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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

ADOBE SYSTEMS INCORPORATED, ) Case No. CV 00-02963 DDP (AJWx)  
a Delaware corporation, )  
 )  
Plaintiff, ) **ORDER DENYING MOTION FOR PARTIAL**  
 ) **SUMMARY JUDGMENT AND PERMANENT**  
v. ) **INJUNCTION**  
 )  
CANUS PRODUCTIONS, INC., )  
et al., ) [Motion filed on 8/21/01]  
 )  
Defendants. )  
 )

This matter comes before the Court on the plaintiff's motion for partial summary judgment and a permanent injunction. After reviewing and considering the materials submitted by the parties, and hearing oral argument, the Court adopts the following order.

**I. Background**

Adobe Systems Incorporated ("Adobe") is a leading software development and publishing company. The defendants Canus Productions, Inc., National Productions, Inc., and Computer Marketplace (collectively "National") are the proprietors of a

1 number of weekly computer fairs located primarily in southern  
2 California. Defendant Robert Kushner ("Kushner") is the founder  
3 and president of National. In this case, under the principles of  
4 vicarious liability and contributory infringement, Adobe seeks to  
5 hold National and Kushner liable for the sale of unauthorized Adobe  
6 software by vendors at National's computer shows.

7 National's computer shows offer computer hardware and software  
8 through individual vendors, each of whom contracts with National to  
9 secure a booth at the shows. National's larger shows, such as the  
10 Pomona Computer Fair, average up to 15,000 attendees per weekend.  
11 General admission fees range from free to \$7 per person and are  
12 collected by National employees upon a customer's entrance to the  
13 show. Up to 90% of National's profits from the shows comes from  
14 admission fees and the booth fees charged to individual vendors.  
15 Once contracted, the vendors are free to distribute any computer-  
16 related products they choose. Each vendor signs a separate  
17 contract with National which provides, among other things, that  
18 "NPI [National] reserves the right to eject or cause to be ejected  
19 from the premises any objectionable person or persons." (Van  
20 Voorhis Decl., Ex. 2 at 60.) National does not receive a share of  
21 profits from any individual vendor. National provides some  
22 internal security for the computer fairs, as well as more extensive  
23 external security to monitor the entrances and the perimeter.

24 In April 1996, Adobe's counsel sent a letter to National  
25 describing the alleged infringing activities taking place at  
26 National's shows and requesting that National ensure that vendors  
27 selling unauthorized Adobe products would be ejected. Adobe  
28 alleges that National took no action at that time. Subsequently,

1 Adobe representatives went to the Pomona Computer Fair in March  
2 1999, and attempted to hand out flyers to attendees which stated  
3 that unauthorized Adobe products were being distributed at the  
4 show. National ejected these Adobe representatives from the  
5 premises, and informed Adobe that it was required to buy a booth in  
6 order to present flyers. According to National, Adobe was ejected  
7 because the activities of its representatives interfered with  
8 access to the entrances and posed a potential fire hazard. (Romo  
9 Decl. at p. 2.)

10       It is undisputed that on July 17, 1999, Adobe and the U.S.  
11 Marshal seized over one hundred units of various "unauthorized"  
12 Adobe software from a National show. The seized items included  
13 boxes containing genuine software manufactured by Adobe but with  
14 "Educational" or "Not-For-Resale" stickers removed or covered with  
15 a "Sale" or plain white sticker. The defendants do not raise the  
16 issue of whether these unauthorized products constitute copyright  
17 infringement. Adobe asserts that they do. Although the Court is  
18 somewhat dubious of Adobe's contention, the Court finds that this  
19 issue is not the focus of the motion and is best reserved for  
20 another day. The Court, therefore, will accept this argument as  
21 valid for purposes of the instant motion only. Adobe has also  
22 presented evidence that pirated software was seized, such as CD-  
23 ROMs in jewel cases with homemade product description jackets.  
24 Adobe contends, and National denies, that unauthorized Adobe  
25 products continue to be distributed at National's computer shows.

26       Adobe filed suit against National on March 23, 2000. Adobe  
27 now moves the Court for summary judgment on three claims in the  
28 First Amended Complaint: (1) that National, as proprietor of the

1 Pomona Computer Fair and other local computer fairs, is vicariously  
2 liable for copyright infringement in that National obtained a  
3 direct financial benefit from the unauthorized distribution of  
4 Adobe software and had control over the premises at which the  
5 infringing activities took place; (2) that National is liable for  
6 contributory infringement of Adobe's copyrights in that National  
7 knowingly provided a means for individual vendors to distribute  
8 Adobe software; and (3) that Kushner is liable for infringing acts  
9 of National under principles of agency and/or alter ego liability.

10 Adobe moves to permanently enjoin National from allowing  
11 individual vendors at any National-sponsored computer fair to  
12 distribute Adobe software, including Adobe software that National  
13 knows or should know to be unauthorized. Adobe also moves to  
14 enjoin National from ejecting from any National computer fair any  
15 Adobe employee or agent who has paid an admission fee.

16

## 17 **II. Discussion**

### 18 **A. Legal Standard for Summary Judgment**

19 Summary judgment is appropriate where "there is no genuine  
20 issue as to any material fact and . . . the moving party is  
21 entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).  
22 A genuine issue exists if "the evidence is such that a reasonable  
23 jury could return a verdict for the nonmoving party," and material  
24 facts are those "that might affect the outcome of the suit under  
25 the governing law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242,  
26 248 (1986). Thus, the "mere existence of a scintilla of evidence"  
27 in support of the nonmoving party's claim is insufficient to defeat  
28 summary judgment. Id. at 252. In determining a motion for summary

1 judgment, all reasonable inferences from the evidence must be drawn  
2 in favor of the nonmoving party. Id. at 242.

3

4 **B. Third Party Liability for Copyright Infringement**

5 Although the Copyright Act does not expressly impose liability  
6 on anyone other than direct infringers, courts have recognized that  
7 in certain circumstances, vicarious or contributory liability will  
8 be imposed. Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259,  
9 261 (9th Cir. 1996); see also Sony Corp. of Am. v. Universal City  
10 Studios, Inc., 464 U.S. 417, 435 (1984) (explaining that "vicarious  
11 liability is imposed in virtually all areas of the law, and the  
12 concept of contributory infringement is merely a species of the  
13 broader problem of identifying the circumstances in which it is  
14 just to hold one individually accountable for the actions of  
15 another").

16 Two forms of third party liability for contributory  
17 infringement have been recognized in the case law: vicarious  
18 liability, derived from the similar concept in the law of  
19 employer-employee relations; and contributory infringement, derived  
20 from the tort concept of enterprise liability. Polygram Int'l  
21 Publ'g v. Nevada/TIG, Inc., 855 F. Supp. 1314, 1320 (D. Mass.  
22 1994).

23 Contributory infringement requires that the secondary  
24 infringer "[k]now, or have reason to know" of direct infringement.  
25 Cable/Home Communication Corp. v. Network Prods., Inc., 902 F.2d  
26 829, 845-46 & n. 29 (11th Cir. 1990); Religious Tech. Ctr. v.  
27 Netcom On-Line Communication Servs., Inc., 907 F. Supp. 1361, 1374

28

1 (N.D. Cal. 1995) (framing issue as "whether [defendant] knew or  
2 should have known of" the infringing activities).

3 Vicarious liability exists when (1) a defendant has the right  
4 and ability to supervise the infringing conduct and (2) the  
5 defendant has an obvious and direct financial interest in the  
6 infringement. Shapiro, Bernstein & Co. v. H.L. Green Co., 316 F.2d  
7 304, 307 (2d Cir. 1963). Lack of knowledge of the infringement is  
8 irrelevant. Id. Vicarious copyright liability is an "outgrowth"  
9 of the common law doctrine of respondeat superior, which holds the  
10 employer liable for the acts of its agents. Fonovisa, 76 F.3d at  
11 262.

12 Shapiro is the landmark case in which vicarious liability for  
13 sales of counterfeit recordings was expanded outside the employer-  
14 employee context. In Shapiro, the court was faced with a copyright  
15 infringement suit against the owner of a chain of department stores  
16 where a concessionaire was selling counterfeit recordings. Noting  
17 that the normal agency rule of respondeat superior imposes  
18 liability on an employer for copyright infringement by an employee,  
19 the Second Circuit articulated what has become the acknowledged  
20 standard for a finding of vicarious liability in the context of  
21 copyright infringement:

22 When the right and ability to supervise coalesce with an  
23 obvious and direct financial interest in the exploitation of  
24 copyrighted materials -- even in the absence of actual  
25 knowledge that the copyright monopoly [sic] is being impaired  
26 . . . , the purpose of copyright law may be best effectuated  
27 by the imposition of liability upon the beneficiary of that  
28 exploitation.

26 Shapiro, 316 F.2d at 307 (internal citations omitted).<sup>1</sup>

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27  
28 <sup>1</sup> The Shapiro court looked at the two lines of cases it  
(continued...)

1           **C. National's Vicarious Liability**

2           Fonovisa is one of the first cases to address the issue of  
3 vicarious liability in the context of a trade show. In Fonovisa, a  
4 copyright owner sued the operators of the Cherry Auction swap meet,  
5 where third-party vendors routinely sold counterfeit recordings  
6 that infringed the plaintiff's copyrights and trademarks. The  
7 Ninth Circuit held that the plaintiff could maintain a cause of  
8 action against the swap meet operators for vicarious liability for  
9 copyright infringement. In order to state a claim for vicarious  
10 copyright infringement liability, the plaintiff must establish: (1)  
11 direct infringement of the plaintiff's copyright; (2) that the  
12 copyright infringement provides a direct financial benefit to the  
13 defendant; and (3) the defendant's right and ability to control the  
14 direct infringer. See Fonovisa, 76 F.3d at 262, 263.

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15  
16           <sup>1</sup> (...continued)  
17 perceived as most clearly relevant. In one line of cases, the  
18 landlord-tenant cases, the courts held that a landlord who lacked  
19 knowledge of the infringing acts of its tenant and who exercised no  
20 control over the leased premises was not liable for infringing  
21 sales by its tenant. See, e.g., Deutsch v. Arnold, 98 F.2d 686 (2d  
22 Cir. 1938). In the other line of cases, the so-called "dance hall  
23 cases," the operator of an entertainment venue was held liable for  
24 infringing performances when the operator (1) could control the  
25 premises and (2) obtained a direct financial benefit from the  
26 audience, who paid to enjoy the infringing performance. See, e.g.,  
27 Buck v. Jewell-La Salle Realty Co., 283 U.S. 191, 198-99 (1931).  
28 From these cases, the Shapiro court determined that the  
relationship between the store owner and the concessionaire in the  
case before it was closer to the dance-hall model than to the  
landlord-tenant model.

24           Other courts have continued to apply this paradigm to third-  
25 party infringement cases. In Polygram, for example, the court  
26 examined whether a trade show organizer is liable, either  
27 vicariously or as a contributory infringer, for the copyright  
28 violations of its exhibitors and entertainers. 855 F. Supp. at  
1317-18. In that case, the court concluded that the defendant lay  
closer on the spectrum to the nightclub owner and department store  
operator than to the landlord, and imposed liability on the trade show  
operator.

1                   **1.    Direct Infringement**

2           For purposes of this motion, the defendants do not dispute  
3 that direct infringement occurred at a National show on July 17,  
4 1999, where unauthorized versions of Adobe software were seized.  
5 In addition, Adobe asserts that direct infringement is established  
6 because Adobe only licenses its software to consumers through a  
7 network of retailers and distributors. Therefore, Adobe claims,  
8 any individual vendor who distributes Adobe products without a  
9 license from Adobe -- in particular, altered Adobe products -- is  
10 per se liable for copyright infringement. See, e.g., Adobe Sys.  
11 Inc. v. One Stop Micro, Inc., 84 F. Supp. 2d 1086, 1093 (N.D. Cal.  
12 2000). Adobe claims the following additional evidence demonstrates  
13 that vendors sold unauthorized Adobe products at National's shows:  
14 (1) Adobe has acquired copies of adulterated, unauthorized Adobe  
15 Educational software from various vendors at National's Pomona  
16 Computer Fair as recently as June 1998 (Navarro Decl., ¶ 20);  
17 (2) vendors at National's computer fairs have distributed Adobe  
18 Educational software without first checking for a student  
19 identification as required by the Adobe OCRA (Navarro Decl.,  
20 ¶¶ 17-19); and (3) Adobe has acquired numerous adulterated,  
21 unauthorized "Not For Resale" copies of its products at National  
22 shows (Navarro Decl., ¶¶ 11-16). Finally, Adobe asserts that Adobe  
23 has already sued and recovered against a number of individual  
24 vendors from the Pomona Computer Fair for infringing activities.<sup>2</sup>

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27                   <sup>2</sup> In an underlying action, CV 00-07091, Adobe sued and claims  
28 to have recovered against five vendors for these allegedly  
infringing activities.



1 National disputes that unauthorized Adobe products continue to  
2 be distributed at the defendants' shows. "To the best of  
3 Defendants' knowledge, there are no unauthorized products being  
4 distributed at [their] shows." (Def.'s Opp. at 5.) National  
5 admits that four to six vendors, out of at least 400 vendors, at  
6 the July 1999 fair may have engaged in activities that infringed  
7 the plaintiff's copyrights. (Id. at 5:21-22, 8:16.)

8 The Court finds that there is no genuine issue of material  
9 fact that on July 17, 1999, vendors at National's Pomona Computer  
10 Fair sold unauthorized Adobe software. The Court finds that a  
11 genuine issue of material fact exists as to whether adulterated  
12 Adobe software is currently sold at National computer shows.

## 13 **2. Direct Financial Benefit**

14 Virtually all commercial landlords or trade show operators  
15 derive a direct financial benefit from the rents of their tenants  
16 or from the booth fees of vendors, as well as from the revenues  
17 associated with services provided to consumers at the venue such as  
18 parking and concessions. Strict liability for this entire class of  
19 commercial landlords cannot be the lesson of Fonovisa.

20 To satisfy the direct financial benefit prong of the vicarious  
21 copyright infringement test, Fonovisa holds that the sale of the  
22 counterfeit products must in fact be the "draw" for customers to  
23 the venue.<sup>3</sup> Under Fonovisa, the plaintiff bears the burden of

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24  
25 <sup>3</sup> See Fonovisa, 76 F.3d at 263-64 ("the sale of pirated  
26 recordings at the Cherry Auction swap meet is a 'draw' for  
27 customers, as was the performance of pirated music in the dance  
28 hall cases and their progeny."); see also Napster, 239 F.3d at 1023  
(affirming that "[f]inancial benefit exists where the availability  
of infringing material 'acts as a "draw" for customers'" (citations  
omitted)).

1 demonstrating a direct financial benefit to the landlord from  
2 "customers seeking to purchase infringing recordings" and profits  
3 which "flow directly from customers who want to buy the counterfeit  
4 recordings." Id. The direct financial benefit must stem from the  
5 fact that substantial numbers of customers are drawn to a venue  
6 with the explicit purpose of purchasing counterfeit goods. In  
7 order to satisfy this prong, there must be "an obvious and direct  
8 financial interest in the exploitation of copyrighted materials."  
9 Shapiro, 316 F.2d at 307. Without the requirement that the  
10 counterfeit goods provide the main customer "draw" to the venue,  
11 Fonovisa would provide essentially for the limitless expansion of  
12 vicarious liability into spheres wholly unintended by the court.

13 The facts of Fonovisa illustrate that the sale of pirated  
14 recordings at the Cherry Auction was the "draw" for customers to  
15 attend the swap meet. In Fonovisa, the scope of the copyright  
16 infringement that occurred at the weekly swap meets was vast.  
17 According to the district court's opinion, Fonovisa Inc. v. Cherry  
18 Auction, Inc., 847 F. Supp. 1492, 1498 (E.D. Cal. 1994), the  
19 majority of Cherry Auction vendors sold counterfeit music tapes.  
20 A pre-litigation raid by the Fresno County Sheriff's Department  
21 resulted in the seizure of more than 38,000 counterfeit recordings.  
22 The Ninth Circuit determined that there was no dispute that Cherry  
23 Auction was aware that vendors in its swap meet were selling  
24 counterfeit recordings. See Fonovisa, 76 F.2d at 261. The Court  
25 held that the defendants reaped "substantial financial benefits  
26 from admission fees, concession stand sales and parking fees, all  
27 of which flow directly from customers who want to buy the  
28 counterfeit recordings at bargain basement prices." Id. (emphasis

1 added). Other benefits that accrued to Cherry Auction from the  
2 infringing sales included: "the payment of a daily rental fee by  
3 each of the infringing vendors; a direct payment to Cherry Auction  
4 by each customer in the form of an admission fee, and incidental  
5 payments for parking, food and other services *by customers seeking*  
6 *to purchase infringing recordings.*" Id. (emphasis added).

7 In short, in Fonovisa, a symbiotic relationship existed  
8 between the infringing vendors and the landlord.<sup>4</sup> Cherry Auction  
9 became a venue for the distribution of large quantities of  
10 counterfeit recordings. This type of relationship involves more  
11 than a mere financial benefit to the landlord because the very  
12 success of the landlord's venture depends on the counterfeiting  
13 activity (and thus the landlord has every incentive to allow the  
14 activity to continue). This relationship between the activities of  
15 the counterfeiter and the overall success of the landlord's  
16 business enterprise is what is meant when the Fonovisa court stated  
17 that the infringement became the "draw" to the swap meet. 76 F.3d  
18 at 263-64.

19 It is therefore more concise to state that Fonovisa requires:  
20 (1) direct infringement of the plaintiff's copyright; (2) the  
21 defendant's right and ability to control the direct infringer; and  
22 (3) a direct financial benefit to the defendant from the "draw" of  
23 the infringing products. Plaintiffs must show that the vendor's  
24 infringement constitutes a draw to the venue to the extent that the  
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26 <sup>4</sup> In Napster, the court noted that the vicarious infringer's  
27 future revenue was "directly dependent" on increases in the direct  
28 infringer's user-base. 239 F.3d at 1024. "More users register  
with the Napster system as the 'quality and quantity of available  
music increases.'" Id. (citations omitted).

1 economic interests of the direct infringer and those of the  
2 landlord become closely intertwined.

3 a. Application

4 Adobe argues that National meets the "direct financial  
5 benefit" requirement because National's trade shows are similar in  
6 organization to the Cherry Auction swap meet in Fonovisa. National  
7 charges vendors a daily admission fee in exchange for a booth, and  
8 makes money from customers' entrance fees as well as advertising  
9 fees collected from vendors. National distinguishes itself from  
10 Cherry Auction in that National gains no income from food, parking  
11 and other services but instead earns most (90%) of its income from  
12 booth space rental and attendance fees. National contends that it  
13 has no direct financial interest in the infringing activities  
14 because it receives no percentage of any sales or any compensation  
15 based on vendor sales at the shows. Under Fonovisa, this argument  
16 is irrelevant. Commissions on individual vendor sales is not  
17 required to support a finding of vicarious liability: booth and  
18 admission fees may suffice. See Fonovisa, 76 F.3d at 263.

19 The critical issue for purposes of this motion is whether  
20 unauthorized Adobe software is the "draw" for National's shows.  
21 Adobe contends that "prominent trade show vendors admit that low-  
22 priced Adobe software is a key to attracting customers" (Pl. Mot.  
23 at 8 (citing Van Voorhis Decl., Ex. 4) (emphasis in original)), and  
24 that National benefits through increased admission to its shows by  
25 customers in search of adulterated Adobe products (see id.). Adobe  
26 asserts that the "pirated software sold by vendors yields profits  
27 to National in the form of higher booth rental and admission  
28 revenue." (Adobe Reply at 8.) Adobe points to National's

1 advertisements for "A Huge Inventory of PC Computer Products at Low  
2 Wholesale Prices!" (Van Voorhis Suppl. Decl., Ex. 2.) Adobe  
3 investigators have also purchased unauthorized products sold at  
4 discount prices.<sup>5</sup> In short, Adobe argues that the popularity of  
5 National's shows can be traced directly to the sale of unauthorized  
6 Adobe software, and that a portion of those profits flow directly  
7 to National. (Adobe's Reply at 1.)

8 National denies that customers attend its shows in order to  
9 purchase adulterated software, or that there is anything illegal  
10 about customers attending the shows to find bargains. National  
11 asserts that would also be harmed by such infringement because  
12 sales of counterfeit items: (1) damage the reputation of the show;  
13 and (2) cause a loss of attendees due to frustration about  
14 malfunction of illegal items. This detriment, National claims,  
15 explains why the penalty imposed for providing adulterated and  
16 infringing products is that the vendor is permanently expelled from  
17 National shows. In reference to the July 1999 raid, National  
18 argues that "less than two percent of the vendors selling less than  
19 one percent of the products for sale are involved in the allegedly  
20 infringing activity. It can hardly be said that this is a  
21 significant source of revenue or attraction for customers." (Defs'  
22 Opp. at 11.) Thus, although conceding that some infringing  
23 activity has occurred, National claims that such activity is on too  
24 small a scale to constitute a benefit to National in terms of  
25 increased attendance or draw to its shows.

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26  
27 <sup>5</sup> For example, Adobe investigators purchased a "Not-For-  
28 Resale version of Adobe PageMaker 6.5 for . . . \$172" at a National  
fair in March 1999, a product that Adobe claims has a street value  
of \$499. (Navarro Suppl. Decl., ¶ 6.)

1 Adobe's evidence that customers are drawn to National's shows  
2 by the lure of purchasing infringing software is insufficient to  
3 form the basis for a grant of summary judgment on this claim.  
4 Adobe has failed to demonstrate that no triable issue of fact  
5 exists as to whether the sale of infringing Adobe products at  
6 National computer shows is a direct "draw" for customers. National  
7 disputes that vendors use infringing Adobe software to attract  
8 business. The Court declines to accept the deposition of Phoung  
9 Nguyen as dispositive proof that infringing Adobe software is the  
10 key to drawing customers to National shows.<sup>6</sup> The fact that  
11 National advertises that software is available for low prices or  
12 that consumers may go to National fairs to purchase bargain  
13 software does not establish that infringing Adobe software provides  
14 a significant draw for National's business.

15 In terms of direct financial benefit, this matter is not  
16 analogous to Fonovisa, where the swap meet was apparently saturated  
17 with counterfeit recordings, and, indeed, the swap meet's draw was  
18 to provide a venue for the purchase of counterfeit recordings. The  
19 facts of this case do not demonstrate that a symbiotic relationship  
20 existed between National and the infringing vendors such that  
21 National's success (or even existence) came to depend on the  
22 vendors' sales of infringing products. The Court finds that a

23

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24 <sup>6</sup> The Court is also not convinced that Mr. Nguyen's  
25 deposition establishes that National uses the availability of  
26 unauthorized Adobe software as a major attraction to its show.  
27 Mr. Nguyen states only: "Well, since I only have kids software and  
28 it doesn't attract customer[s], I figure, maybe I [would] go into  
Adobe and then Microsoft, something just to catch people['s] eyes  
for me to sell my children stuff." (Van Voorhis Decl., Ex. 4 at  
65.) National asserts that the vendor in question has been barred  
from shows because of the activity.

1 triable issue of fact remains as to whether the infringing products  
2 constituted a draw.

3           **3. Right and Ability to Control**

4           In Fonovisa, the Ninth Circuit found that Cherry Auction had  
5 the right and the ability to control the vendors who sold the  
6 counterfeit recordings. Cherry Auction patrolled the small booths  
7 where the vendors operated; Cherry Auction's personnel promoted the  
8 swap meet; and Cherry Auction controlled customers' access to the  
9 booth area. Cherry Auction's right to police its vendors was  
10 established in a broad contract between the defendant and the  
11 vendors. Other factors which the Ninth Circuit considered relevant  
12 to Cherry Auction's degree of control included whether the  
13 defendant: (1) could control the direct infringers through its  
14 rules and regulations; (2) policed its booths to make sure the  
15 regulations were followed; and (3) promoted the show in which  
16 direct infringers participated. Fonovisa, 76 F.3d at 263.

17           In this case, the Court finds that National does not have an  
18 analogous right and ability to control its exhibitors. The amount  
19 of control necessary to support a finding of vicarious liability is  
20 fact-specific. As discussed above, the spectrum of control has, at  
21 one end, the landlord-tenant model, usually representing minimal  
22 ability of the premises owner to control the infringing activities  
23 of someone using his premises; and, at the other end, the  
24 employer-employee model, which represents maximum control by the  
25 premises owner. Such maximum control may be present either through  
26 a master-servant relationship or through "pervasive participation"  
27 in the business of the infringing party. See id. The Court finds  
28 that National does not possess the practical right and ability to

1 control the sale of infringing products at its shows; and National  
2 does not act with "pervasive participation" in the business of the  
3 infringing vendors.

4 National does resemble Cherry Auction in a number of ways.  
5 National promotes its computer trade shows by: conducting  
6 advertising for its vendors and their products (thus creating an  
7 audience for the vendors at its shows); providing security services  
8 for the shows; and controlling customer access to the shows.  
9 National reserves the right to terminate vendors at any time in its  
10 contract with them: "NPI [National] reserves the right to eject or  
11 cause to be ejected from the premises any objectionable person or  
12 persons." (Van Voorhis Decl., Ex. 2.) In Fonovisa, Cherry Auction  
13 also retained the right to terminate vendors for any reason  
14 whatsoever, and therefore, the court held that the defendant had  
15 the ability to control the activities of the vendors on the  
16 premises. Fonovisa, 76 F.3d at 262. National employs a team of  
17 security guards to monitor entrances, exits, and outside areas; and  
18 National arranges for some security inside the show, including two  
19 to five undercover security agents, who walk the floor and monitor  
20 issues such as booth placement, vendor disputes, and theft.<sup>7</sup>  
21 During the shows, Adobe alleges, National "actively polices the  
22 premises, all the while exercising its contractual right to eject  
23 anyone from the premises." (Adobe Mot. at 11.) Adobe claims that  
24 National's ability to control the premises and its vendors is  
25 further demonstrated by the fact that National ejected Adobe

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26  
27 <sup>7</sup> "[I]f they saw a product that was illegal, if they knew  
28 about it, they would do something about it. They would inform the  
show manager and security would go over and do something about it."  
(Van Voorhis Decl., Ex. 1 at 41.)



1 investigators from the Pomona Computer Fair in March 1999. The  
2 ability to eject vendors was the type of control that the Fonovisa  
3 court found partially determinative of Cherry Auction's ability to  
4 control. See Fonovisa, 76 F.3d at 263.

5 National contends, however, that it does not meet the Fonovisa  
6 "policing the booths" factor because the twenty security people who  
7 monitor access to the building and outside are not policing the  
8 booths. The internal security force consists of two to five  
9 security guards, and their mandate is broad. The function of the  
10 internal security guards is not geared toward locating infringing  
11 products, although if illegal products are spotted, these employees  
12 are instructed to take action. (See Van Voorhis Decl., Ex. 1 at  
13 41.) Further, National argues that these internal security  
14 officers lack the training and expertise to identify unauthorized  
15 infringing products. National alleges that, unlike the defendant  
16 in Fonovisa, National made efforts to stop the alleged infringing  
17 activity insofar as National indicated that it was willing to  
18 cooperate with Adobe and wanted to know what National could do to  
19 stop the illegal activity. (Kurtzman Decl., Ex. B.)

20 a. Size of National's Shows

21 It appears that attendance at a typical National computer  
22 fair, such as the Pomona Computer Fair, may consist of up to 15,000  
23 attendees in a given weekend. (Van Voorhis Decl., Ex. 1 at 29.)  
24 National's computer fairs are comprised of an average of 350  
25 independent vendors per show, and up to 450 at a larger show such  
26 as the Pomona Computer Fair. (Id. at 26-27.) The Court finds that  
27 the presence of National's 20-person security force, whose primary  
28 purpose is to monitor access to the building and the perimeter, and

1 two to five person internal security presence, does not meet the  
2 right and ability to control prong of Fonovisa.<sup>8</sup> The ability to  
3 control the crowds and the flow of traffic into the complex, or to  
4 respond to theft or vendor disputes within the complex, is not  
5 equivalent to the practical ability to police the content of up to  
6 450 vendors' booths.

7                   b.     Scope of Infringement

8             In Fonovisa, a pre-litigation raid by the Fresno County  
9 Sheriff's Department resulted in the seizure of more than 38,000  
10 counterfeit recordings. In this case, Adobe alleges that the July  
11 1999 raid resulted in the seizure of roughly 100 unauthorized  
12 items. The difference in scale between the scope of the infringing  
13 activity occurring in the two venues suggests that in Fonovisa,  
14 Cherry Auction's ability to police the booths in order to eject  
15 those engaging in infringing activity was significantly greater  
16 than National's ability here to police the booths in search of a  
17 substantially smaller quantity of infringing product.

18                   c.     Ability to Identify Infringing Product

19             In this case, there is a question of fact regarding the  
20 ability of National's security guards to recognize the alleged  
21 infringing product. There can be no practical ability to control  
22 the infringing behavior if National does not know what constitutes  
23 an unauthorized Adobe product. National represented to the Court  
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25             <sup>8</sup> National's position is summed up in a letter to Adobe's  
26 counsel: "[W]e are an event that sells exhibit space to resellers.  
27 We don't have a working knowledge of every piece of product that  
28 every vendor brings to the show to sell. But we do not condone  
illegal activity, and if a vendor is caught selling stolen,  
illegal, etc., merchandise, [it] will be prevented from exhibiting  
in the show." (Kurtzman Decl., Ex. B.)

1 at oral argument that it was not possible to identify what software  
2 infringed Adobe's copyright without training and information that  
3 National lacked (and only Adobe possessed). In particular, some of  
4 the alleged infringing sales relate to vendors who sell authentic  
5 Adobe products without a license from Adobe. A layperson, or even  
6 a minimally trained security guard, would not be able to determine  
7 whether a vendor had the Adobe-required license. Thus, there is a  
8 genuine issue of fact as to whether National had the power to  
9 recognize what products infringed Adobe's copyright, even if its  
10 personnel did undertake the type of booth-by-booth, product-by-  
11 product oversight that Adobe advocates.

12 As the defendants in this action correctly point out, imposing  
13 strict vicarious liability on trade show operators for infringing  
14 sales can place the organizer in a Catch-22 situation. If the  
15 organizer retains the right to terminate vendors for any reason, it  
16 automatically meets the control requirement for vicarious  
17 liability. If the organizer does not retain this type of control,  
18 it risks not being able to act in the case of a dispute between two  
19 exhibitors, thereby potentially exposing itself to additional  
20 liability.

21 The Court finds that a triable issue of fact exists as to  
22 whether National had the ability to root out the infringing  
23 conduct, given the size of the show, the number of security  
24 personnel, the alleged scope of the infringing activity, and the  
25 ability of National's staff to identify infringing Adobe products.

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28

1                   **4. Vicarious Liability Conclusion**

2           The Court is not persuaded that the proper identity of  
3 interest is present between National and the infringing vendors to  
4 justify the imposition of vicarious liability. The Fonovisa court  
5 directed lower courts to look for the defendant's "pervasive  
6 participation" in the activities of the direct infringers.  
7 Fonovisa, 76 F.3d at 263. The Court finds that National's  
8 pervasive participation in the infringing conduct at issue in this  
9 case remains a question of fact.

10                   **D. Contributory Infringement of Adobe's Copyrights**

11           "[O]ne who, with knowledge of the infringing activity,  
12 induces, causes or materially contributes to the infringing conduct  
13 of another, may be held liable as a 'contributory' infringer."  
14 Fonovisa, 76 F.3d at 264 (citation omitted).

15                   **1. Material Contribution**

16           In Fonovisa, the Ninth Circuit found contributory  
17 infringement where Cherry Auction, with knowledge of the infringing  
18 activities, provided support services, including space, utilities,  
19 parking and advertising for the vendors participating in its flea  
20 market. Id. Adobe alleges that the facts in this case are  
21 indistinguishable. In Fonovisa, the court stated that "it would be  
22 difficult for the infringing activity to take place in the massive  
23 quantities alleged without the support services provided by the  
24 swap meet." Id. at 263. Similarly, Adobe argues, National  
25 provides the amenities such as parking and security that make  
26 possible the distribution of unauthorized Adobe software. As with  
27 Cherry Auction in Fonovisa, here National provides the venue and  
28 all supporting services for the infringing vendors, such as

1 parking, advertising, and customers. National also argues that it  
2 does not provide all of the supporting services for the site  
3 because parking, concessions and security are provided by the  
4 facilities. The Court finds that National provides, or arranges  
5 for the provision of, support services in an analogous manner to  
6 the actions of Cherry Auction in Fonovisa.

## 7           **2.    Knowledge**

8           The Court finds that there is a disputed issue of fact as to  
9 whether National had sufficient knowledge of the infringing  
10 activity to justify the imposition of liability. Adobe claims that  
11 National knew that infringing activity was occurring because Adobe  
12 sent National a letter on April 30, 1996 that informed National  
13 that infringing activities were taking place at its computer fairs.  
14 (Van Voorhis Decl., Ex. 3.) In addition, Adobe asserts it warned  
15 National again in March 1999 of the problem (the warning consisted  
16 of the distribution of flyers at the fair), only to be ejected from  
17 the premises.

18           National denies that it had knowledge of the infringing  
19 activity, or that there is any evidence that National had knowledge  
20 of the alleged infringement before the raid of July 17, 1999.  
21 National claims that the 1996 Adobe letter referred only to  
22 "possible sales of stolen Adobe software" and that there was no  
23 follow-up to the letter. Id. National claims that the March 1999  
24 incident cannot be construed as putting National on notice of  
25 infringing activities.

26           In Fonovisa, there was no dispute for purposes of the appeal  
27 that Cherry Auction was aware that vendors in its swap meet were  
28 selling counterfeit recordings in violation of Fonovisa's

1 trademarks. Indeed, the record suggests that the entire purpose of  
2 the swap meet was to provide a forum for dealing in counterfeit  
3 recordings. In 1991, the Sheriff's Department raided the Cherry  
4 Auction swap meet and seized more than 38,000 counterfeit  
5 recordings. In that case, one year after the raid, the Sheriff  
6 sent a letter notifying Cherry Auction of ongoing sales of  
7 infringing materials. In 1993, Fonovisa itself sent an  
8 investigator to the Cherry Auction site and observed sales of  
9 counterfeit recordings. The court therefore refused to credit  
10 Cherry Auction's claims of ignorance, and found that Cherry Auction  
11 had in fact actively interfered with law enforcement efforts to  
12 identify infringing vendors by protecting infringer's identities.  
13 Fonovisa, 76 F.3d at 264.

14 In this case, the Court finds that triable issues of fact  
15 exist regarding National's knowledge of the infringing activities  
16 for purposes of imposing liability for contributory copyright  
17 infringement. As stated above, the scale of the infringing  
18 activity in Fonovisa made it clearly implausible that the defendant  
19 was not aware of the activity. In this case, Adobe alleges a  
20 dramatically smaller number of infringing items seized. National's  
21 knowledge of infringing activities remains a question of fact for  
22 trial.

23

24 **E. Kushner as Alter-Ego of National**

25 Because the Court finds that genuine issues of material fact  
26 exist as to both Adobe's vicarious liability and contributory  
27 copyright infringement claims such as to preclude summary judgment,

28

1 the Court declines at this time to address Adobe's claims against  
2 Robert Kushner as an individual.

3

4 **III. Conclusion**

5 For the reasons set forth above, the Court denies the  
6 plaintiff's motion for partial summary judgment. The plaintiff  
7 must succeed on the merits of its claims to be entitled to a  
8 permanent injunction. See Coleman v. Wilson, 912 F. Supp. 1282,  
9 1311 (E.D. Cal. 1995). Here, the plaintiff has not succeeded on  
10 the merits of its claims for partial summary judgment, and  
11 therefore Adobe is not entitled to a permanent injunction.

12

13 IT IS SO ORDERED.

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15 Dated: \_\_\_\_\_

\_\_\_\_\_  
DEAN D. PREGERSON  
United States District Judge

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