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Television Sponsor and Advertising Agency Held Vicariously Liable for Copyright Infringement—*Davis v. E. I. DuPont de Nemours & Co.**

DuPont sponsored a dramatization of Edith Wharton's novel *Ethan Frome* presented by the CBS television network. Petitioner claimed an infringement of his earlier copyrighted dramatization of the same novel and sought a declaration of liability[1] against CBS, the producer of the program,[2] DuPont, and its advertising agency, Batten, Barton, Durstine & Osborn, Inc. (BBDO). Although DuPont and BBDO were notified before the performance of the possibility of copyright infringement liability and could have stopped the producers from using petitioner's play,[3] they made no attempt to interfere. In petitioner's action in the federal district court, DuPont and BBDO contended that they were not proper parties to any suit for infringement because they had not participated in the production. The court found a "substantial and unfair use"[4] of petitioner's production, and held that all defendants were liable for infringe-

* 240 F. Supp. 612 (S.D.N.Y. 1965) (hereinafter cited as principal case).

1. The case was limited by stipulation of the plaintiff to issues of liability. The district court sat without a jury and made separate findings of fact and conclusions of law in accordance with FED. R. CIV. P. 52. No judgment was entered.

2. Talent Associates, Ltd., was the producer. Also joined as direct participants in the infringement were Talent Associates' officer in charge of the production and the Talent Associates employees who prepared the script.

3. The court found that DuPont had the ultimate power to control the production and exercised that power through its agent, BBDO. Principal case at 631-32.

4. Principal case at 620. This is the controlling test in the Second Circuit for infringement. See, *e.g.*, Nutt v. National Institute Inc. for the Improvement of Memory, 31 F.2d 236 (2d Cir. 1929); *accord*, Comptone Co. v. Rayex Corp., 251 F.2d 487 (2d Cir. 1958); Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99 (2d Cir. 1951). Other jurisdictions have adopted similar standards. See, *e.g.*, Ansehl v. Puritan Pharmaceutical Co., 61 F.2d 131 (8th Cir. 1932).

ment under the Federal Copyright Act.[5] Although DuPont and BBDO had not participated in the production, they were nevertheless held vicariously liable because they had a financial interest in an infringement by parties over whose programming they had the power of control.[6]

The United States Congress, acting under authority granted by the Constitution,[7] has attempted to expand common-law rights in literary property in order to give protection to "every expression of human thought."[8] Yet, although the present Copyright Act provides remedies for infringement, it does not indicate the elements of liability, stipulating only that "if any person shall infringe . . . the copyright laws of the United States," such person shall pay to the copyright proprietor both the profits he has made and the damages caused by the infringement.[9] Consequently, the meaning read by the courts into the statutory language, "if any person shall infringe," has largely established the basis for determining who will be held legally responsible under the act. The court in the principal case employed two different bases for liability. First, because the producers and CBS had participated directly in the infringement, the court held them *strictly* liable, and did not require petitioners to show fault. Second, although DuPont and BBDO had not participated in the infringement, they were nevertheless held *vicariously* liable because of their power of control over the production and their financial interest in the infringing program. The following discussion will consider the applicability of these two bases of liability to copyright infringement[10] and the policy of holding sponsors liable for the content of television programs.

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5. 17 U.S.C. §§ 1-216 (1964).

6. Principal case at 632.

7. U.S. CONST. art. 1, § 8, cl. 8.

8. Greco, *Copyright Protection and Radio Broadcasting*, 3 LA. L. REV. 200, 201 (1940). See generally WEIL, AMERICAN COPYRIGHT LAW 174 (1917); 54 YALE L.J. 697 (1945).

9. 17 U.S.C. § 101 (1964): "If any person shall infringe the copyright in any work protected under the copyright laws of the United States such person shall be liable . . . to an injunction restraining such infringement [and] . . . to pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits which the infringer shall have made from such infringement . . . or in lieu of actual damages and profits, such damages as to the court shall appear to be just . . . ."

10. Courts have also imposed liability on parties who have induced others to infringe, deeming them contributory infringers. See, *e.g.*, Reeve Music Co. v. Crest Records, Inc., 285 F.2d 546 (2d Cir. 1960). This liability has generally been invoked when the inducer sold the infringing work to another person who subsequently made public use of it. Universal Pictures Co. v. Harold Lloyd Corp., 162 F.2d 354 (9th Cir. 1947). Although this appears to be basically another form of participation, lack of intent that the work be put to an infringing use has been considered a valid defense. Harper & Bros. v. Kalem Co., 169 Fed. 61 (2d Cir. 1909), *aff'd*, 222 U.S. 55 (1911).

It has been suggested that vicarious liability is merely a form of what should be a broader concept of contributory infringement and should be equated with the field

I. Bases of Copyright Liability

A. *Strict Liability*

Courts have generally held that fault is not required for liability under section 101, the infringement provision, and that anyone who participates in an infringing work or performance is liable as an infringer.[11] Consequently, the producer of an infringing radio program has been held jointly and severally liable[12] with the station broadcasting it,[13] regardless of their mutual innocence or good faith.[14] Although critics of this policy of strict liability have pointed to its harshness on innocent infringers,[15] most courts have felt that strict liability is a desirable means of holding responsible the party with the ability to inquire into the nature of the infringing activity[16] and to insure against it.[17]

The courts have justified liability without fault under the Copyright Act by drawing analogies with the substantive common law of

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of contributory patent infringement. However, since this theory has not been articulated clearly and as yet has little if any support in precedent, it is not dealt with in this note.

11. *E.g.*, Gross v. Van Dyk Gravure Co., 230 Fed. 412 (2d Cir. 1916); Greenbie v. Noble, 151 F. Supp. 45 (S.D.N.Y. 1957); Fleischer Studios, Inc. v. Ralph A. Freundlich, Inc., 14 F. Supp. 401 (S.D.N.Y. 1936). *But see* Barry v. Hughes, 103 F.2d 427 (2d Cir.), *cert. denied*, 308 U.S. 604 (1939).

12. Copyright infringement is a tort, and proof of the infringement leads to joint and several liability of all defendants. See Gross v. Van Dyk Gravure Co., *supra* note 11; Harris v. Miller, 50 U.S.P.Q. 306 (S.D.N.Y. 1941); Howell, Copyright Law 179 (rev. ed. Latman 1962); Note, *Monetary Recovery for Copyright Infringement*, 67 Harv. L. Rev. 1044, 1051-52 (1954).

13. Select Theatres Corp. v. Ronzoni Macaroni Co., 59 U.S.P.Q. 288 (S.D.N.Y. 1943).

14. See, *e.g.*, Shapiro, Bernstein & Co. v. H. L. Green Co., 316 F.2d 304 (2d Cir. 1963); M. Witmark & Sons v. Tremont Social & Athletic Club, 188 F. Supp. 787 (D. Mass. 1960); R. R. Donnelley & Sons v. Haber, 43 F. Supp. 456 (E.D.N.Y. 1942); Norm Co. v. John A. Brown Co., 26 F. Supp. 707 (W.D. Okla. 1939); M. Witmark & Sons v. Calloway, 22 F.2d 412 (E.D. Tenn. 1927).

15. See Barry v. Hughes, 103 F.2d 427 (2d Cir.), *cert. denied*, 308 U.S. 604 (1939); Chafee, *Reflections on the Law of Copyright*, 45 Colum L. Rev. 503, 526-27 (1945); *cf.* De Acosta v. Brown, 146 F.2d 408, 413 (2d Cir. 1944) (L. Hand, J., dissenting), *cert. denied*, 325 U.S. 862 (1945); Fendler v. Morosco, 253 N.Y. 281, 171 N.E. 56 (1930).

16. See Shapiro, Bernstein & Co. v. Goody, 248 F.2d 260, 264 (2d Cir. 1957), *cert. denied*, 355 U.S. 952 (1958); Khan v. Leo Feist, Inc., 78 F. Supp. 754, 755 (S.D.N.Y. 1948). See also Letter From Melville B. Nimmer to the Copyright Office, June 16, 1958, in Studies Prepared for Subcommittee on Patents, Trademarks, and Copyrights of the Senate Comm. on the Judiciary, 86th Cong., 2d Sess., Copyright Law Revision Studies Nos. 22-25, at 169 (Comm. Print 1960).

17. "It is the innocent infringer who must suffer, since he, unlike the copyright owner . . . has . . . the ability to guard against the infringement (by an indemnity agreement . . . and/or by insurance)." Letter From Melville B. Nimmer, *supra* note 16. See also Variety, Oct. 16, 1957, p. 63, col. 1 (reporting growth in demand for indemnity agreements). *But cf.* 2 Harper & James, Torts § 26.1, at 1362 n.1 (1956) (indemnity is generally not pursued in master-servant application of vicarious liability). Several courts have also been influenced by the desire to burden enterprises with the losses caused by the risks they create. See Shapiro, Bernstein & Co. v. H. L. Green Co., 316 F.2d 304 (2d Cir. 1963); De Acosta v. Brown, 146 F.2d 408, 411-12 (2d Cir. 1944), *cert. denied*, 325 U.S. 862 (1945).

copyright infringement[18] and conversion of property.[19] Moreover, indications of congressional intent to impose strict liability may be found in the Copyright Act. Sections 1(c)[20] and 101(b)[21] of the act contain limitations on the liability of certain parties who show that they were not aware, and could not have reasonably known, of their infringement. Furthermore, section 21 protects an infringer's "reasonable outlay innocently incurred" when the copyright notice has been inadvertently omitted from a particular copy of a work.[22] Were innocent infringers already immune from liability, there presumably would be no need to give them this statutory protection.

The legislative history of the Copyright Act also supports the inference that Congress intended to impose strict liability. Until the adoption of the present Copyright Act in 1909, the seller of an infringing work was not liable unless he knew that it was printed without consent,[23] but innocence was not generally considered a defense to an action for infringement.[24] There is evidence that those participating in the drafting and enactment of the 1909 act realized this situation.[25] Nevertheless, the 1909 statute added no broad provisions excusing innocent infringers; indeed, it eliminated the provision in earlier statutes expressly protecting the innocent seller.

B. *Vicarious Liability*

There appears to be nothing in the Copyright Act or in its legislative history to indicate a congressional policy favoring the imposition of vicarious liability. Because liability without fault for the copyright infringement of others had not yet been applied by the courts,[26] vicarious liability was not a subject of debate in the

18. Intent was not necessary for liability for common-law infringement of copyright. American Press Ass'n v. Daily Story Pub. Co., 120 Fed. 766 (7th Cir. 1902), *appeal dismissed*, 193 U.S. 675 (1904); Norris v. No-Leak-O Piston Ring Co., 271 Fed. 536 (D. Md.), *aff'd*, 277 Fed. 951 (4th Cir. 1921). See generally 54 YALE L.J. 697 (1945).

19. See American Press Ass'n v. Daily Story Pub. Co., *supra* note 18, at 768; *cf.* RESTATEMENT (SECOND), TORTS § 222A (1965); De Acosta v. Brown, 146 F.2d 408, 412 (2d Cir. 1944), *cert. denied*, 325 U.S. 862 (1945): "But 'torts' is a broad field of law; and while the doctrine [of fault] may apply to negligence, it does not apply to conversion or appropriation."

20. 17 U.S.C. § 1(c) (1964) (protecting the delivery of a nondramatic literary work).

21. 17 U.S.C. § 101(b) (1964).

22. 17 U.S.C. § 21 (1964).

23. See 1 Stat. 124 (1790); 16 Stat. 214 (1870).

24. See DRONE, PROPERTY 401-03 (1879).

25. See *Hearings on H.R. 19853 and S. 6330 Before the Committees on Patents of the Senate and House of Representatives*, Conjointly, 59th Cong., 1st Sess. 49 (1906).

26. In several cases decided prior to the adoption of the present Copyright Act, employers were deemed to be liable for the infringing acts of their employees only if they could be charged with knowledge of the infringement. See Trow Directory, Printing & Bookbinding Co. v. Boyd, 97 Fed. 586 (C.C. S.D.N.Y. 1899); West Publishing Co. v. Lawyers' Co-op. Publishing Co., 79 Fed. 756 (2d Cir. 1897). A principal may not be subjected to penalties and forfeitures, designed in part as punishment for an offense,

drafting of the 1909 act.[27] Since that time, however, courts have been influenced by the same policy considerations that have encouraged them generally to ignore the innocence of infringers,[28] and they have employed vicarious liability to broaden further the area of accountability for infringement.

The first parties to be held vicariously liable under the Copyright Act were owners of night clubs, dance halls, and amusement theatres in which there were unauthorized performances of copyrighted songs.[29] It was apparent that the protection accorded literary property would be diminished if these proprietors could insulate themselves from liability for damages by merely avoiding inquiry into the nature of the performance at their establishments, since the only recourse left to the copyright owner would be against the performer.[30] The courts also felt that the owners of the establishments could spread the burden of the risk of infringement by either obtaining liability insurance or seeking indemnity from the performers.[31]

To hold these owners of entertainment establishments liable, the courts relied on common-law agency theory. The performers were held to be either servants acting within the scope of their authority[32] or agents implicitly authorized by the establishment proprietors to engage in the performance which constituted the infringement.[33]

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by an unauthorized copyright infringement of his agent. See McDonald v. Hearst, 95 Fed. 656 (N.D. Cal. 1899).

27. For a history of strict and vicarious liability in copyright legislation, see LATMAN & TAGER, LIABILITY OF INNOCENT INFRINGERS OF COPYRIGHTS (U.S. Copyright Office General Revision of the Copyright Law Study No. 8, 1958).

28. See Shapiro, Bernstein & Co. v. H. L. Green Co., 316 F.2d 304, 308 (2d Cir. 1963): "For much the same reasons, the imposition of *vicarious* liability in the case before us cannot be deemed unduly harsh or unfair." See also M. Witmark & Sons v. Tremont Social & Athletic Club, 188 F. Supp. 787 (D. Mass. 1960); Buck v. Pettijohn, 34 F. Supp. 968 (E.D. Tenn. 1940).

29. *E.g.*, M. Witmark & Sons v. Calloway, 22 F.2d 412 (E.D. Tenn. 1927); M. Witmark & Sons v. Pastime Amusement Co., 298 Fed. 470 (E.D.S.C. 1924); Harms v. Cohen, 279 Fed. 276 (E.D. Pa. 1922).

30. For discussion of the policy of imposing vicarious liability in these cases, see Shapiro, Bernstein & Co. v. H. L. Green Co., 316 F.2d 304 (2d Cir. 1963); De Acosta v. Brown, 146 F.2d 408, 412 (2d Cir. 1944), *cert. denied*, 325 U.S. 862 (1945).

31. See M. Witmark & Sons v. Tremont Social & Athletic Club, 188 F. Supp. 787 (D. Mass. 1960); Remick Music Corp. v. Interstate Hotel Co., 58 F. Supp. 523 (D. Neb. 1944), *aff'd*, 157 F.2d 744 (8th Cir. 1946). Shapiro, Bernstein & Co. v. Goody, 248 F.2d 260 (2d Cir. 1957), *cert. denied*, 355 U.S. 952 (1958), holding a department store owner liable for an infringement by its concessionaire, had the following effect: "A flock of retailers and chain stores . . . notified disk companies that they [would] . . . not handle any disks from any company without indemnification or other guarantees that they [would] . . . not be responsible for disks . . . not licensed by publishers." Variety, Oct. 16, 1957, p. 63, col. 1.

32. Shapiro, Bernstein & Co. v. Veltin, 47 F. Supp. 648 (W.D. La. 1942); M. Witmark & Sons v. Calloway, 22 F.2d 412 (E.D. Tenn. 1927).

33. M. Witmark & Sons v. Pastime Amusement Co., 298 Fed. 470 (E.D.S.C. 1924); Harms v. Cohen, 279 Fed. 276 (E.D. Pa. 1922). For a discussion of the applicability of the rule of *respondeat superior* in these cases and the cases cited in note 32 *supra*, see SEAVEY, AGENCY §§ 91-93 (1964).

Most of the holdings were difficult to justify, since the performer usually appeared to be an independent contractor with an absolute right to choose his own material. Consequently, still convinced that it was desirable to hold the proprietors liable, judges abandoned the agency theory for the more flexible "right to control coupled with a financial interest" test for imposing vicarious liability for infringement.[34] Under this test, a department store with a financial interest in the sale by its concessionaire of infringing phonograph records has been held liable.[35] However, a landlord with no financial interest in the infringing activities of his tenant,[36] and a radio advertiser with a financial interest in, but no right to control, the selection of records on its program,[37] have been exonerated for the infringements to which they did not contribute.

It is questionable whether this test for vicarious liability effectuates any congressional intention found in or inferable from the Copyright Act. It is true that the requirement of "financial interest" has some statutory relevance in cases involving infringements of musical compositions or non-dramatic literary productions. The Copyright Act gives holders of copyrights on these works the exclusive right to perform them "in public for profit";[38] thus, profit is a necessary requisite for an infringement of the protected right.[39] Testing a party's financial interest in an infringement seems tantamount to judging whether he is seeking a profit, yet the "financial interest" test inquires into the profit sought by the particular party charged with vicarious liability. In this respect, it differs substantially from the "for profit" test set by the Copyright Act, which has been held not to require that the profit sought by individual infringers be shown.[40] Furthermore, Congress has developed a different rule to protect dramatic works, such as that of the petitioner in the principal case. These works are protected against *any* unauthorized public performance, regardless of whether profit is sought.[41] Thus, "financial interest" has no relation to the provisions of the

34. Apparently the first case to employ these criteria was Irving Berlin, Inc. v. Daigle, 26 F.2d 149 (E.D. La. 1928), *rev'd on other grounds*, 31 F.2d 832 (5th Cir. 1929). See also Shapiro, Bernstein & Co. v. H. L. Green Co., 316 F.2d 304 (2d Cir. 1963); Dreamland Ball Room, Inc. v. Shapiro, Bernstein & Co., 36 F.2d 354 (7th Cir. 1929); M. Witmark & Sons v. Tremont Social & Athletic Club, 188 F. Supp. 787 (D. Mass. 1960); Buck v. Pettijohn, 34 F. Supp. 968 (E.D. Tenn. 1940).

35. Shapiro, Bernstein & Co. v. H. L. Green Co., *supra* note 34.

36. Deutsch v. Arnold, 98 F.2d 686 (2d Cir. 1938).

37. National Ass'n of Performing Artists v. Wm. Penn Broadcasting Co., 38 F. Supp. 531 (E.D. Pa. 1941).

38. 17 U.S.C. §§ 1(c), (e) (1964).

39. See Famous Music Corp. v. Melz, 28 F. Supp. 767 (W.D. La. 1939); M. Witmark & Sons v. Pastime Amusement Co., 298 Fed. 470 (E.D.S.C. 1924).

40. See Associated Music Publishers, Inc. v. Debs Memorial Radio Fund, Inc., 141 F.2d 852 (2d Cir.), *cert. denied*, 323 U.S. 766 (1944); Universal Pictures Co. v. Harold Lloyd Corp., 162 F.2d 354 (9th Cir. 1947).

41. 17 U.S.C. § 1(d) (1964).

Copyright Act in cases involving dramatic works. This distinction between the protection given dramatic performances and that given other types of performances has been the subject of extensive congressional debate,[42] but it is apparent from the present wording of the statute that Congress intends the distinction to be maintained.

The "right to control" also bears no apparent relation to the terms of the Copyright Act. This requirement is usually applied to justify vicarious liability in agency cases,[43] but it has been applied in copyright infringement situations, such as the principal case, where it is clear that no form of agency exists between the actual infringers and the parties held vicariously liable.[44] The courts have made no attempt to support these holdings by reference either to the Copyright Act or to congressional intent. Consequently, the justification for the "right to control coupled with a financial interest" test in copyright litigation remains unclear.

II. Application of Vicarious Liability to Television Sponsors

Not only is it difficult to support the imposition of vicarious liability in the principal case by the provisions of the Copyright Act; there would also appear to be little policy basis for imposing such liability on television sponsors. Most television programs today are controlled by their producers under the supervision of the networks.[45] A sponsor's only contact with the program is usually through an advertising agency, and he ordinarily has little opportunity to "police" the production;[46] nevertheless, the principal case indicates

42. See, *e.g.*, H.R. Rep. No. 2222, 60th Cong., 2d Sess. 4 (1909). See generally Varmer, Limitations on Performing Rights (U.S. Copyright Office General Revision of the Copyright Law Study No. 16, 1958).

43. "Right to control" is an essential element of a master-servant relationship. Mechem, Agency § 13 (4th ed. 1952); Seavey, Agency § 6 (1964).

44. See, *e.g.*, Shapiro, Bernstein & Co. v. H. L. Green Co., 316 F.2d 304 (2d Cir. 1963), in which a chain store owner was held liable for infringement by a phonograph record concessionaire who had licensed an area in the store in which to play its records. In reversing a district court holding that the owner was not liable, the court noted: "Realistically, the courts have not drawn a rigid line between the strict cases of agency, and those of independent contract, license, and lease." *Id.* at 307. See also cases cited *supra* note 34. The courts in all of these cases held that proprietors could not escape infringement liability on the ground that the performer was an independent contractor.

45. Of course, there are some instances where the sponsor owns and produces his own show. See Kennedy, *Programming Content and Quality*, 22 Law & Contemp. Prob. 541 (1957). However, at the present time producers are usually engaged by the networks, which in turn have extensive control over the programs. See Senate Committee on Interstate and Foreign Commerce, 84th Cong., 2d Sess., The Network Monopoly (Comm. Print 1956) (prepared by Senator Bricker); Sponsor, May 17, 1965, p. 42 (networks now control 93.1% of "prime time" on television); *id.*, Nov. 16, 1964, p. 12 (too much network control over programming).

46. In the principal case, DuPont's only apparent contacts with the show occurred when it received a copy of the script, and when the advertising agents attended story conferences. Principal case at 631-32.

for the first time that a sponsor may be held liable for a television program's copyright infringement.[47] Since even co-sponsors and time buyers[48] have some *rights* of control,[49] as well as a financial interest in the popularity of the program, it is possible that they too could be held liable under the test utilized in the principal case.[50] Sponsors and time buyers can of course protect themselves from such liability either by purchasing liability insurance or by constantly supervising the program content. Increased outside supervision of program content, however, would be a hindrance to production.[51] Furthermore, the duty to supervise and insure would be especially burdensome to time buyers, who constitute a large segment of television's advertising market and who typically operate on a small advertising budget.

It would appear most equitable to place the entire risk of copyright infringement on the networks and producers rather than on the sponsors. Networks and producers are clearly liable under the Copyright Act as direct participants in infringements on their programs.[52] Since they exercise extensive control over programming, the networks can continue to police the content of the shows with-

47. A sponsor has previously been held liable when it engaged the infringing performance itself. Select Theatres Corp. v. Ronzoni Macaroni Co., 59 U.S.P.Q. 288 (S.D.N.Y. 1943). Another sponsor has been held liable when its own radio and television advertisement caused an infringement. Robertson v. Batten, Barton, Durstine & Osborn, Inc., 146 F. Supp. 795 (S.D. Cal. 1956). However, no prior authority has been found holding sponsors vicariously liable for television or radio program content.

48. "Time buyers" are advertisers who merely buy the rights to a certain amount of time on a particular program, during which time they present their advertisement.

49. Multiple sponsorship clearly dilutes the power of each advertiser, and there are "many differences and degrees" in the right of different advertisers to exercise control over the actual content of a program. Sponsor, Aug. 3, 1964, p. 27. All have the right, however, to protect against activities threatening their interest in the program. See SETTEL & GLENN, TELEVISION ADVERTISING AND PRODUCTION HANDBOOK 277-78 (1953).

50. If the "right to control coupled with a financial interest" test used in the principal case is generally adopted, there is no reason why courts could not also make sponsors responsible under that test for defamation on the program. Vicarious liability has been applied in defamation cases, but to date the holdings in such cases have rested on common-law agency theory. See, *e.g.*, Rosenberg v. J. C. Penney Co., 30 Cal. App. 2d 609, 86 P.2d 696 (Dist. Ct. App. 1939); Magidson v. Bloom, 170 Misc. 832, 11 N.Y.S.2d 324 (N.Y. City Ct. 1939).

51. Sponsors faced with the threat of liability would be likely to seek indemnity from the advertising agencies, thus putting the duty of surveillance of program content squarely on the agencies. It would seem more logical to impose the liability on advertising agencies, rather than on sponsors, since the agencies have greater contact with the production and are under a duty to protect the sponsor's interest. However, extensive agency interference with program content has received severe criticism from producers, who claim that it prevents efficient production. See Sponsor, July 15, 1963, p. 33.

52. The networks' broadcasting of programs constitutes participation in the infringement and renders them strictly liable. See Associated Music Publishers, Inc. v. Debs Memorial Radio Fund, Inc., 141 F.2d 852 (2d Cir. 1944); Select Theatres Corp. v. Ronzoni Macaroni Co., 59 U.S.P.Q. 288 (S.D.N.Y. 1943). Once infringement was found in the instant case, the liability of CBS was conceded.

out upsetting present practices in the industry. Also, networks can acquire protection by securing broad liability coverage, and can demand indemnity from their producers. The dearth of litigation in the area seems to indicate that the safeguards currently employed by the networks and the producers have been generally successful in preventing copyright infringement on television programs. There is consequently no apparent reason to burden the sponsor with liability by invoking the questionable "right to control coupled with a financial interest" test for vicarious liability under the Copyright Act.

The particular circumstances in the principal case may help to explain the decision to impose liability on the sponsor. The court noted that DuPont had failed to uphold its "duty to exercise [its] ... power so as to insure against copyright infringement"[53] after having been informed of the potential infringement.[54] The court did not find this "duty" in the Copyright Act; instead, it seems to have concluded that DuPont's failure to act was essentially a common-law tort.[55] If this was the actual basis for the decision, however, the court should have made this clear rather than invoking a theory of vicarious liability to try to bring DuPont within the scope of the Copyright Act.

III. Conclusion

Courts have provided extensive protection for copyrighted works by imposing both strict and vicarious liability for copyright infringement. Strict liability appears consonant with both congressional intent and sound policy. Vicarious liability, however, has been extended beyond cases where actual agency is shown in an attempt to impose a duty of surveillance on proprietors in whose establishments copyright infringement by performing artists is likely to occur.[56] The "right to control coupled with a financial interest" test consequently adopted by many courts bears little relation to the Copyright Act, and lacks a sound policy basis when applied to television sponsors. The difficulties created by imposing vicarious liability upon sponsors, and the apparent preferability of imposing the entire liability for infringement upon producers and networks, indicate that the holding in the principal case should be reexamined.

53. Principal case at 632.

54. *Id.* at 631-32.

55. It is not clear from the opinion whether the court considered the breach of duty intentional or negligent.

56. See text accompanying notes 29-37 *supra.*