

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 INTERNATIONAL DOCUMENTARY ASSOCIATION,
AMERICAN LIBRARY ASSOCIATION, ASSOCIATION OF RESEARCH
LIBRARIES, ASSOCIATION OF COLLEGE AND RESEARCH
LIBRARIES AND THE WGBH EDUCATIONAL FOUNDATION FOR
LEAVE TO FILE AN AMICI CURIAE BRIEF IN SUPPORT OF
DEFENDANTS-APPELLEES' PETITION FOR REHEARING OR
REHEARING EN BANC**

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The International Documentary Association (IDA), American Library Association (ALA), Association of Research Libraries (ARL), Association of College and Research Libraries (ACRL) and the WGBH Educational Foundation (“Amici”) respectfully move the Court for leave to file a brief as *amici curiae* in support of Defendants-Appellees’ Petition for Rehearing or Rehearing *En Banc*. Neither the Federal Rules of Appellate Procedure nor the Local Rules for the U.S. Circuit Court for the Fourth Circuit expressly allow or prohibit briefs from *amici curiae* at this stage. Amici’s brief has been filed concurrently with this motion and urges the Court to grant rehearing of the panel’s decision. Counsel for Defendants-Appellees consented to the filing of this brief. Amici requested the consent of counsel for Plaintiff-Appellant but has not received a response.

The International Documentary Association is a non-profit 501(c)(3) dedicated to promoting nonfiction filmmakers and increasing public awareness of the documentary film genre. The IDA was founded in 1982, and it exists to serve the needs of those who create this vital documentary art form.

The American Library Association was founded in 1876 and is the oldest and largest library association in the world, with members in academic, public, government, school and special libraries. The ALA’s mission is to promote access to information and protect intellectual freedom; it has been an outspoken advocate for the First Amendment throughout its 132-year history.

The Association of Research Libraries is a nonprofit organization comprising 125 research libraries at comprehensive, research-extensive institutions in the United States and Canada. The ARL's mission is to advance the goals of its member research libraries by fostering the exchange of ideas and expertise, providing leadership in public and information policy to the scholarly and higher education communities, and facilitating the emergence of new roles for research libraries.

The Association of College and Research Libraries is the largest division of the American Library Association with more than 12,000 members. The ACRL is a professional association of academic librarians and other interested individuals dedicated to enhancing the ability of academic library and information professionals to serve the information needs of the higher education community and to improve learning, teaching, and research.

The WGBH Educational Foundation, a Massachusetts charitable non-profit corporation, is PBS's single largest producer of television and online content, creating approximately one-third of the national prime-time lineup and reaching an estimated 34 million people weekly nationwide. WGBH productions include *Frontline*, *Nova*, *American Experience*, and *Antiques Roadshow*. WGBH also is a major source of programs heard nationally on public radio, including the news program *The World*, and a pioneer in developing educational multimedia and new

technologies that make media accessible for people with disabilities. WGBH's educational non-broadcast services include *Teachers' Domain*, the first online digital library that tailors segments from national broadcasts for K-12 classroom use, and *Open Vault*, an online source of important WGBH-produced archival content (video excerpts, full interviews, searchable transcripts, and resource management tools) designed for individual and classroom learning. WGBH has been recognized with hundreds of honors, including Oscars, Emmys, Peabodys, and duPont-Columbia Journalism Awards.

The panel decision in this case threatens to undermine the well-established right to use copyrighted material to document, depict and discuss historic events. Amici and their members create, archive or distribute documentaries and other works of non-fiction on a wide array of important historical subjects and each has a profound interest in protecting the right of documentary filmmakers, archivists, and others to depict or refer to historical events in film, photographs, or any other audio-visual medium. Amici believe their friend-of-the-court brief will assist the Court in understanding the important free speech and expression rights at stake in this case and the extent to which the panel's misapplication of the controlling fair use standard might affect these rights.

This brief meets the requirements of Federal Rule of Appellate Procedure 29, and it provides the Court with an important perspective not offered by the

parties to the litigation. An amicus brief should be permitted if “the brief will assist the judges by presenting ideas, arguments, theories, insights, facts, or data that are not to be found in the parties’ briefs.” *Voices for Choices v. Illinois Bell Telephone Co.*, 339 F.3d 542, 545 (7th Cir. 2003). Amici’s brief gives the Court the opportunity to view the issues in this case from the perspective of documentary filmmakers and others who strive to tell and preserve stories about our collective history through any audio-visual medium. Further, Amici’s brief would not prejudice the Plaintiff-Appellant because Defendants-Appellees have consented to an extension of time to file a reply brief until October 11, 2010, if the Court orders a response.

On this basis, Amici respectfully ask the Court to grant them leave to file the Brief of Amici Curiae submitted with this motion.

Respectfully Submitted,

September 17, 2010

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STATUTES

17 U.S.C. § 1072, 6

I. STATEMENT OF INTEREST

The panel decision in this case threatens to undermine the well-established right to use copyrighted material to document, depict and discuss historic events. This right is critical to documentary filmmakers, news organizations, public broadcasters, television networks, libraries, or anyone who wants to present a truthful and accurate account of events in any audio or visual medium. Amici curiae in this case include the International Documentary Association, American Library Association, Association of Research Libraries, Association of College and Research Libraries and the WGBH Educational Foundation. (A full description of each amicus party is attached to this brief as Exhibit A.) Each organization represents members who create or distribute documentaries and other works of non-fiction on a wide array of important historical subjects. Each has a keen interest in making sure its members' fair use protections remain robust and intact.

II. ARGUMENT

This panel's decision in this case appears to be the first time any court has held the appearance of a copyrighted logo or other artwork captured incidentally and unavoidably in the course of a non-fictional narrative constitutes copyright infringement. That conclusion flies in the face of the controlling fair use standard articulated by the United States Supreme Court, and conflicts with an established body of decisions holding fair use protects historical and biographical uses like this

one, whether or not they are undertaken for profit. Defendants' Petition for Rehearing or Rehearing *En Banc* should be granted to correct this error and protect the important speech and expression rights the Panel's decision might undermine.

A. The Panel Decision Misapplies Supreme Court Law And Departs From Well-Established Fair Use Analysis

While the fair use analysis is guided by the four non-exclusive factors listed in Section 107 of the Copyright Act, *see* 17 U.S.C. § 107, it is designed to serve important social functions. The fair use doctrine is a critical "First Amendment safeguard[]," *Eldred v. Ashcroft*, 537 U.S. 186, 220 (2003), designed to prevent copyright law from stifling the very creativity copyright law is designed to encourage. *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994).

In *Campbell*, the Supreme Court expressly rejected a presumption against fair use based on the commercial nature of the defendant's work. *See id.* at 591. In assessing the nature and purpose of the use, the Court stressed the importance of protecting "transformative" uses. *See id.* A work is considered "transformative" where a defendant does not simply supplant the original work, but "instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message." *See id.*

Applying *Campbell*, courts across the country have held the use of copyrighted works in the context of historical, biographical and other non-fictional works is transformative. *See, e.g., Bill Graham Archives v. Dorling Kindersley*

Ltd., 448 F.3d 605, 609 (2d Cir. 2006) (book publisher's use of Grateful Dead concert posters in illustrated history of the band was transformative where publisher used the posters as "as historical artifacts to document and represent the actual occurrence" of events); *Elvis Presley Enters., Inc. v. Passport Video*, 349 F.3d 622, 629 (9th Cir. 2003) (use of television clips considered transformative where they helped tell the story of entertainer's life); *Warren Pub. Co. v. Spurlock*, 645 F.Supp.2d 402, 419 (E.D. PA 2009) (use of artist's work in biography / retrospective chronicling his career held transformative); *Monster Commc'ns., Inc. v. Turner Broad. Sys., Inc.*, 935 F.Supp. 490, 493-94 (S.D.N.Y. 1996) (television network's use of approximately one minute of boxing footage was transformative in biography of Muhammad Ali); *Hofheinz v. AMC Prods., Inc.*, 147 F.Supp.2d 127, 137 (S.D.N.Y. 2001) (television network's use of film clips from monster movies in documentary about that film genre held transformative); *Hofheinz v. A & E Television Networks*, 146 F.Supp.2d 442, 446-47 (S.D.N.Y. 2001) (television network's use of film clips from actor's early motion picture appearances in feature-length biography held transformative).

Indeed, courts recognize fair use protection is especially important where it would be impossible to create a work of non-fiction without depicting the copyrighted works – even in their entirety. *See Ty, Inc. v. Publ'ns Int'l Ltd.*, 292

F.3d 512, 521 (7th Cir. 2002) (copyright on appearance of stuffed toys should not create second monopoly in collector's guides).¹

The panel decision in this case represents a dramatic departure from these principles. While the panel decision insists the highlight films are not “historical,” it cannot escape the fact these films depict and discuss actual events. The plain purpose of the highlight films is to document and recount each Ravens season from 1996 to 1998, and even the panel decision acknowledges they “add to the historical record of Ravens play.” *Bouchat v. Baltimore Ravens, Ltd. P’ship.*, No. 08-2381, slip op. at 8 (4th Cir. Sept. 2, 2010). The Flying B logo standing alone serves no comparable purpose; it is simply an artifact and the only purpose served by including it in the highlight films is historical accuracy. There should be no dispute that each highlight film adds substantial new meaning and expression beyond that which exists in the logo alone because each film uses the logo to depict what the Ravens did on the field each season. By ignoring the sharply differing purposes of the highlight films and the Flying B logo, the panel decision misapplies *Campbell*, and ignores the substantial body of case law that demonstrates the use of the logo in the highlight films is transformative.

¹ Copyright restrictions may or may not prohibit the incidental depiction of copyrighted material in *fictional* works. See *Ringgold v. Black Ent. Television, Inc.*, 126 F.3d 70 (2d Cir. 1997) (incidental display of artistic poster in television sitcom). But, as set forth above, fair use routinely protects the use of copyrighted material to create works of *non-fiction*, especially when the new work is historical or biographical. See, e.g., *Bill Graham*, 448 F.3d at 615.

The panel decision resists this conclusion on the theory the depiction of the Flying B logo duplicates the logo's original purpose – “to identify the Ravens team.” *Id.* at 9. That misses the point. The Flying B logo no longer identifies the Ravens team, and the panel itself recognizes it would be practically impossible to film a single play of a Baltimore Ravens game played in the 1996 – 1998 seasons without capturing the Flying B logo. *See id.* at 3 (noting Flying B logo was displayed on every player's helmet and on the playing field). The only reason the logo is included in any of the highlight films is because no filmmaker could accurately depict what happened in those seasons without the logo. *See id.* at 30 (Niemeyer, J., dissenting). The use is simply an incidental – and unavoidable – part of the team's history. *See id.*

The panel decision compounds these errors with others. Although it does not say so, it adopts what appears to be a presumption against fair use based on the commercial nature of the highlight films. *See id.* at 11-12, 15-16. But *Campbell* expressly rejected any such presumption. (P. 2, above.) The panel likewise declares the fourth factor (market effect) to be “undoubtedly the single most important element of fair use” analysis. Slip Op. at 13 (citing *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566 (1985)). Yet *Campbell* overruled *Harper & Row* on this very point and held all factors are to be weighed together. *See Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109, 113 (2d Cir.

1998); *American Geophysical Union v. Texaco, Inc.*, 60 F.3d 913, 926 (2d Cir. 1994). Under *Campbell*, “the importance of [the fourth] factor will vary, not only with the amount of harm, but also with the relative strength of the showing on the other factors.” *Campbell*, 510 U.S. at 590 n.21.

B. The Panel Decision Affects Exceptionally Important Speech And Expression Rights

The panel decision has the potential to interfere with important speech and expression rights. First, it gives Bouchat a *de facto* right to control the depiction of facts – the events that actually happened on the field. Copyright does not protect facts, expressly or otherwise. *See, e.g., Bond v. Blum*, 317 F.3d 385, 394 (4th Cir. 2003); 17 U.S.C. § 102. In providing this control over facts, the panel decision crosses a line of constitutional proportions. *See, e.g., Feist Publications, Inc. v. Rural Tel. Svc. Co., Inc.*, 499 U.S. 340, 345-46 (1991).²

The potential impact of the panel’s decision is not limited to the Baltimore Ravens or the NFL. There are many historical subjects that cannot be discussed effectively without the extensive use of copyrighted material. It would be difficult, for example, to make an effective biography of a musician without including sound

² Bouchat’s proposed solution to this problem is equally troubling: at oral argument, his counsel suggested the defendants should airbrush the Flying B logo out of the highlight films. But a rule that requires a documentary filmmaker to “airbrush history” is hardly an appropriate solution. If anything, it highlights the important speech rights that are in jeopardy here.

and movie clips depicting his work, *see Elvis Presley*, 349 F.3d at 629, or to create a comprehensive study of surrealist art without including works by Salvador Dali. *Cf. Warren*, 645 F.Supp.2d at 419. It would be nearly impossible to document any sliver of life in a major American city without capturing vast numbers of logos, signs, billboards and other copyrighted works along the way. It would be similarly impossible to make a documentary about the healthfulness of McDonald's food (*Super Size Me*) or Walmart's business practices (*Wal-Mart: The High Cost of Low Price*) without depicting each company's logo.

Requiring permission for uses like these would have a profoundly negative impact on free speech and expression. Rights holders would presumably demand some control over the way individuals or organizations are portrayed. But even if not, the cost of requesting, negotiating, and obtaining permission for every copyrighted logo or other artwork captured as an incidental and necessary part of any real-life scene would often be prohibitive – or simply unimaginable. One shot of Times Square could require hundreds of negotiations. These obstacles would create a profound chilling effect on anybody who wants to create documentaries or any other work of non-fiction.

If the Court believes the conduct of the defendants renders them ineligible to maintain a fair use defense as a matter of law (*see Bouchat*, No. 08-2381, slip op. at 12), the Court should decide the case on that narrow and specific basis (though

not without accounting for the extent to which Bouchat may have acted unfairly by sitting on his rights for years and the important speech rights that remain at stake regardless of who the speaker is). It should not issue a sweeping decision that could be read to suggest incidental and unavoidable depictions of copyrighted logos and other artwork in documentaries flunk the fair use test, or require any permission at all.

III. CONCLUSION

The panel decision makes serious errors that could have important consequences that go well beyond this case. This Court should grant rehearing.

Respectfully Submitted,

September 17, 2010

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Counsel for Amici Curiae

EXHIBIT A

The following parties are Amici Curiae:

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The International Documentary Association is a non-profit 501(c)(3) dedicated to promoting nonfiction filmmakers and increasing public awareness of the documentary film genre. The IDA was founded in 1982, and it exists to serve the needs of those who create this vital documentary art form.

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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 1,841 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.

Dated: September 17, 2010
New York, NY

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DECLARATION OF SERVICE

I, AMANDA SMITH, under penalty of perjury, declare and state that I am over eighteen years of age and not a party to the above-captioned action, and that on the 17th day of September, 2010, I caused to be served by Federal Express, Motion for Leave to File Brief of Amici Curiae and Brief of Amici Curiae, International Documentary Association, American Library Association, Association of Research Libraries and Association of College and Research Libraries on the following:

Clerk of the Court
United States Court of Appeals for the Fourth Circuit
1100 East Main Street
Richmond, VA 2319
(804) 916-2700

Dated: Stanford, California
September 17, 2010

AMANDA SMITH

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. _____ Caption: _____

Pursuant to FRAP 26.1 and Local Rule 26.1,
Association of College

and Research Libraries who is _____, makes the following disclosure:
(name of party/amicus) (appellant/appellee/amicus)

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 _____ 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:

(signature)

(date)

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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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 _____ 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:

(signature)

(date)

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. _____ Caption: _____

Pursuant to FRAP 26.1 and Local Rule 26.1,

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

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:

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No. _____ Caption: _____

Pursuant to FRAP 26.1 and Local Rule 26.1,

The WGBH Educational

Foundation who is _____, makes the following disclosure:
(name of party/amicus) (appellant/appellee/amicus)

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 _____ 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:

(signature)

(date)