

SONY CORPORATION OF AMERICA, ET AL., *Petitioners*, v. UNIVERSAL CITY STUDIOS, INC. AND WALT DISNEY PRODUCTIONS, *Respondents*.

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BRIEF AMICUS CURIAE OF THE AMERICAN LIBRARY ASSOCIATION IN SUPPORT OF REVERSAL

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INTEREST OF THE AMICUS CURIAE

The American Library Association ("ALA"), by its attorneys, respectfully files this brief Amicus Curiae in support of petitioner Sony Corporation of America. *

* Consent of the parties has been granted and is on file with the Court.

The ALA is the world's oldest and largest library association. Its 39,000 members include libraries, librarians, library trustees and friends and patrons of libraries, representing a wide spectrum of users of copyrighted materials. A principal mission of the ALA and of libraries is to insure that all in our society have access to information under terms that are fair both to copyright owners and users of copyrighted works. For this reason, the ALA throughout its history, has been in the forefront of copyright law revision. In particular, the ALA was one of the major consultants to the architects of the Copyright Revision Act of 1976. *

* The Association has worked with coalitions of publishers, other copyright owners and copyright users in general to establish voluntary guidelines governing photocopying of library materials for classroom use, educational uses of music, and off-air taping.

The Ninth Circuit's decision in this case has major implications for libraries and librarians and for the public's right of access to information and entertainment. First, the Court's holding below that "intrinsic" uses of copyrighted materials cannot be "fair" uses will profoundly affect the ability of librarians to serve their patrons effectively. Libraries are the critical link in bringing new information technologies to the public at large. Libraries permit the masses to use such technologies otherwise available only to the affluent. Thus, many libraries now, and in the future most libraries will, provide patrons with access to video recorders for "in-library" use. An increasing number of libraries

provide off-air tapes of news and other programming for in-library viewing for patrons who, for financial reasons, may be unable to purchase their own recorders, and who otherwise would be denied access to broadcast programming. If the decision of the Court of Appeals is not reversed, libraries could be accused of making, or of aiding and abetting, unfair "intrinsic" uses of copyrighted materials.

Second, the Ninth Circuit's holding that "intrinsic" uses of copyrighted materials must be justified by a substantial countervailing social benefit will seriously affect public access to information and severely constrict the traditional role of libraries. For example, libraries frequently are asked to photocopy articles from journals for patrons when such copying has no significant market impact. Upon receiving such a request, a librarian can, however, neither predict nor know with any degree of certainty whether such reproductions bestow a benefit to society sufficient to satisfy the Court of Appeals's test. Furthermore, a librarian can neither inquire as to the patron's need for and planned use of the requested material nor judge its educational or scientific value without violating long-established ethical principles of librarianship.

Accordingly, the Court of Appeals's holding effectively creates a dichotomy between entertainment and education. This dichotomy will restrict public access to information and constrict the judicially recognized role of libraries as "a mighty resource in the free market place of ideas." *Minarcini v. Strongville City School District*, 541 F.2d 577, 582 (6th Cir. 1976).

Finally, the Ninth Circuit's construction of Section 108 of the Copyright Revision Act of 1976, 17 U.S.C. § 101 et seq. (1976), threatens the fair use rights of libraries and librarians under Section 107. The Ninth Circuit stated that Section 108 clearly manifests Congress's intent not to create a blanket home video recording exemption. Section 108, however, grants certain rights to libraries over and above those available under the fair use provisions of Section 107. Thus, the Ninth Circuit's implication that a library's reproduction rights are limited to those available under Section 108 contradicts the manifest intent of Congress.

In sum, the issues raised by this case are of great national importance to libraries, librarians and users of libraries. For this reason, and because the ALA believes its analysis of those issues may assist this Court in resolving them, the ALA respectfully submits this brief as Amicus Curiae.

ARGUMENT

SUMMARY OF ARGUMENT

The Ninth Circuit held that only "productive" uses of copyrighted materials could be fair uses under the Copyright Revision Act of 1976, 17 U.S.C. § 101 et seq. (1976). This holding ignores Congress's intent as well as the express language of the statute and is in clear conflict with the decision of the Court of Claims in *Williams & Wilkins Co. v. U.S.*, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by an equally divided court*, 420 U.S. 376 (1975). The questions concerning fair use decided by the Ninth Circuit possess enormous national importance, particularly for librarians and library users, for the Ninth Circuit's wooden interpretation of Section 107 of the Copyright Act will seriously affect the ability of librarians to serve their patrons and will restrict the public's access to information. In addition, the Ninth Circuit's holding threatens to deprive libraries of their fair use rights and further undermines their ability to serve their patrons adequately. Rapid technological changes in the information industry and the need to strike a workable, reasonable balance between the interests of copyright owners and copyright users require that this Court reverse the Ninth Circuit's decision.

I. THE HOLDING OF THE NINTH CIRCUIT COURT OF APPEALS THAT

"INTRINSIC" USES OF COPYRIGHTED MATERIALS CANNOT BE "FAIR USES" UNDER SECTION 107 OF THE ACT IS IN ERROR AND IN CONFLICT WITH THE DECISION OF THE COURT OF CLAIMS IN WILLIAMS & WILKINS CO. V. U.S.

The Court of Appeals held that "intrinsic" uses of copyrighted materials cannot be "fair" uses. This holding conflicts with both the clear intent of Congress to establish a flexible fair use doctrine and the express terms of the statute itself. In reaching its decision, the Ninth Circuit concluded that the provisions of the Act are "clear and unambiguous" and that an examination of legislative history is therefore unnecessary. This Court, however, has noted: "When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'" *United States v. American Trucking Association*, 310 U.S. 534, 543-44 (1940) (footnotes omitted). Such assistance is possible here.

The House Report which accompanied the amendment to the Act of 1909 concerning sound recording (which Congress later incorporated into the new Act) unequivocally established that "intrinsic" uses are not *ipso facto* copyright infringements. Concerning the "intrinsic" use of home audio recordings, the Report stated: "[I]t is not the intention of the Committee to restrain the home recording from broadcasts or from tapes or records, of recorded performances, where the home recording is for private use and with no purpose of reproducing or otherwise capitalizing commercially on it." H. Rep. No. 487, 92nd Cong., 1st Sess. 7, reprinted in [1971] U.S. Code Cong. & Ad. News 1566, 1572. Similarly, the Register of Copyrights stated in a 1961 report: "New technical devices will probably make it practical in the future to reproduce televised motion pictures in the home. We do not believe the private use of such a reproduction can or should be precluded by copyright." * Copyright Law Revision, Report of the Register of Copyright (July, 1961) at 30. The treatise from which the Ninth Circuit frequently quoted acknowledges that the legislative history of the New Act "does not appear to recognize" the principle of "productive use." 3 Nimmer on Copyright P13.05[A] 13-59 n. 23.8. Thus, the Court of Appeals was simply wrong when it held that "intrinsic" uses cannot be fair uses.

* This Court has held that it will "accord great weight to a departmental construction of its own enabling legislation." *Zuber v. Allen*, 396 U.S. 168, 192 (1969).

The Ninth Circuit's holding that fair use must involve "the use by a second author of a first author's work" also conflicts with the flexible fair use analysis required by Section 107 of the Act. Section 107 identifies four factors courts are to consider in determining whether a use is fair: the nature of the copied work, the purpose of the copying, the substantiality of the copying, and the effect of the copying on the potential market for the work. These factors are, as the district court pointed out, neither exclusive nor required. By *automatically* excluding all "intrinsic" uses from fair use protection, the Ninth Circuit imposed a rigidity on fair use analysis entirely unwarranted by the statute. As the Second Circuit has observed, "The line which must be drawn between fair use and copyright infringement depends on an examination of the facts in each case. It cannot be determined by resort to any arbitrary rules or fixed criteria." *Meeropol v. Nizer*, 560 F.2d 1061, 1068 (2d Cir. 1977), cert. denied, 434 U.S. 1013 (1978) (citations omitted). Thus, in *Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171 (5th Cir. 1980), the Fifth Circuit held that while a commercial motive may be relevant to fair use analysis, there can be no *per se* rule that such a motive precludes fair use. The Ninth Circuit's holding arbitrarily establishes a similar *per se* rule.

If not reversed, the Ninth Circuit's holding will result in further decisions clearly contrary to the underlying purpose of the statute. This purpose is to balance the economic

interests of an author against the public interest in access to his work. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151 (1974). The decision of the Ninth Circuit means that, for example, a person who must work during the evening and is therefore unable to watch commercial television during "prime-time" may not record a program (such as the critically acclaimed docu-drama "Roots") for a private viewing at a more convenient time even if the tape is erased after a single viewing and even though such a recording may actually increase the viewership, and thus the profits of the copyright owner.

This result is totally inconsistent with the balancing approach which is at the heart of the doctrine of fair use. A program such as "Roots" is both entertaining and educational and is voluntarily broadcast over commercial television by copyright owners who presumably desire to have the largest possible viewing audience. The only purpose of recording such a program in the above example is to gain access to it. And arguably the fact that the program is erased after viewing is just as relevant to a determination of "substantiality" as the fact that the entire program may be taped. See Note, *The Betamax Case: Accommodating Public Access and Economic Incentive in Copyright law*, 31 *Stan. L. Rev.* 243, 256 (1979). Finally, it is difficult to see how such a recording harms the copyright owner when it merely accomplishes the purpose of the original broadcast. Thus, while *some* "intrinsic" uses of video tape recorders no doubt constitute copyright infringement, other "intrinsic" uses, such as the above example, are clearly protected by the doctrine of fair use. The Ninth Circuit was in error, therefore, when it held that *all* "intrinsic" uses are infringing uses.

The Ninth Circuit's decision is also in direct conflict with the court's decision in *Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by an equally divided court*, 420 U.S. 376 (1975). * In *Williams & Wilkins*, the Court of Claims upheld the applicability of the fair use doctrine to certain "intrinsic" uses of copyrighted materials by the National Library of Medicine. In rejecting the decision in *Williams & Wilkins*, the Ninth Circuit disregarded the intent of Congress that Section 107 "restate the present judicial doctrine of fair use, not to change, *narrow*, or enlarge it in any way." H. Rep. No. 1476, 94th Cong. 2d Sess. 66 (1976) (emphasis added). The Ninth Circuit's holding that intrinsic uses cannot be fair uses *narrows* the application of the doctrine and thus conflicts with Congress's intent.

* *Williams & Wilkins Co.*, dealt with issues now primarily addressed by Section 108 of the law, and upheld certain institutional photocopying practices.

The Ninth Circuit further held that in any event *Williams & Wilkins* could be distinguished because of the countervailing social benefit of the uses of copyrighted materials in that case and the disastrous social consequences of reduced access to the scientific materials there in issue. This holding will seriously inhibit public access to all kinds of information through libraries. Libraries cannot know in advance whether any patron's use of copyrighted materials will be of sufficient social benefit to meet the Ninth Circuit's stringent test and yet if a use fails that test, libraries and librarians could be contributory infringers under the Ninth Circuit's decision. The kinds of materials typically photocopied by libraries or otherwise reproduced for patrons are often for scholarly and research purposes, but there are in practice no lines between information and entertainment as clear as the Court of Appeals is able to discern for purposes of its analysis of this case. Indeed, as this Court observed in *Stanley v. Georgia*, 394 U.S. 557 (1969): "The line between the transmission of ideas and mere entertainment is much too elusive for this Court to draw, if indeed such a line can be drawn at all."

The "ordinary" purpose of a television program may be to entertain or to inform -- in either case it may well serve to educate, to generate thought, criticism, comment and scholarship, and to provide the basis and background against which critical thought may

take place. Librarians, as the store-keepers of knowledge in all its tangible forms, cannot agree with the Court of Appeal's cavalier judgment that "the consequences attendant upon reduced consumer control of access do not in any way correspond to the deleterious consequences of reduced access identified by the Court of Claims in *Williams & Wilkins Co.*" *Universal City Studios, Inc. v. Sony Corporation of America*, 659 F.2d 963, 971 (9th Cir. 1981).

The ALA believes that the purposes of the original broadcasts here in issue and of home videorecordings in general are not the same. The purpose of the first is the *commercial* distribution of the programming; the second is the nonprofit, *non-commercial*, private use of that same programming. The Court of Appeals has treated home recording as if it were done for the purpose of commercial gain or advantage, and in so doing has established the fair use doctrine as a censor of the kinds of private, non-commercial uses for which an individual or a library may use copyrighted material. It has confused commercial, systematic, multiple copy reproduction with *ad hoc private, non-commercial* activity and has established a distinction between such uses not previously found in the fair use doctrine. Because this confusion will seriously affect libraries' and patrons' rights of access to information, this Court should reverse the decision below.

II. THE NINTH CIRCUIT'S DECISION FAILED TO RECOGNIZE THAT THE FAIR USE RIGHTS OF LIBRARIES UNDER SECTION 107 ARE IN ADDITION TO SPECIAL LIBRARY RIGHTS UNDER SECTION 108; THIS ERROR JEOPARDIZES THE PUBLIC'S RIGHT OF ACCESS TO COPYRIGHTED MATERIALS.

The Ninth Circuit's holding that Section 108 establishes that Congress did not intend to create a home recording exemption seriously misconstrues the intent of Section 108. The Ninth Circuit referred to the limitation in Section 108 that requires libraries to distribute taped audio visual material only by lending and concluded "In light of this caution with respect to the limited § 108 exemption, it is clear that Congress did not intend to create a blanket exemption for home videorecording...." *Id. at 967*. This conclusion overlooks the fact that Section 108 grants to libraries and archives open to the public certain rights *in addition* to those granted under the fair use provisions of Section 107. The decision below, if it is allowed to stand, is likely to be construed as a definition of *all* of a library's reproduction rights, when in fact Section 108 was meant to allow libraries to engage in certain additional activities, such as interlibrary loan arrangements, which may not otherwise be deemed fair use. The Act specifically states: "Nothing in this section... in any way affects the right of fair use as provided by Section 107...." *17 U.S.C. 108(f)(4)* (1976). The House Report specifically notes that although Section 108(h) generally removes musical, graphic, sculptural, motion pictures and non-news audiovisual works from the library reproduction exemption, "it is important to recognize that the doctrine of fair use under Section 107 remains *fully applicable* to the photocopying or other reproduction of such works." H. Rep. No. 1476, 94th Cong. 2d Sess. 76 (1976).

The public relies on libraries as its primary source of many kinds of information. Economic conditions have placed a great strain on library services, and interlibrary loans, networks, photocopying and other forms of resource sharing have allowed libraries to maintain high levels of public service without adversely affecting the market for copyrighted works. It is thus vital to the public interest that libraries utilize both Sections 107 and 108 of the Act in fulfilling requests for information and service and that the Ninth Circuit's decision not undermine this access by its misinterpretation of Section 108.

CONCLUSION

The Ninth Circuit's decision is in error and conflicts with the express terms of Sections 107 and 108 of the Copyright Revision Act of 1976, with relevant legislative

history, and with the decision of the Court of Claims in *Wilkins, supra*, with respect to the availability of the fair use defense for "intrinsic" uses of copyrighted materials. Because the Ninth Circuit's holding jeopardizes legitimate public access to copyrighted material, the American Library Association respectfully urges this Court to reverse the decision of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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