assume that because they are part of a national organization, affiliated associations may reach agreements to limit areas of trade shows, or engage in other joint economic activities. It is no great comfort to know that absent a federal judge's well-reasoned analysis, an association faced a multi-million dollar judgment. Association executives should consider a parent's relationship with other affiliated associations before engaging in activities that might be considered an unreasonable or monopolistic restraints of trade.

As many association executives know, the promotion and sponsorship of trade shows is a lucrative and important source of non-dues revenue for associations. But, as this case demonstrates, association executives must tread carefully to avoid antitrust disputes or possible liability. Despite the fact the jury verdict was overturned, associations are not out of the woods yet, Seabury has filed an appeal to the U. S. Court of Appeals for the Fourth Circuit, and, we suspect we have not heard the last word on this issue.

For more information, contact Mr. Bricker or Mr. Levy at 305/530-3535. ■