COLUMBIA PICTURES TELEVISION v. KRYPTON BROADCASTING OF BIRMINGHAM, INC.

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United States Court of Appeals for the Ninth Circuit, 1997
106 F.3d 284

BRUNETTI, Circuit Judge.

C. Elvin Feltner is the owner of Krypton International Corporation, which in turn owns three television stations in the southeast. Columbia Pictures Television licensed several television shows to the three stations, including "Who's the Boss?," "Silver Spoons," "Hart to Hart," and "T.J. Hooker." After the stations became delinquent in paying royalties, Columbia attempted to terminate the licensing agreements. The stations continued to broadcast the programs, and Columbia filed suit. During the course of the litigation, Columbia dropped all causes of action except its copyright claims against Feltner. The district court found Feltner vicariously and contributorily liable for copyright infringement on the part of the Krypton defendants, granted summary judgment in favor of Columbia on liability, and, after a bench trial, awarded Columbia $8,800,000 in statutory damages and over $750,000 in attorneys fees and costs. In this appeal, Feltner and Krypton International challenge several of the district court's rulings.

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VII. CALCULATION OF THE NUMBER OF INFRINGEMENTS

A. The Stations Were Separate Infringers

Section 504(c)(1) of the Act provides that statutory damages may be awarded "for all infringements involved in the action, with respect to any one work, for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally . . . ." Thus, when statutory damages are assessed against one defendant or a group of defendants held to be jointly and severally liable, each work infringed may form the basis of only one award, regardless of the number of separate infringements of that work. However, "where separate infringements for which two or more defendants are not jointly liable are joined in the same action, separate awards of statutory damages would be appropriate." H.R. Rep. No. 94-1476, 94th Cong., 2d Sess., at 162, *reprinted in* 1976 U.S. Code Cong. and Admin. News 5778.

By finding that "the 'Who's the Boss?' episodes broadcast by WNFT are separate acts of infringement from the episodes broadcast by WTVX," the district court impliedly found that WNFT and WTVX were not joint tortfeasors with respect to the broadcasting of these episodes.

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. . . Feltner has failed to demonstrate that the finding was erroneous.

B. Each Episode Was a Separate Work

As mentioned, §504(c)(1) of the Act provides that statutory damages may be awarded "for all infringements involved in the action, with respect to any one work." Section 504(c)(1) further provides that "for purposes of this subsection, all the parts of a compilation or derivative work constitute one work." The district court found that each infringed episode of the television series constituted a separate work for purposes of §504(c)(1). Feltner argues that each series, and not each episode, constitutes a work.

The two courts to have addressed whether each episode of a television series constitutes a separate work have both held in the affirmative. *Gamma Audio & Video, Inc. v. Ean-Chea*, 11 F.3d 1106, 1116-1117 (1st Cir. 1993). Feltner attempts to distinguish these cases by arguing that the episodes at issue are not separate works because they do not have independent economic value.

While Feltner correctly states the proper test to apply in analyzing whether each episode is a separate work, *see Gamma Audio*, 11 F.3d at 1117 (focusing on whether each television episode "has an independent economic value and is, in itself, viable"); *Walt Disney Co. v. Powell*, 897 F.2d 565, 569 (D.C. Cir. 1990) (stating that "separate copyrights are not distinct unless they can 'live their own copyright life' "), the facts upon which Feltner bases his argument — that the episodes are licensed as a series — were addressed and rejected in *Gamma Audio*.

In *Gamma Audio*, the district court found that the episodes were a single work because the copyright holder sold only complete sets of the series to video stores. The First Circuit found this unpersuasive. Instead, the court found significant "the fact that (1) viewers who rent the tapes from their local video stores may rent as few or as many tapes as they want, may view one, two, or twenty episodes in a single setting, and may never watch or rent all of the episodes; and (2) each episode in the . . . series was separately produced." 11 F.3d at 1117.

In this case, the different episodes were broadcast over the course of weeks, months, and years. From this fact, it was reasonable for the district court to conclude that, as in *Gamma Audio*, viewers may watch as few or as many episodes as they want, and may never watch all of the episodes. Additionally, it was clear from the record that the episodes could be repeated and broadcast in different orders. Nor does Feltner contest that the episodes were separately written, produced, and registered. Thus, this case comes squarely within the holdings of *Gamma Audio* and *Twin Peaks*.

Feltner also contends that each series was an anthology, a type of "compilation" under §504(c). Feltner argues that the question of whether the

episodes amounted to a "collective whole" was a factual one. Thus, argues Feltner, the district court's refusal to allow Feltner to produce evidence on the issue, which would have consisted of a license agreement and expert testimony that "programs of this nature are considered to be anthologies," was error.

Even were Feltner allowed to prove that the programs were considered to be "anthologies," he would still have to show that they consisted of "separate and independent works . . . assembled into a collective whole." As mentioned, the evidence was uncontroverted that the episodes were broadcast over the course of weeks, months, or even years, and could be repeated and rearranged at the option of the broadcaster. Because this evidence supports the conclusion that the episodes were not "assembled into a collective whole," it was not error for the district court to reject Feltner's contention that each series was a "compilation" under §504(c).

The district court did not err in calculating the number of infringements.

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