RECORD NO. 08-2381

IN THE

United States Court Of Appeals

FOR THE FOURTH CIRCUIT

FREDERICK E. BOUCHAT,

Plaintiff-Appellant,

v.

BALTIMORE RAVENS LIMITED PARTNERSHIP; NATIONAL FOOTBALL LEAGUE;
NFL PRODUCTIONS LLC, d/b/a NFL Films, Incorporated,
a subsidiary of NFL Ventures L.P.,
1 NFL Plaza, Mt. Laurel, New Jersey 08054,

Defendants-Appellees,

and

NFL FILMS, INCORPORATED; THE BALTIMORE SUN COMPANY,

Defendants.

On Appeal from the United States District Court
for the District of Maryland at Baltimore

MOTION OF MOTION PICTURE ASSOCIATION OF AMERICA, INC. FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF IN SUPPORT OF DEFENDANTS-APPELLEES' PETITION FOR REHEARING OR REHEARING *EN BANC*

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Pursuant to Federal Rule of Appellate Procedure 29(a), the Motion Picture Association of America, Inc. (the "MPAA")[1] respectfully moves the Court for leave to file a brief as *amicus curiae* in support of Defendants-Appellees' Petition for Rehearing or Rehearing *En Banc*. The MPAA's brief, which asks the Court to grant rehearing of the panel's decision, has been filed concurrently with this motion, as required by Federal Rule of Appellate Procedure 29(b). On September 17, 2010, counsel for Defendants-Appellees consented to the filing of this brief. On September 17, 2010, counsel for Plaintiff-Appellant refused to consent to the filing of this brief.

The MPAA is a not-for-profit trade association founded in 1922 to address issues of concern to the motion picture industry. The MPAA's members and their affiliates are the leading producers and distributors of filmed entertainment in the theatrical, television and home entertainment markets. The MPAA's members and their affiliates create and distribute a significant number of audiovisual works concerning a variety of non-fictional and historical subjects.

This case involves, *inter alia*, the scope and application of section 107 of the Copyright Act of 1976, 17 U.S.C. § 107, the provision governing fair use of

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[1] The MPAA member companies include Paramount Pictures Corporation, Sony Pictures Entertainment Inc., Walt Disney Studios Motion Pictures, Twentieth Century Fox Film Corporation, Universal City Studios LLLP, and Warner Bros. Entertainment Inc.

copyrighted material. Because the panel's opinion could have a materially adverse effect on creators and distributors of expressive content, including the MPAA's members and their affiliates, the MPAA has a strong interest in the outcome of this case. The MPAA therefore requests that the Court grant panel rehearing or rehearing *en banc*, as requested by Defendants-Appellees.

On this basis, the MPAA respectfully requests leave to file the Brief of *Amicus Curiae* submitted with this motion.

Respectfully submitted,

/s/ Steven J. Metalitz

September 21, 2010

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On Appeal from the United States District Court
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BRIEF OF *AMICUS CURIAE* MOTION PICTURE ASSOCIATION OF AMERICA, INC. IN SUPPORT OF DEFENDANTS-APPELLEES' PETITION FOR REHEARING OR REHEARING *EN BANC*

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STATEMENT OF INTEREST

The Motion Picture Association of America, Inc. (the "MPAA") urges panel or *en banc* rehearing to correct a misapplication of fair use law in the panel's opinion ("the Opinion") that could adversely affect the MPAA's members.[1]

The MPAA is a not-for-profit trade association founded in 1922 to address issues of concern to the motion picture industry. The MPAA's members and their affiliates are the leading producers and distributors of filmed entertainment in the theatrical, television and home entertainment markets. The MPAA's members and their affiliates create and distribute a significant number of audiovisual works concerning a variety of non-fictional and historical subjects. The MPAA therefore has a strong interest in this case, which involves the scope and application of 17 U.S.C. § 107, governing fair use of a copyrighted work. The MPAA supports rehearing, as requested by Defendants-Appellees.

ARGUMENT

The MPAA agrees with Defendants-Appellees that this case merits rehearing. The panel's erroneous fair use analysis could have a chilling effect on the creation and distribution of expressive content. The highlight films that

[1] The MPAA member companies include Paramount Pictures Corporation, Sony Pictures Entertainment Inc., Walt Disney Studios Motion Pictures, Twentieth Century Fox Film Corporation, Universal City Studios LLLP, and Warner Bros. Entertainment Inc.

incorporate the Flying B logo in Baltimore Ravens' highlight tapes of the 1996-1998 seasons are factual works concerning a historical subject. Moreover, the use of the Flying B logo in the highlight films is necessary to accurately depict the Baltimore Ravens' 1996-1998 seasons. Indeed, while the original purpose of the Flying B logo was to identify the Baltimore Ravens football team, the display of the Flying B logo in the highlight films serves an entirely different purpose, namely historical accuracy, which does not supersede or supplant the protected uses of the Flying B logo. Accordingly, the Baltimore Ravens' use of the Flying B logo is transformative under the first fair use factor, 17 U.S.C. § 107 (the nature and purpose of the use), and the first fair use factor weighs in favor of Defendants-Appellees. *See Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 609 (2d Cir. 2006); *Elvis Presley Enters., Inc. v. Passport Video*, 349 F.3d 622, 629 (9th Cir. 2003). The panel erred in holding otherwise.

The panel cited *Ringgold v. Black Entertainment Television, Inc.*, 126 F.3d 70 (2d Cir. 1997), in support of its holding. While the panel's reliance on *Ringgold* was misplaced for a number of reasons, the Court need not look beyond the *Ringgold* decision itself for one of these reasons. The Second Circuit explicitly distinguished between works like the one before it and factual works: "It is not difficult to imagine a television program that uses a copyrighted visual work for a purpose that heavily favors fair use. If a TV news program produced a feature on

Faith Ringgold and included camera shots of her story quilts, the case for a fair use defense would be extremely strong. *The same would be true of a news feature on the High Museum that included a shot of [plaintiff's work]." Id.* at 79, *citing Italian Book Corp. v. Am. Broad. Cos.*, 458 F. Supp. 65 (S.D.N.Y. 1978) (emphasis added). Rather than supporting the Opinion, *Ringgold* actually underscores the panel's error.

The panel also misconstrued the significance of *Davis v. Gap, Inc.*, 246 F.3d 152, 174-75 (2d Cir. 2001), which involved the use of a copyrighted work to advertise a *product*, a fact that the panel failed to appreciate. As the Supreme Court said in *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 585 (1994): "The use . . . of a copyrighted work to advertise a product, even in a parody, will be entitled to less indulgence under the first factor of the fair use enquiry than the sale of a parody for its own sake, let alone one performed a single time by students in school." Because *Davis v. Gap* involved a product advertisement, the commercial nature of that use weighed more heavily against the first factor of the fair use analysis than it would in the present case.

CONCLUSION

The panel's Opinion could have a chilling effect on creators and distributors of expressive content like the MPAA's members and their affiliates. The MPAA

therefore requests that the Court grant panel rehearing or rehearing *en banc*, as requested by Defendants-Appellees.

Respectfully submitted,

/s/ Steven J. Metalitz

September 21, 2010

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CERTIFICATE OF COMPLIANCE WITH FRAP RULE 28.1(e) or 32(a)

This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2) because it contains 722 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14 point Times New Roman font.

Respectfully Submitted,
September 21, 2010

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DECLARATION OF SERVICE

I, BERTHA A. GARCÍA, under penalty of perjury, declare and state that I am over eighteen years of age and not a party to the above-caption action, and that on the 21st day of September, 2010, I caused to be served by Federal Express, MOTION OF MOTION PICTURE ASSOCIATION OF AMERICA, INC. FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF IN SUPPORT OF DEFENDANTS-APPELLEES' PETITION FOR REHEARING OR REHEARING *EN BANC* and BRIEF OF *AMICUS CURIAE* MOTION PICTURE ASSOCIATION OF AMERICA, INC. IN SUPPORT OF DEFENDANTS-APPELLEES' PETITION FOR REHEARING OR REHEARING *EN BANC* on the following:

Clerk of the Court
United States Court of Appeals for the Fourth Circuit
1100 East Main Street
Richmond, VA 23219
(804) 916-2700

Dated: Los Angeles, California
September 21, 2010

Bertha A. García

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Only one form needs to be completed for a party even if the party is represented by more than one attorney. Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case. Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements. Counsel has a continuing duty to update this information.

No. 08-2381 Caption: Bouchat v. Baltimore Ravens Limited Partnership, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

MPAA, Inc. (name of party/amicus) who is amicus (appellant/appellee/amicus), makes the following disclosure:

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐YES ☑NO
2. Does party/amicus have any parent corporations? ☐YES ☑NO
   If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐YES ☑NO
   If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐YES ☑NO
   If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☐NO
   If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
   If yes, identify any trustee and the members of any creditors' committee:

CERTIFICATE OF SERVICE

****

I certify that on September 21, 2010 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/ Steven J. Metalitz (signature) 9/21/2010 (date)