1991 WL 11009198 (U.S.) (Appellate Petition, Motion and Filing)
Supreme Court of the United States.

SIMON & SCHUSTER, INC., Petitioner,

v.

MEMBERS OF THE NEW YORK STATE CRIME VICTIMS BOARD, Gennaro Fischetti, George L. Grobe, Jr., Diane McGrath, and Angelo Petromelis, Respondents.

No. 90-1059.
October Term, 1990.
January 28, 1991.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

**Brief of Motion Picture Association of America, Inc., as Amicus Curiae, in Support of Petition for a Writ of Certiorari**

Richard M. Cooper, Counsel of Record, David E. Kendall, Laurence Shore, Williams & Connolly, 839 17th Street, N.W., Washington, DC 20006, (202) 331-5000, Walter J. Josiah, Jr., Simon Barsky, 1133 Avenue of the Americas, New York, New York 10036, (212) 840-6161, Counsel for Amicus Curiae, Motion Picture Association of America, Inc.

***i TABLE OF CONTENTS**



***ii TABLE OF AUTHORITIES**

**CASES**



**STATUTES**



**OTHER AUTHORITIES**

***1 AMICUS BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI**

## I. INTEREST OF THE AMICUS CURIAE

Amicus curiae Motion Picture Association of America, Inc. ("MPAA") is a New York not-for-profit corporation that seeks to advance the interests of the American motion picture industry. MPAA's members [1] are primarily engaged in the production and distribution of filmed entertainment, including theatrical motion pictures and television programs.

Four decades ago, the Court recognized the important expressive role films play in modern society:

***2** "It cannot be doubted that motion pictures are a significant medium for the communication of ideas. They may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression. The importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform . . .

'The line between the informing and the entertaining is too elusive for the protection of that basic right [a free press]. Everyone is familiar with instances of propaganda through fiction. What is one man's amusement teaches another's doctrine."'

Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501 (1952) (quoting Winters v. New York, 333 U.S. 507, 510 (1948)).

New York's "Son-of-Sam" law, N.Y. Exec. Law § 632-a (McKinney 1982 & Supp. 1990), places substantially the same burdens upon film-makers as it does upon ***3** book publishers: persons accused or convicted of crimes, or who admit crimes, § 632-a.10(b), will have no incentive to grant motion picture companies the right to make motion pictures that are based upon or depict their crime, and therefore many works of social and political importance either will not be made or will be significantly truncated. Film-makers, like book publishers such as the petitioner herein, Simon & Schuster, thereby are constrained in what they may depict. Such a constraint directly burdens film-makers' First Amendment rights and discourages them from making certain types of films, "all of which will ultimately 'reduc[e] the quantity of expression'." See Riley v. National Federation of the Blind of North Carolina, 487 U.S. 781, 794 (1988) ***4** (quoting Buckley v. Valeo, 424 U.S. 1, 19, 39 (1976)). The "Son-of-Sam" law's chilling effect on film-making thus represents a matter of grave concern to the MPAA.

Moreover, MPAA's concern extends well beyond the borders of New York. The "Son-of-Sam" law has spawned similar legislation in a great many other states. [2] A federal statute also has ***5** been enacted. See 18 U.S.C. § 3681 (1988). If the constitutionality of this legislation is upheld, the national ***6** consequences will be immense: film-makers' First Amendment rights will be restricted, public understanding of crime will be limited, and crime victims will not make any significant gains. [3] As the Court recently stated in Hustler Magazine v. Falwell, 485 U.S. 46, 50-51 (1988), "[a]t the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern. . . .

We therefore have been particularly vigilant to insure that ***7** individual expressions of ideas remain free from governmentally imposed sanctions."

All parties have consented to the filing of this brief. [4]

## II. SUMMARY OF ARGUMENT

There are numerous examples of well-known motion pictures that depict "real life" crimes and persons who have committed crimes. The New York "Son-of-Sam" law and its progeny around the country burden and obstruct a studio's ability to make such films. If the decision below stands, the "Son-of-Sam" law will be allowed to create a new and ***8** additional category of unprotected speech, recognition of which will adversely affect the free expression of film-makers in at least three ways: suppression of some works; bowdlerization of some works; and legal controversies with respect to some works for which releases must be obtained from persons subject to the "Son-of-Sam" law, resulting in suppression.

It is plain that, under numerous precedents of this Court, limitations on the power of a would-be speaker to make payments in connection with expressive activity triggers strict scrutiny. The rationale of the court below will not withstand the strict scrutiny which that court recognized was properly applicable. The fact that speech is about crime, as defined in the New York statute, does not ***9** provide a basis for burdening or restricting it.

To produce an accurate and effective "crime film," the film-maker often needs access to the thoughts and descriptions of the person who was directly involved with the crime. Indeed, critically acclaimed films about crime have entailed payments to the criminals, and filmed presentation of matters of indisputable public interest and political importance may depend on the willingness of participants in criminal acts to disclose their thoughts and emotions. "Son-of-Sam" laws make it more difficult for film-makers to work with crucial sources, who will require compensation, and thereby reduce the flow of ideas and information to the public.

## ***10** III. ARGUMENT

### A. The "Son-of-Sam" Law Is an Unjustifiable Content-Based Regulation of Expression.

Amicus' members have an interest in making films about crime and criminals, both to inform and to entertain the public. Such films as "I Want to Live!", "Birdman of Alcatraz," "The Thin Blue Line," "All the President's Men," "GoodFellas", "Missing," "Inherit the Wind," "Lenny," "Mississippi Burning," "Born on the Fourth of July," "Blood Feud," "Reversal of Fortune," "Dog Day Afternoon," "Serpico," "Matewan," and "The Front" are only a few examples of films containing accounts of "real life" crimes and persons who have committed crimes. The New York "Son-of-Sam" law and its progeny around the country burden and obstruct a ***11** studio's ability to make such films. Due to the First Amendment, categorical content-based restrictions on film-makers' freedom of expression are rare. [5] Obscenity is the principal judicially recognized category of unprotected speech relevant to films. [6]

If the decision below stands, New York Executive Law § 632-a will be allowed to create a new and additional category of unprotected speech: speech that (i) involves a contract with a person who has been charged with, or convicted of, or who has admitted, a ***12** crime, and that (ii) constitutes the "reenactment" of the crime or "the expression of the thoughts, feelings, opinions or emotions [of the person] regarding such crime" (§ 632-a(1)). There is no precedent for recognition of any such category of speech that is subject to burdensome governmental restrictions.

Recognition of this new category of unprotected speech will adversely affect the free expression of film-makers and others in at least three distinct ways.

First, it will lead to suppression of a work where (i) the raison d'etre of the work is the presentation of the reenactment of a crime or the thoughts, feelings, etc. of the person who committed the crime, and ***13** (ii) the work cannot be made without a contractual arrangement with the person who committed the crime.

Due to the broad but also ambiguous sweep of the New York statute, film-makers are likely to be deterred from embarking on certain types of projects to avoid the risk that an expensive production will be entangled in litigation or subject to disputes with state agencies administering "Son-of-Sam" laws. It will often not be possible to determine whether an individual is subject to a particular statute. In New York, for example, the statutory term "convicted" person is expansively defined to include a person deemed by the New York State Crime Victims Board to have "voluntarily admit[ted]" the commission of a crime. § 632-a.10(b). Indeed, in ***14** the present case, Henry Hill was held subject to the "Son-of-Sam" law not because he had been convicted of any crime (indeed, he had been immunized) but because the Crime Victims Board ruled that Wiseguy "contains thoughts, feelings, opinions and emotions regarding crimes committed by Henry Hill as well as his admission to involvement in such crimes" (50a).

Second, it will lead to the bowdlerization of a work where the presentation of the reenactment of a crime or the thoughts, feelings, etc. of the person who committed it is not central to the work (though such a presentation may be necessary to an accurate or fully informative ***15** presentation).[7] "Son-of-Sam" laws will operate to distort and truncate the content of films as well as to deter them entirely. In the district court, the President of G.P. Putnam's Sons describes in an affidavit how a recent book by a celebrity was bowdlerized due to concern about the application of a "Son-of-Sam" law:

"We felt compelled to severely restrict any discussion of the crime in order to avoid the snare of another state's "Son-of-Sam" law. Full treatment of the crime would have added credibility to the main ***16** subject of the book and increased significantly the book's general interest. However, we and the author did not wish to run the risk of being caught up in the bureaucratic maze of "Son-of-Sam" procedures."

(CA App. 128.)

Third, it will lead to suppression of, or legal controversies with respect to, a work with respect to which (i) it is arguable that a release should be obtained from a person who may, with respect to the film, have a claim for commercial appropriation, or defamation[8], but (ii) because that person committed a crime depicted in the work there is a substantial risk that any ***17** contract with him or her would be subject to a "Son-of-Sam" law. Insurance coverage for many motion pictures requires that such releases be obtained. In many cases, while an accused or convicted criminal's cooperation may not be needed for the production of an accurate film, since the facts are well known or the story is in the public domain, it may nonetheless be necessary to obtain a release, and payment may be necessary to secure it. "Son-of-Sam" laws may make such payments, which are normally not large, illegal, and thereby prevent such projects from going forward.

All three of these speech-restricting effects of the law will be relatively invisible to the general public. The first and third effects are the most severe because they involve ***18** total suppression of works. The second effect is the most insidious because it involves the distortion of works that are produced and that appear to be uncensored.

The court below recognized that § 632-a applies only to contractual payments for expressive activity, and only to expression of a certain kind: "the statute burdens directly the speech of those who wish to tell (and sell) the stories of their crimes" (App. 11a). Although the statute does not directly prohibit such expression, it is plain that, under numerous precedents of this Court, limitations on the power of a would-be speaker to make payments in connection with expressive activity trigger the same kind of strict scrutiny as does a law that directly prohibits a ***19** certain kind of expression. See Riley, 487 U.S. 781; Meyer v. Grant, 486 U.S. 414 (1988); Secretary of State of Maryland v. Joseph H. Munson Co., 467 U.S. 947 (1984); Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980).

The "Son-of-Sam" laws spring from an understandable objection to the perception of criminals "profiting" further from their crime. The court of appeals considered the speech about crime of a Henry Hill as an "exploitation" of the crime, to the possible detriment of the victims of the crime (App. 13a). That rationale does not withstand analysis. This Court has repeatedly ruled that the mere offensiveness of speech does not justify the imposition of sanctions on it. "If there is a bedrock ***20** principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." Texas v. Johnson, 491 U.S. 397, 109 S. Ct. 2533, 2544 (1989). The speech at issue in Hustler could have hardly been more grossly outrageous, but the Court ruled that, in the absence of knowing falsity, there was no remedy for a public figure subjected to such vituperation. For the reasons set forth in the Petition for Writ of Certiorari at 10-16, the "exploitation" rationale of the court below will not withstand the strict scrutiny which that court recognized was properly applicable. But the extraordinary original logic of the New York legislature should not be lost sight ***21** of. The fact that speech is about crime, as defined in the New York statute, does not provide a basis for burdening or restricting it. One lower court has observed that the New York statute was enacted "under the cry of the public for the Legislature to exact retribution," [9] while the then unknown "Son-of-Sam" killer was being sought by the police.

**B. Film-Makers, Not The Government, Should Determine The Content Of Their Works.**

The First Amendment protects the right not only to present a certain viewpoint but also to select "the most effective means for so doing." Meyer, 486 U.S. at 424. To appreciate the significance of the restriction imposed ***22** on film-makers by laws like the "Son-of-Sam" law, it is helpful to understand the motion picture industry and film-makers' need for access to sources that the statute expansively defines as "criminal."

In this highly competitive industry, [10] it is well known that, "[i]n recent years, in fact, the marketplace has been willing to pay handsomely for written, filmed, or televised chronicles of crime." N.Y. Times, March 22, 1987, § 7 ***23** at 1, col. 1. The public's unabated interest in "confessions" is concomitant with its apparent revulsion at the sight of criminals apparently profiting from their crimes. Id.

The realities of the marketplace underscore a related fact of film-making: to produce an accurate and effective "crime film," the film-maker often needs access to the thoughts and descriptions of the person who was directly involved with the crime. The criminal arguably is in the best position to explain, e.g., whether the death penalty deters; to account for the role of social conditions in contributing to the crime; to suggest how crime can be prevented; to describe the agony of committing a mercy-killing ***24** of an ailing spouse. [11] Indeed, NBC ***25** television reportedly paid $50,000 to Roswell Gilbert and his attorney [12] to make the NBC-TV film, "Mercy or Murder?". See St. Petersburg Times, April 15, 1988 at 2B (Metro and State); Associated Press, Tallahassee, Florida, April 14, 1988 (Nexis, Omni file). Gilbert was ***26** convicted of murdering his wife. Without the benefit of Gilbert's account of his thoughts and feelings, the film clearly would have been a different -- and in NBC-TV's view, an inferior -- product, and public discussion of and policy-making about mercy-killing issues would have been diminished. Indeed, critically acclaimed films about crime have entailed payments to the criminals. Warner Brothers paid $100,000 to John Wojtowicz, whose 1972 bank robbery became the subject of the movie "Dog Day Afternoon." See N.Y. Times, March 27, 1987. The movie won the Academy Award for "Best Screenplay" (1975). Id.

Matters of indisputable public interest and political importance sometimes involve criminal conduct. Filmed presentation of such matters may ***27** depend on the willingness of participants in criminal acts to disclose their thoughts and emotions. Convicted Watergate felon G. Gordon Liddy contracted with NBC television to grant it the right to transform his 1980 autobiography, Will, into a movie. See R. Snider, Coming Soon to a Theatre Near You, 7 Cal. Lawyer 29, 32 (April 1987). Liddy claimed to have received at least $100,000 from NBC. Id. [13] To depict most effectively certain aspects of the ***28** Watergate scandal, [14] film-makers understandably wanted the opportunity to present, with a high degree of confidence, the thoughts and feelings of a leading participant. Application of the "Son-of-Sam" law would either have prevented the film from being made or have resulted in a bowdlerized presentation.

This issue is put in starkest terms by the following hypothetical ***29** example: in the wake of the most recent presidential election, if a film-maker decides to film the "Willie Horton Story," and the film-maker determines that Willie Horton is a crucial source, and Horton demands payment before he will cooperate, should the government be allowed to erect an impediment to the film-maker's decision to use Horton? "Son-of-Sam" laws pose just such an impediment.

In Riley, Justice Scalia observed that "[c]ompensatory employment is, I would judge, the natural order of things." 487 U.S. at 804 (Scalia, J., concurring in part and concurring in judgment). The Court in Meyer quoted with approval the Colorado Supreme Court's statement that "[w]e can take judicial notice of the fact that it is ***30** often more difficult to get people to work without compensation than it is to get them to work for pay." 486 U.S. at 423. The record below confirms these realities. "Son-of-Sam" laws obviously make it more difficult for film-makers to work with crucial sources, and will limit the number of films that can be made, since many possible sources will refuse to work without compensation, although the exact extent of this phenomenon may not be quantifiable. [15] These laws will thereby reduce the flow of ideas and information to the public.

## ***31 IV. CONCLUSION**

For the foregoing reasons, amicus curiae MPAA respectfully requests that the petition for a writ of certiorari be granted.
Respectfully submitted,

**WILLIAMS & CONNOLLY**

---

Richard M. Cooper

(Counsel of Record)

David E. Kendall

Laurence Shore

839 17th Street, N.W.

Washington, DC 20006

(202) 331-5000

Walter J. Josiah, Jr.

Simon Barsky

1133 Avenue of the Americas

New York, N.Y. 10036

(212) 840-6161

Counsel for *Amicus Curiae*

Motion Picture Association of America, Inc.

January 28, 1991

Footnotes

1 Buena Vista Pictures Distribution, Inc., Columbia Pictures Entertainment, Inc., MGM/Pathe Communications Company, Orion Pictures Corporation, Paramount Pictures Corporation, Twentieth Century Fox Film Corporation, Universal City Studios, Inc., Warner Bros. Inc.

2 See, e.g., Joint Appendix in the United States Court of Appeals for the Second Circuit ("CA App.") 200, 206-07, Affidavit of Angelo Petromelis at ¶ 14 (Mar. 10, 1988), providing examples of states that have enacted "Son of Sam laws modeled after section 632-a": Ala. Code § 41-9-80-84 (1983); Alaska Stat. § 12.61.020 (1980); Ariz. Rev. Stat. Ann. § 13-4202 (1978); Cal. Civ. Cod § 2224.1 (West 1983); Fla. Stat. Ann. § 944.512 (West 1983); Ga. Code Ann. § 17-14-30 to 32 (1979 and Supp. 1982); Idaho Code § 19-5301 (1979); Ind. Code Ann. § 16-7-3.7(1-6) (Burns 1983); Iowa Code ch. 910.15 (1982); Ky. Rev. Stat. Ann. § 46.1831-3 (West 1982); Mass. Gen. laws Ann. ch. 258A, § 8 (Michie/Law. Coop 1980); Mo. Rev. Stat. § 595.045.11 (1985); Mont. Code Ann. § 53-9-104(2)(e) (1983); Neb. Rev. Stat. § 81-1836-1842 (Supp. 1986); Nev. Rev. Stat. § 217.265 (1981); N.J. Stat. Ann. § 52-4B-26 (1983); N.M. Stat. Ann. 31-22-22 (1983); Ohio Rev. Code Ann. §2743.81 (Anderson 1982); Or. Rev. Stat. § 147.275 (1985); Pa. Stat. Ann. 71 § 180-7.18 (1984); R.I. Gen. Laws § 12-25.1-1 (1983); 1983 R.I. Pub. Laws 328; S.C. Code Ann. § 15-59-40 to 80 (Law. Co-op Supp. 1982); S.D. Codified Laws Ann. § 23A-28A-1 to 14 (Supp. 1982); Tenn. Code Ann. § 29-13-201 to 208 (1980); Tex. Civ. Code Ann. 8309 § 1-18 (Vernon 1980); Wash. Rev. Code Ann. § 7.68.200 to 280 (West Supp. 1982); Wis. Stat. Ann. § 950.04 (2A) (West Supp. 1984).
See also Colo. Rev. Stat. § 24-4.1-201 (Supp. 1987); Conn. Gen. Stat. Ann. § 54-218 (West 1985); Del. Code Ann. tit. 11, § 9103 (1987); Ill. Ann. Stat. ch. 70, para. 403 (Smith- Hurd Supp. 1988); Kan. Stat. Ann. § 74-7319 (Supp. 1987); Mich. Comp. Laws Ann. § 780.768 (West Supp. 1988); Minn. Stat. Ann. § 611A.68 (West 1987); Wyo. Stat. Ann. § 1-40-112(d) (1988).

3 As the dissenting opinion in the court below noted, the possibility of victims recovering under New York's restitution statute renders the Son of Sam law's actual benefit to victims very questionable. See Petition for Certiorari, Appendix 25a [hereinafter cited as "App"]. In addition, the possibility of tort suits by victims, in which all of the defendant's assets would be subject to any recovery, makes the "Son of Sam" law's benefit questionable.

4 See Letter from Charles S. Sims to David E. Kendall (January 17, 1991) (granting consent of petitioner) (submitted herewith); Letter from Robert Abrams to David E. Kendall (January 10, 1991) (granting consent of respondents) (submitted herewith).

5 See, e.g., Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952) (striking down blasphemy law); Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963) (striking down law requiring public notification of expression deemed "indecent or impure" or "manifestly tending to the corruption of youth").

6 Cf., e.g., Jenkins v. Georgia, 418 U.S. 153 (1974).

7 For example, in a filmed biography or a filmed version of an historical event made with the paid assistance of a participant in the events depicted, a desire to avoid the application of a "Son-of-Sam" law might lead the film-maker to censor out any depiction of criminal conduct, even though such a depiction might contribute to a fuller understanding of the subject matter of the film.

8 See, e.g., Spahn v. Julian Messner, Inc., 21 N.Y.2d 124, 286 N.Y.S.2d 832, 233 N.E.2d 840 (1967); Davis v. Costa-Gavras, 654 F. Supp. 653 (S.D.N.Y. 1987) (libel claim with respect to the film "Missing").

9 In re Johnsen, 103 Misc. 2d 823, 430 N.Y.S.2d 904 (Sup. Ct. Kings County 1979).

10 Each year work begins on more than three thousand full-length theatrical film projects. See 16 Ingram's No. 5 at 24 (May 1990). In 1989, however, only 472 movies, mostly studio productions at an average cost of approximately $24.5 million dollars, actually appeared in theaters. Id. Most of these movies failed to earn their costs. See L.A. Times, Sept. 23, 1990, at 7 (Calendar). Costs are expected to rise to $30 million per movie in 1990, making it increasingly difficult for film-makers to produce a work that will break even. Id.

11 The cooperation of persons with first-hand knowledge of crime will give the public a more accurate and realistic picture of the true facts of criminal life and may well serve as a better foundation for public action against crime than a fiction writer's imaginings. See George Will, "The Godfather's Hold on America," The Washington Post, (December 30, 1990, at C7):
"[G]angsters were the preferred expressions of America's busted moral compass, beginning with "Bonnie and Clyde" (1967) . . . In the first two Godfather epics (1972, 1974), the fascination with organized crime was unmistakably tinged with admiration for its organization.

Gangster novels and movies supposedly serve as correctives for American cheerfulness, a salutary reminder of life's dark side. But . . . see "Goodfellas," this year's winner of the best picture award from New York and Los Angeles critics. . . . [a] true story of small-beer mobsters from the 1950s to the 1980s, from criminal squalor to the witness-protection program,. . . [the film] is a corrective to the corrective. The moral of its story is not that America is criminal or is even the 'root cause' of crime, but that the cause of organized crime is criminals who like the life." [emphasis supplied]

12 Apparently NBC paid $45,000 to Gilbert's attorney, who had obtained movie rights to Gilbert's life as part of legal fees; $5,000 was paid to Gilbert, who donated that amount to a non-profit institution for Alzheimer's research. See Associated Press, Tallahassee, Florida, April 14, 1988 (Nexis, Omni file).

13 In 1979, Liddy published a spy novel, Out of Control (St. Martin's Press), which also contains passages based on his past experiences as a secret agent. This book, however, is beyond the reach of "Son-of-Sam" laws. That one piece of writing is subject to restriction, while another is not, underscores the content-based nature of "Son-of-Sam" laws.

14 Other Watergate figures also reportedly received payments for television interviews. See, e.g., The Washington Post, February 25, 1978, § 1 at A1 (CBS television paid H. R. Haldeman $25,000 in 1975; ABC television paid Charles W. Colson $10,000 in 1978); M. N. Carter, Associated Press, New York, January 26, 1978 (Nexis, Omni file) (David Frost paid Richard M. Nixon $600,000 plus 20% of profits from interviews in 1977). Similarly, NBC television paid Sirhan Sirhan approximately $15,000 in 1969 for an on-camera interview. See Wash. Post, Feb. 25, 1978, § 1 at A1.

15 Cf., e.g., N.Y. Times, March 22, 1987 (comment of R. Foster Winans, convicted of federal fraud and conspiracy charges, regarding a contract he entered into to write "Trading Secrets: Seduction and Scandal at the Wall Street Journal": "There would have been a strong economic disincentive if I had thought that the [Son of Sam] law would have applied.")

**End of Document**