

No. 19-259

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In The  
**SUPREME COURT OF THE UNITED STATES**

MARON PICTURES LTD.,  
*Petitioner,*

v.

SAM EIGEN et al.,  
*Respondents,*

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On Petition for Writ of Certiorari to the California  
Court of Appeal for the Second Appellate District

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**REPLY BRIEF FOR PETITIONER**

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## **COMPANY DISCLOSURE STATEMENT**

Maron Pictures Ltd. has no parent company. Maron Pictures Ltd. is owned by Mark Mahon, who is a sole proprietor, administrator, sole beneficiary and the only creditor of Maron Pictures Ltd. Mark Mahon is also the sole owner and Copyright holder of the motion picture, 'Strength and Honour' registered in the U.S. Copyright Office, registration no. PA 1-642-297. Mark Mahon is also the registered Copyright owner of the screenplay registered in the U.S. Copyright Office, registration no. TXul-289-556. Mark Mahon's ownership rights in this matter also fall under the protection of Title 17, United States Code and of The Berne Convention Implementation Act of 1988.

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**REPLY BRIEF FOR PETITIONER**

This case is a very simple, straight forward matter but was made to appear complex through deceitful techniques intentionally deployed by Respondents throughout, as they profited and enjoy the benefit of Petitioner's property, resources and copyright protected work whilst brazenly ignoring Petitioner's moral rights, ownership rights and royalties due contrary to Federal Copyright Law. (17 U.S.C. §§ 101, et seq.)

Through the smoke and mirrors of Respondents' Brief presented to this Court and the large number of erroneous legal references, which are completely inappropriate to the matters at hand, Respondents' admissions are fatal to their arguments. Respondents' Brief completely shows that they recognize that the trial court wrongly ruled in favor of Respondents at trial in its bizarre interpretation of the Delivery requirement of the Agreement as somehow imposing a forfeiture by which Petitioner's literal delivery of the Film, which Respondents actually licensed and distributed all over the world, nonetheless did not entitle Petitioner to any benefits of the Agreement. Tellingly, the physical agreement was originally presented to Petitioner with the short form page in first order under the heading "SHORT FORM DISTRIBUTION

AGREEMENT” too. (Res.App., p.43a-p.44a.)<sup>1</sup> Why Respondents would be entitled to the benefits of Petitioner’s intellectual property absent an enforceable agreement was never explained by the trial court or appellate court. California law abhors a forfeiture. Courts also attempt to avoid absurdly literal interpretations of contracts. The trial and appellate court’s decision accomplished this. The court’s finding that Petitioner failed to “deliver” the very Film that Respondents commercially exploited necessarily meant that Respondents had no rights to use the Film and have committed copyright infringement but by doing so, the claims would fall outside of the 1-year contractual statute of limitations.

**I. This Case Is Properly Presented.**

Respondents clothe justiciability matters raised about the record in vague concerns, but neither do their underlying record-related complaints nor their jurisdictional window-dressing arguments have any substance. This is particularly noticeable through Respondents humbug that attempts to address Petitioner’s well pleaded complaint, first amended complaint, Federal Copyright Law issues

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<sup>1</sup> “Br.Opp’n.” refers to Brief in Opposition, No. 19-259; “Pet.App.” refers to the appendices with the petition for writ of certiorari, No. 19-259; “Res.App.” refers to the brief in opposition appendices.”



raised during the bench trial as well as with the appellate court, and the preemption matters raised by failing to cite a single preemption precedent applicable to ***motion picture rights*** because they cannot. (Br.Opp'n., p.23 through p.29.) For example, Respondents cite *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987) (citing *Gully v. First Nat'l Bank*, 299 U.S. 109 (1936); *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149 (1908)) which has to do with an employee benefit plan and *Caterpillar v. Williams*, 482 U.S. 386, 392 (1987) which again, is a matter involving individual employment contracts. To further confuse this Court in its attempt to make a case for why preemption pursuant to 17 U.S.C. § 301, which codifies to protect "exclusive rights within the general scope of copyright" is not available to Petitioner, it speaks on Ordinary or Defensive Preemption and states "Ordinary preemption is not available to Petitioner, who was plaintiff in the underlying action, because federal preemption is an affirmative position available to defendants." (Br.Opp'n., p.25-p.26.) Respondents then cite inappropriate cases like *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987) after this again; *Close v. Sotheby's, Inc.*, No. 16-56234 (9th Cir. Jul. 6, 2018) (citing *Sickle v. Torres Advanced Enter. Sols., LLC*, 884 F.3d 338, 345 (D.C. Cir. 2018) that concerns resale royalties under the California Resale Royalties Act; *Brannan v. United Student Aid Funds, Inc.*, 94

F.3d 1260 (9th Cir. 1996) (holding that the Higher Education Act preempts all state law that regulates pre-litigation collection activities); *Johnson v. Armored Transport of California*, 813 F.2d 1041 (9th Cir. 1987) concerning armored car service to businesses in San Francisco; *Shamrock Oil Corp. v. Sheets*, 313 U.S. 100 (1941) (holding that cases cannot be removed on the basis of a defendant's counterclaim but which has since been superseded) and finally, *Home Depot U.S.A. Inc. v. Jackson*, No. 17-1471, slip op. at 1 (U.S. May 28, 2019).

Further examples of inappropriate references, but not limited to, are where Respondents concede that Petitioner's copyright certificate was used as part of the bench trial. (Br.Opp'n., p.29 through p.34.) It is also interesting that in order to further confuse this Court, Respondents cite *Obb Personenverkehr AG v. Sachs*, 136 S. Ct. 390 (2015) (Finding that a personal injury suit arising from a fall during train travel was not "based upon" the train ticket sale by the foreign state) which has nothing to do with motion picture rights or the copyright certificate issue on discussion that was before the trial court. In fact, Respondents cite *Original Appalachian Artworks, v. Toy Loft*, 684 F.2d 821, 27-28 (11th Cir. 1982) and *Bateman v. Mnemonics, Inc.*, 79 F.3d 1532, 1541 (11th Cir. 1996) ("Once the plaintiff produces a certificate of copyright, the burden shifts to the defendant to

demonstrate why the claim of copyright is invalid.”) which we submit, in fact, supports Petitioner’s arguments. Needless to say, this should clearly be seen for the modus operandi that Respondents have continuously engaged over the last nine years.

## **II. Issues Regarding Respondents’ Opening Statement.**

“Fully represented by counsel during an ensuing state court bench trial, Petitioner again raised no copyright issues. Then, when the trial court issued its preliminary decision in favor of Respondents and invited objections or modifications thereto, Petitioner was silent. In so doing, Petitioner waived any objections and/or right to request modification of the trial court’s preliminary decision or to invoke copyright claims under federal copyright law.” (Br.Opp’n., p. 4.) Respondents conveniently fail to represent the facts to this Court. The court records clearly reflect that the copyright certificate was used during the bench trial (6 CT:1269, MTA pp. 197-198; R.T.P.O., p.63-p.64; Pet.App., p.19a) as the infringement issues were raised.

Secondly, what Respondents are also aware of is that Petitioner’s relationship with his former counsel broke down during the bench trial as his former counsel was about to seek to withdraw, and then went out of state as the court invited objections and modifications thereto. Petitioner, as an entity, literally could not file such an objection by law. It is,

frankly, misleading for Respondents to suggest that “Petitioner was silent” and in doing so, “waived any objections and/or right to request modification of the trial court’s preliminary decision.” It also conveniently ignores the fact that Petitioner’s owner, Mark Mahon, however, still attempted to file objections to the ‘Proposed Statement of Decision,’ but they were rejected by the trial court because Petitioner could only appear through counsel. (6 CT: 1281.) The appellate court was made aware of this too and also denied Petitioner’s motion to augment these documents to the record on July 12, 2017, which contained his *six* page letter addressed to the trial Judge highlighting the court errors dated *July 18<sup>th</sup>, 2016* and an *87* page book of evidence, which included copies of the various exhibits presented during the trial with *notes asserting Federal Copyright Law (17 U.S.C. §§ 106, 106A, 501) violations*. Further, Respondents’ assertion here is flatly wrong and completely unsupported by the law, that the effect of a failure to file is that a reviewing court will assume that unstated issues were decided in favor of the prevailing party:

**When a statement of decision does not resolve a controverted issue, or if the statement is ambiguous and the record shows that the omission or ambiguity was brought to the attention of the trial court either prior to entry of judgment or in conjunction with a motion under 657 or 663, it shall not be inferred on appeal or upon a motion under**

Section 657 or 663 **that the trial court decided in favor of the prevailing party as to those facts** or on that issue.

Code of Civil Procedure Section 634 (emphasis added). Clearly, there are still numerous issues that remain unresolved and in fact, the rulings have also created a quagmire of new legal issues that are contrary to Federal Copyright Law (17 U.S.C. §§ 101, et seq.) and well established legal precedents.

### **III. Respondents Ignore The Actual Facts.**

Respondents further claim that Petitioner ignores “that both the trial court and appellate court are bound by the trial record.” (Br.Opp’n., p.13.) However, as stated in the appellate court Opinion, “[a] defendant may be equitably estopped from asserting a statutory or contractual limitations period as a defense if the defendant’s act or omission caused the plaintiff to refrain from filing a timely suit and the plaintiff’s reliance on the defendant’s conduct was reasonable. (*Lantzy v. Centex Homes* (2003) 31 Cal.4<sup>th</sup> 363, 384-385 (*Lantzy*)). The defendant need not intend to deceive the plaintiff to give rise to an equitable estoppel. (Id. at p. 384.)” (Pet.App., p.34a.)

But in this case, this well established rule of law was applied to a significantly different set of facts as the Opinion states “On January 24, 2011, defendants’ counsel replied they could not set a date “until we have more information at our disposal. [¶] As I mentioned, we will be in better shape next

week.” ***There is no further correspondence in the record between the parties discussing a date for mediation.***” (emphasis added)(Pet.App., p.31a-p.32a.) However, Petitioner had put appellate court on notice of the correct facts in its Opening Brief filed 02/21/2018, and of facts and exhibits that it had incorrectly stated in its Opinion pursuant to Cal. Evid. §459 (a)(2) which states “[t]he reviewing court may take judicial notice of any matter specified in Section 452. The reviewing court may take judicial notice of a matter in a tenor different from that noticed by the trial court.” Cal. Evid. §452 further states “[j]udicial notice may be taken of the following matters to the extent that they are not embraced within Section 451: (d) Records of (1) any court in the state”. This was also addressed when Petitioner filed a ‘petition for rehearing and transfer to Federal jurisdiction’ on 03/01/2019 that was denied on 03/05/2019 (Pet.App., p.11a), a ‘petition to transfer’ on 03/08/2019, which was denied on the same day (Pet.App., p.6a) and ‘petition for transfer of appellate division case’ filed on 03/11/2019 that was also denied by appellate court on 03/14/2019. (Pet.App., p.4a.)

The missing factual information is very significant based on the appellate court’s Opinion (Pet.App., p.17a, p.19a-p.20a, p.24a-p.25a, p.29a through p.36a) and would have completely changed the outcome based on the actual timeline. In this

case which evidence supports (R.T.P.O., p.12-p.14) “the defendant’s act or omission caused the plaintiff to refrain from filing a timely suit and the plaintiff’s reliance on the defendant’s conduct was reasonable. (*Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 384-385 (*Lantzy*).)” (Pet.App., p.34a.) Further, “[w]here the delay in commencing action is induced by the conduct of the defendant it cannot be availed of by him as a defense.” *Vu v. Prudential Property & Casualty Ins. Co.* (2001) 26 Cal.4th 1142, 1152; see also *Griffis v. S.S. Kresge Co.*, (1984) 150 Cal.App.3d 491, 499.

Petitioner also completely contested this finding and called for legal clarification and jurisdiction under 28 U.S.C. §1631.

Further, as correctly stated in appellate court’s Opinion, “[u]nder the doctrine of continuous accrual, “a series of wrongs or injuries may be viewed as each triggering its own limitations period, such that a suit for relief may be partially time-barred as to older events but timely as to those within the applicable limitations period.” (*Aryeh v. Canon Business Solutions, Inc.* (2013) 55 Cal.4th 1158, 1192 (*Aryeh*).) In contrast, “[t]he continuing violation doctrine aggregates a series of wrongs or injuries for purposes of the statute of limitations, treating the limitations period as accruing for all of them upon commission or sufferance of the last of them.” (*Ibid.*) Thus, while “the continuing violation doctrine ...

renders an entire course of conduct actionable, the theory of continuous accrual supports recovery only for damages arising from those breaches falling within the limitations period.” (*Id.* at p. 1199.)” (Pet.App., p.38a-p.39a.)

Petitioner also agrees with this rule of law, which is why the appellate court’s Opinion makes no sense.

Appellate court further states “[t]he court also found Mainsail stopped all licensing activities “when it received a ‘cease and desist’ letter from Maron Pictures on January [22], 2010. [Exh. 254].” (Pet.App., p.43a.)

However, it has been continuously ***disputed*** that Mainsail ***did not ‘cease and desist’*** as per the letter from Maron Pictures on Jan 29, 2010. Furthermore, over nine years after a very specific formal demand was issued by Petitioner to Respondents “to ‘cease and desist’ from distributing” his work for blatantly infringing Petitioner’s copyright (6CT:1269, MTA pp. 82; R.T.P.O., p.63 - p.64), and ***to remove all product from “any place where the product’s images or trailers is listed for sale,”*** it is still available in the global marketplace and was during all court and appellate proceedings, was never withdrawn which is *global* common knowledge, in violation of Petitioner’s exclusive rights. (MTA pp.82, MTA pp.132 through 139; MTA pp.157 through 165; MTA pp.183-184.)



These ‘*exclusive*’ *rights* are owned solely by Mark Mahon and Maron Pictures’, *were never assigned to Respondents* and are fully protected under 17 U.S.C. §§ 106(1), 106(2), 106(5), 106A, 301, 501, 504 and under the Berne Convention Implementation Act of 1988, Section 3 (b) and Section 3 (b)(2). Further, “a law established for a public reason cannot be contravened by a private agreement.” (Cal. Civ. Code § 3513.) Furthermore, Petitioner also attached his copyright certificates, the ‘Film Audit Report’ and the ‘Film Proceeds Report’ to his ‘Request to Publish Opinion’ despite the appellate court denying his motions to augment, so they were aware that his Film was still generating revenue up until at least 2015. (R.T.P.O., p.54 through p.64.)

#### **IV. Copyright Preemption Does Apply To Extra-Territorial Conduct.**

Respondents argue that Copyright preemption does not apply to extra-territorial conduct and cites *Subafilms, Ltd. v. MGM-Pathe Communications Co.*, 24 F.3d 1088 (9th Cir. 1994) (Holding that no infringement took place where the copying of a copyrighted work occurred overseas and was merely authorized in the United States) and *Robert Stigwood Group Ltd. v. O'Reilly*, 530 F.2d 1096 (2d Cir. 1976), which relates to a staged Opera concert in Canada performed by Catholic priests without a license but has been superseded by *Bryant v. Media Right Productions, Inc.*, 603 F.3d 135 (2d Cir. 2010).

It further makes the claim “Respondents’ grant of license of the Film was limited to territories outside the United States. Thus, there is no basis for this Court to address the merits of Petitioner’s alleged copyright claims because any alleged infringement occurred outside the United States.” (Br.Opp’n., p.22.) However, the cases Respondents cite are not applicable to this matter as these relate to cases where the asserted infringing conduct consists solely of authorization within the United States of acts that occur entirely abroad. In fact, we submit that *Subafilms, Ltd. v. MGM-Pathe Communications Co.*, 24 F.3d 1088 (9th Cir. 1994) supports extraterritoriality as an element of copyright infringement.

In this case, Petitioner provided Respondents with ***one master copy of each individual element*** as per distribution Agreement. (Res.App., p.32a through p.44a.) These *masters* were delivered to Visual Data Media Services in Los Angeles for Respondents, which still remain at Visual Data in California today. (6 CT:1269, MTA pp. 169 through 172.) Based on the legal discovery conducted in December 2014, it was established that Respondents delivered his motion picture to over 41 countries around the world, so numerous copies of each master element were replicated by Respondents, who then distributed physical sub-masters from the United States to the relevant countries. Visual Data also

confirmed this to Petitioner, so copyright violations under Federal Copyright Law (17 U.S.C. §§ 101, et seq.) do apply. ***Respondents also generated the illicit covers and trailer from the masters provided within the United States, which they provided to every respective country too.***

Further, previous circuit court rulings have found that the copyright holder may recover damages that stem from a direct infringement of its exclusive rights that occurs *within* the United States. *Sheldon v. Metro-Goldwyn Pictures Corporation*, 106 F.2d 45, 52 (2d Cir. 1939) (L. Hand, Judge.) ("The [copyrighted film] negatives were 'records' from which the work could be 'reproduced', and it was a tort to make them in this country. The defendants acquired an equitable interest in them as soon as they were made, which attached to any profits from their exploitation. . . ."), *aff'd*, 309 U.S. 390 (1940); *Famous Music Corporation v. Seeco Records, Inc.*, 201 F. Supp. 560, 568-69 (S.D.N.Y. 1961). In these cases, liability is not based on contributory infringement, but on the theory that the infringing use would have been actionable *even if* the subsequent foreign distribution that stemmed from that use never took place.

Professor Nimmer formulates the doctrine in the following terms:

[I]f and to the extent a part of an 'act' of infringement occurs within the United States, then, although such act is completed in a foreign jurisdiction, those parties

who contributed to the act within the United States may be rendered liable under American copyright law.

3 Nimmer, *supra*, § 17.02, at 17-19 (footnotes omitted).

“It is well established that copyright laws generally do not have extraterritorial application. There is an exception — when the type of infringement permits further reproduction abroad — such as the unauthorized manufacture of copyrighted material in the United States.” *Update Art, Inc. v. Modiin Publishing, Ltd.*, 843 F.2d 67, 73 (2d Cir. 1988). See also *Los Angeles News Ser. v. Reuters Television I*, 149 F.3d 987 (9th Cir. 1998) (Finding that plaintiff was "entitled to recover damages flowing from exploitation abroad of the domestic acts of infringement committed by defendants").

### CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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