

SONY CORPORATION OF AMERICA, et al., Petitioners, v. **UNIVERSAL CITY STUDIOS, INC. and WALT DISNEY PRODUCTIONS,** Respondents.
No. 81-1687

OCTOBER TERM, 1982

October 21, 1982

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE AUTHORS LEAGUE OF AMERICA, INC. AS Amicus Curiae

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Authorities

U.S. Copyright Act (17 U.S.C.)

Interest of the Authors League

The Authors League of America is the national society of professional authors and dramatists. One of its principal purposes is to express the views of its 11,000 members in cases involving the rights of authors under the United States Copyright Act.

The League files this brief (with the parties' consent) because this appeal raises questions of enormous importance and grave concern to authors and dramatists. The Court of Appeals decision correctly decided that home-recording of broadcast motion pictures and television programs infringed rights granted under Sec. 106 of the Copyright Act. Reversal of that decision would destroy or greatly erode the rights of novelists and playwrights, as well as those of motion picture companies and television producers, and seriously impede the production and distribution of literary and dramatic works, and of films and television programs based upon them.

TEXT: ARGUMENT

The Authors League agrees completely with the opinion and conclusions of the Court of Appeals, and we will not burden the Court with a prolonged reiteration of the analysis and authorities set out in its opinion. We do wish to discuss the consequences of the decision, or its reversal, for authors and playwrights.
The Effect of Home-Recording On Authors' Rights

Sec. 106 of the Copyright Act grants authors -- writers and dramatists as well as motion picture producers -- the "exclusive right(s) to reproduce (their) copyrighted works in copies or phonorecords." The Section does not limit the right of reproduction by the condition that it be "public", as is the case with the rights of performance and display. Nor do any of the specific limitations on the right of reproduction, in Secs. 110, 112, 115 and 118, permit unauthorized home-recording of broadcast motion pictures or television programs. Clearly, such home-recording

violated the rights of the motion picture producer-respondents in this case, as it would violate the rights of a dramatist whose play was televised or transmitted by cable (an increasingly-popular means of presenting "live" stage performances to home audiences).

Modern technology, moreover, makes it impossible to draw any meaningful copyright distinction between reproduction of a copyrighted film or play, in cassettes, by a commercial pirate or by individuals in their homes. If a commercial pirate reproduced 10 videocassettes of Stephen Sondheim's acclaimed musical play SWEENEY TODD by taping the recent cable transmission of a stage performance, in his home, that would be an infringement of copyright under Sec. 106(1). It would be no less an infringement because the pirate distributed the copies, one to a customer, to 10 individuals for use in their homes. The essence of most infringements of the right of reproduction is the making of copies for distribution to ultimate consumers for use in their homes.

Furthermore, it makes no difference whether the piracy is undertaken for profit or for not-for-profit. If a school taped the SWEENEY TODD performance and distributed 10 copies to students without charge for use at home, it would violate the author's copyright. (cf. Sec. 118(d)).

The modern technology of the Betamax and other home video-recording machines makes it possible for 10, or 1,000 or 1,000,000 individuals to by-pass the commercial pirate and reproduce video-cassettes of SWEENEY TODD or a Disney movie from a single television or cable broadcast. For the author, the copyright and economic consequences are the same as those of commercial piracy: 10, or 1,000 or 1,000,000 copies have been reproduced and placed in the possession of individuals - - who make up the author's audience -- without his/her permission and without any compensation. The home-counterfeiting of copyrighted plays, novels or films is no more justifiable because it is done at home and for the home-owner's sole benefit than would be the home-counterfeiting of \$10 bills, performed on a sophisticated copying-machine equivalent of the Betamax for the benefit and enjoyment of the home-owner.

The Court of Appeals correctly ruled that home-recording of copyrighted works is not fair use. As it noted, the doctrine of fair use was not intended to permit the reproduction of entire works to satisfy the very purposes for which authors license the production and distribution of copies, and the broadcast and presentation of performances: to entertain individual readers and listeners.

The accumulation of home-recorded copies of a broadcast or cable transmission of a play, film or television program cannot satisfy the tests of fair use in Sec. 107, and particularly cannot survive the test of "the effect of the use upon the potential market for or value of the copyrighted work."

The Economic Effect of Home-Recording on Authors

The accumulation of home-recordings of a performance of SWEENEY TODD or other plays or musicals has an adverse and pervasive effect on potential markets for that dramatic work, as it does on the potential market for any motion picture which is reproduced, by home-recording, in countless video-cassettes. Obviously, home-recording displaces the sales of commercially-produced cassettes licensed by the author or film company, and deprives those copyright owners of income from such sales.

Beyond that, however, home-recording diminishes many potential markets for films and plays. The broadcast which provided the means of counterfeiting was intended to be ephemeral, as it was prior to the perfection of affordable home-recording machines. An ephemeral presentation of any work -- by broadcast, on the stage, or in motion picture theatre -- does not exhaust the work's appeal to the audiences that view it. Countless movie-goers see the same film many times; television viewers, by the millions, watch re-runs of their favorite programs; theatre-goers will see revivals of their favorite plays in first-class, regional, stock and amateur performances, or in motion picture adaptations.

But thousands or hundreds of thousands of home-recordings of a play or film will have an enormous adverse effect on these potential markets for dramatic and literary works. They will prevent many plays, films and television programs from being revived, rerun or rebroadcast; and, in a vast number of instances, will reduce sharply the number of subsequent presentations in various media. All of this, without providing authors and producers of income from the source which diminished their potential markets... the unauthorized home-recordings of their copyrighted works.

The authors of plays and musical plays, who license performance, recording and broadcast rights in their works, will be directly injured. If they authorize a cable transmission of their plays, home-recording threatens them with serious loss of income from stock, amateur, regional and other theatrical productions of their works. Yet the granting of cable-transmission rights is an important means of raising funds to produce plays in a theater whose costs have escalated far beyond the rate of inflation.

Many authors who write films and television programs will be injured since a portion of their compensation is a share of the proceeds or profits derived by the motion picture or television producer from television and cable broadcasts of the works they write. Similarly, many authors of books and plays, who sell the motion picture or television rights in their works, will be injured since their compensation often is based, in part, on the income derived from the company which produced the film or television program based on their writings.

Another wide spread consequence of unauthorized and uncompensated home-recording of broadcast motion pictures, plays and television programs may well be the drying-up of financing for worthwhile films and television programs. While the few commercial blockbusters each year may be able to earn huge profits on their initial theatrical exhibition, this is not true of many films and programs that have significant dramatic, cultural or social value. Many of these do not recoup their costs of production from theatrical exhibition or network broadcasting. They must have access to all of the after-markets to repay their investors and to earn reasonable profits for the authors and producers who risked years of work, talent and capital to create them. The term "fair use" cannot, by any stretch of imagination or casuistry, be applied to the unauthorized recording of a production embodying the diverse talents, creative efforts and financial investment of authors, directors, actors, designers, cinematographers and many others.

The Congressional Solution

It is obvious that Congress did not exclude home-recording from the reach of the author's exclusive right of reproduction. It is equally obvious that Congress will enact some "solution" to the home-recording problem if this Court affirms the Court

of Appeals decision. The public will have no dearth of champions in Congress to protect its interests. And it is likely that Congress will enact some method of compulsory licensing and payment to compensate authors and motion picture producers for the serious loss of income they will suffer from continued home-recording.

But if the Court were to reverse the Court of Appeals decision, authors and motion picture companies will be under a severe handicap in obtaining legislation that will provide reasonable compensation for the reproduction of their works by home recorders, and for the substantial loss of potential markets and of value of their works home-recording will increasingly cause.

The solution is one that Congress should enact. It is far less likely to be equitable if the Court does not follow the clear meaning of the Copyright Act and affirm the Court of Appeals decision.

CONCLUSION

It is respectfully submitted that the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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October 18, 1982