United States Supreme Court
KALEM CO. v. HARPER BROS., (1911)
No. 26
Argued: Decided: November 13, 1911

Messrs. John W. Griggs and Drury W. Cooper for appellant.[Kalem Co. v. Harper Bros. 222 U.S. 55 (1911)]

[222 U.S. 55, 60] Messrs. David Gerber and John Larkin for appellees.

Mr. Justice Holmes delivered the opinion of the court:

This is an appeal from a decree restraining an alleged infringement of the copyright upon the late General Lew Wallace's book 'Ben Hur.' 94 C. C. A. 429, 169 Fed. 61. The case was heard on the pleadings and an agreed statement of facts, and the only issue is whether those facts constitute an infringement of the copyright upon the book. So far as they need to be stated here they are as follows: The appellant and defendant, the Kalem company, is engaged in the production of moving-picture films, the operation and effect of which are too well known to require description. By means of them anything of general interest, from a coronation to a prize fight, is presented to the public with almost the illusion of reality,-latterly even color being more or less reproduced. The defendant employed a man to read Ben Hur and to write out such a description or scenario of certain portions that it could be followed in action; these portions giving enough of the story to be identified with ease. It then caused the described action to be performed, and took negatives for moving pictures of the scenes, from which it produced films suitable for exhibition. These films it expected and intended to sell for [222 U.S. 55, 61] use as moving pictures in the way in which such pictures commonly are used. It advertised them under the title 'Ben Hur.' 'Scenery and Supers by Pain's Fireworks Company, Costumes from Metropolitan Opera House. Chariot Race by 3d Battery, Brooklyn. Positively the Most Superb Moving Picture Spectacle Ever Produced in America, in Sixteen Magnificent Scenes,' etc., with taking titles, culminating in 'Ben Hur Victor.' It sold the films and public exhibitions from them took place.

The subdivision of the question that has the most general importance is whether the public exhibition of these moving pictures infringed any rights under the copyright law. By Rev. Stat. 4952, as amended by the act of March 3, 1891, chap. 565, 26 Stat. at L. 1106, U. S. Comp. Stat. 1901, p. 3406, authors have the exclusive right to dramatize any of their works. So, if the exhibition was or was founded on a dramatizing of Ben Hur, this copyright was infringed. We are of opinion that Ben Hur was dramatized by what was done. Whether we consider the purpose of this clause of the statute, or the etymological history and present usages of language, drama may be achieved by action as well as by speech. Action can tell a story, display all the most vivid relations between men, and depict every kind of human emotion, without the aid of a word. It would be impossible to deny the title of drama to pantomime as played by masters of the art. Daly v. Palmer, 6 Blatchf. 256, 264, Fed. Cas. No. 3,552. But if a pantomime of Ben Hur would be a dramatizing of Ben Hur, it would be none the less so that it was exhibited to the audience by reflection from a glass, and not by direct vision of the figures,-as sometimes has been done in order to produce ghostly or inexplicable effects. The essence of the matter in the case last supposed is not the mechanism employed, but that we see the event or story lived. The moving pictures are only less vivid than reflections from a mirror. With the former as with the latter our visual impression-what we see-is caused by the real pan- [222 U.S. 55, 62] tomime of real men through the medium of natural forces, although the machinery is different and more complex. How it would be if the illusion of motion were produced from paintings instead of from photographs of the real thing may be left open until the question shall arise.

It is said that pictures of scenes in a novel may be made and exhibited without infringing the copyright, and that they may be copyrighted themselves. Indeed, it was conceded by the circuit court of appeals that these films could be copyrighted, and, we may assume, could be exhibited as photographs. Whether this concession is correct or not, in view of the fact that they are photographs of an unlawful dramatization of the novel, we need not decide. We will assume that it is. But it does not follow that the use of them in motion does not infringe the author's rights. The most innocent objects, such as the mirror in the other

case that we have supposed, may be used for unlawful purposes. And if, as we have tried to show, moving pictures may be used for dramatizing a novel, when the photographs are used in that way, they are used to infringe a right which the statute reserves.

But again, it is said that the defendant did not produce the representations, but merely sold the films to jobbers, and on that ground ought not to be held. In some cases where an ordinary article of commerce is sold nice questions may arise as to the point at which the seller becomes an accomplice in a subsequent illegal use by the buyer. It has been held that mere indifferent supposition or knowledge on the part of the seller that the buyer of spirituous liquor in contemplating such unlawful use is not enough to connect him with the possible unlawful consequences (Graves v. Johnson, 179 Mass. 53, 88 Am. St. Rep. 355, 60 N. E. 383), but that if the sale was made with a view to the illegal resale, the price could not be recovered (Graves v. Johnson, 156 Mass. 211, 15 L.R. A. 834, 32 Am. St. Rep. 446, 30 N. E. 818). But no such niceties are involved here. The defendant not only expected but invoked by ad- [222 U.S. 55, 63] vertisement the use of its films for dramatic reproduction of the story. That was the most conspicuous purpose for which they could be used, and the one for which especially they were made. If the defendant did not contribute to the infringement, it is impossible to do so except by taking part in the final act. It is liable on principles ciples recognized in every part of the law. Rupp & W. Co. v. Elliott, 65 C. C. A. 544, 131 Fed. 730, 732; Harper v. Shoppell, 28 Fed. 613. Morgan Envelope Co. v. Albany Perforated Wrapping Paper Co. 152 U.S. 425, 433 , 38 S. L. ed. 500, 503, 14 Sup. Ct. Rep. 627.

It is argued that the law, construed as we have construed it, goes beyond the power conferred upon Congress by the Constitution, to secure to authors for a limited time the exclusive right to their writings. Art. 1, 8, cl. 8. It is suggested that to extend the copyright to a case like this is to extend it to the ideas, as distinguished from the words in which those ideas are clothed. But there is no attempt to make a monopoly of the ideas expressed. The law confines itself to a particular, cognate, and well-known form of reproduction. If to that extent a grant of monopoly is thought a proper way to secure the right to the writings, this court cannot say that Congress was wrong.

Decree affirmed.