SHAPIRO, BERNSTEIN & CO., Inc., et al.
v.
H. L. GREEN COMPANY, Inc.,
JALEN AMUSEMENT COMPANY, Inc.,

316 F.2d 304 (2d Cir. 1963)

OPINION BY: KAUFMAN

. . .The plaintiffs in the court below, appellants here, are the copyright proprietors of several musical compositions, recordings of which have met with considerable popularity, especially amongst the younger set. The defendant Jalen Amusement Company, **[**2]** Inc. was charged in the complaint with having infringed the copyrights on these songs by manufacturing records, close copies of the 'hit-type' authorized records of major record manufacturers in violation of *17 U.S.C. ß 101(e)*: **[*306]** 'in the absence of a license agreement' with the plaintiffs and without having served upon them a notice of intention 'to use a copyrighted musical composition upon the parts of instruments serving to reproduce mechanically the musical work.'

Jalen operated the phonograph record department as concessionaire in twenty-three stores of defendant H. L. Green Co., Inc., pursuant to written licenses from the Green Company. The complaint alleged that Green was liable for copyrights infringement because it 'sold, or contributed to and participated actively in the sale of the so-called 'bootleg' records manufactured by Jalen and sold by Jalen in the Green stores.

The District Judge, after trial, found Jalen liable as manufacturer of the 'bootleg' records, and imposed a liability for the statutory royalty of two cents for each record which reproduced one of the plaintiffs' copyrighted compositions, and a further sum of six cents **[**3]** per record as damages. He concluded, however, that Green had not sold any of the phonograph records and was not liable for any sales made by Jalen; he accordingly dismissed the complaint as to Green. Jalen takes no appeal, but plaintiffs come before us to challenge the dismissal of the claims asserted against Green. The validity of those claims depends upon a detailed examination of the relationship between Green and the conceded infringer Jalen.

At the time of suit, Jalen had been operating under license from Green the phonograph record department in twenty-three of its stores, in some for as long as thirteen years. The licensing agreements provided that Jalen and its employees were to 'abide by, observe and obey all rules and regulations promulgated from time to time by H. L. Green Company, Inc. * * *' Green, in its 'unreviewable discretion', had the authority to discharge any employee believed to be conducting himself improperly. Jalen, in turn, agreed to save Green harmless from any claims arising in connection with the conduct of the phonograph record concession. Significantly, the licenses provided that Green was to receive a percentage -- in some cases 10%, in others **[**4]** 12% -- of Jalen's gross receipts from the sale of records, as its full compensation as licensor.

In the actual day-to-day functioning of the record department, Jalen ordered and purchased all records, was billed for them, and paid for them. All sales were made by Jalen employees, who, as the District Court found, were under the effective control and supervision of Jalen. All of the daily proceeds from record sales went into Green's cash registers and were removed therefrom by the cashier of the store. At regular accounting periods, Green deducted its 10% Or 12% Commission and de-

ducted the salaries of the Jalen employees, which salaries were handed over by the Green cashier to one of Jalen's employees to be distributed to the others. Social security and withholding taxes were withheld from the salaries of the employees by Green, and the withholdings then turned over to Jalen. Only then was the balance of the gross receipts of the record department given to Jalen. Customers purchasing records were given a receipt on a printed form marked 'H. L. Green Company, Inc.'; Jalen's name was wholly absent from the premises. The District Judge found that Green did not actively participate **[**5]** in the sale of the records and that it had no knowledge of the unauthorized manufacture of the records.

When a District Court's determination of infringement hinges upon such purely factual questions as whether the defendant had access to the plaintiff's copyrighted materials and whether the physical acts of copying or selling actually occurred, the scope of review on appeal is limited to determining if the District Court's conclusions are clearly erroneous. *Rosen v. Loew's, Inc., 162 F.2d 785 (2d Cir. 1947)*; *Arnstein v.* **[*307]** *Porter, 154 F.2d 464, 469 (2d Cir. 1946)*. But where, as here, the facts are undisputed, and the issue of infringement depends merely upon a legal conclusion to be drawn from a consideration of the parties' relationship, we feel that an appellate court's power of review need not be so constrained. On the facts before us, therefore, we hold that appellee Green is liable for the sale of the infringing 'bootleg' records, and we therefore reverse the judgment dismissing the complaint and remand for a determination of damages.

[6]** *Section 101(e)* of the Copyright Act makes unlawful the 'unauthorized manufacture, use, or sale' of phonograph records. Because of the open-ended terminology of the section, and the related *section 1(e)*, courts have had to trace, case by case, a pattern of business relationships which would render one person liable for the infringing conduct of another. It is quite clear, for example, that the normal agency rule of respondeat superior applies to copyright infringement by a servant within the scope of his employment. See, e.g., *M. Witmark & Sons v. Calloway, 22 F.2d 412, 414 (E.D.Tenn.1927)*. Realistically, the courts have not drawn a rigid line between the strict cases of agency, and those of independent contract, license, and lease. Many of the elements which have given rise to the doctrine of respondeat superior, see Seavey, Studies in Agency, 145-53 (1949), may also be evident in factual settings other **[**7]** than that of a technical employer-employee relationship. 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 monolpoly is being impaired -- the purposes of copyright law may be best effectuated by the imposition of liability upon the beneficiary of that exploitation.

The two lines of precedent most nearly relevant to the case before us are those which deal, on the one hand, with the landlord leasing his property at a fixed rental to a tenant who engages in copyright-infringing conduct on the leased premises and, on the other hand, the proprietor or manager of a dance hall or music hall leasing his premises to or hiring a dance band, which brings in customers and profits to the proprietor by performing copyrighted music but without complying with the terms of the Copyright Act. If the landlord lets his premises without knowledge of the impending infringement **[**8]** by his tenant, exercises no supervision over him, charges a fixed rental and receives no other benefit from the infringement, and contributes in no way to it, it has been held that the landlord is not liable for his tenant's wrongdoing. See *Deutsch v. Arnold, 98 F.2d 686 (2d Cir. 1938)*; cf. *Fromont v. Aeolian Co., 254 F. 592 (S.D.N.Y.1918)*. But, the 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, and whether or not the proprietor has knowledge of the compositions to be played or any control over their selection. See *Buck v. Jewell-LaSalle Realty Co., 283 U.S. 191, 198-199, 51 S.Ct. 410, 75 L.Ed. 971 (1931)*; [remainder of string citation omitted]

We believe that the principle which can be extracted from the dance hall cases is a sound one and, under the facts of the cases before us, is here applicable. Those cases and this one lie closer on the spectrum to the employer-employee model than to the landlord-tenant model. Green licensed one facet of its variegated business enterprise, for some thirteen years, to the Jalen Amusement **[**10]** Company. Green retained the ultimate right of supervision over the conduct of the record concession and its employees. By reserving for itself a proportionate share of the gross receipts from Jalen's sales of phonograph records, Green had a most definite financial interest in the success of Jalen's concession; 10% Or 12% Of the sales price of every record sold by Jalen, whether 'bootleg' or legitimate, found its way -- both literally and figuratively -- into the coffers of the Green Company. We therefore conclude, on the particular facts before us, that Green's relationship to its infringing licensee, as well as its strong concern for the financial success of the phonograph record concession, renders it liable for the unauthorized sales of the 'bootleg' records.

The imposition of liability upon the Green Company, even in the absence of an intention to infringe or knowledge of infringement, is not unusual. . . . While there have been some complaints concerning the harshness of the principle of strict liability in copyright law, courts have consistently refused to honor the defense of absence of knowledge or intention. The reasons have been variously stated. 'The protection accorded literary property would be of little value if * * * insulation from payment of damages could be secured * * * by merely refraining from making inquiry.' *De Acosta v. Brown, 146 F.2d at 412*. 'It is the innocent infringer who must suffer, since he, unlike the copyright owner, either has an opportunity to guard against the infringement (by diligent inquiry), or at least the ability to guard against the infringement (by an indemnity agreement **[**12]** * * * and/or by insurance).'

For much the same reasons, the imposition of vicarious liability in the case before us cannot be deemed unduly harsh or unfair. Green has the power to police carefully the conduct of its concessionaire Jalen; our judgment will simply encourage it to do so, thus placing responsibility where it can and should be effectively exercised. Green's burden will not be unlike that quite commonly imposed upon publishers, printers, and vendors of copyrighted materials. Indeed, the record in this case reveals that the 'bootleg' recordings were somewhat suspicious on their face; they bore no name **[**13]** of any manufacturer upon the labels or on the record jackets, as is customary in the trade. Moreover, plaintiffs' agent and attorneys wrote to Green in March and April 1958, requesting information regarding certain of the 'bootleg' records and finally, upon receiving no reply from Green, threatening to institute suit for copyright infringement. The suit was in fact commenced the following month. Although these last-recited facts are not essential to our holding of copyright infringement by Green, they reinforce our conclusion that in many cases, the party found strictly liable is in a position to police the conduct of the 'primary' infringer. Were we to hold otherwise, we might foresee the prospect -- not wholly unreal -- of large chain and department stores establishing 'dummy' concessions and shielding their own eyes from the possibility of copyright infringement, thus creating a buffer against liability while reaping the proceeds of infringement.

Even if a fairly constant system of surveillance is thought too burdensome, Green is in the position to safeguard itself in a less arduous manner against liability resulting from the conduct of its concessionaires. It has in fact **[**14]** done so, by incorporating a save-harmless provision in its licensing agreements with Jalen. Surely the beneficent purposes of the copyright law would be advanced by placing the jeopardy of Jalen's insolvency upon Green rather than upon the proprietor of the copyright. . . .

Reversed and remanded.