

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

OCTOBER TERM, 1981

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF CBS INC. IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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TABLE OF AUTHORITIES

CASES:

Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968)

Gershwin Publishing Corp. v. Columbia Artists Management, Inc., 443 F.2d 1159 (2d Cir. 1971)

Iowa State University Research Foundation, Inc. v. American Broadcasting Cos., 621 F.2d 57 (2d Cir. 1980)

Universal City Studios, Inc. v Sony Corp. of America, 480 F. Supp. 429 (C.D. Cal. 1979), rev'd in part and aff'd in part, 659 F.2d 963 (9th Cir. 1981)

Walt Disney Productions v. Alaska Television Network, Inc., 310 F. Supp. 1073 (W.D. Wash. 1969)

Williams & Wilkins Co. v. United States, 487 F.2d 1345 (Ct. Cl. 1973), aff'd, 420 U.S. 376 (1975)

STATUTORY AND LEGISLATIVE MATERIALS:

The Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541

H.R. 5705, 97th Cong., 2d Sess. (1982)

Amendment No. 1333, S. 1758, 97th Cong., 2d Sess. (1982)

H.R. Rep. No. 1476, 94th Cong., 2d Sess. 66 (1976), reprinted in 1976 U.S. Code Cong. & Ad. News 5659, 5679-80

S. Rep. No. 473, 94th Cong., 1st Sess. 65 (1975)

OTHER AUTHORITIES

3 Nimmer on Copyright § 13.05 (1981)

INTEREST OF AMICUS CURIAE

CBS is engaged in several activities that may be affected by this litigation. CBS produces television programs, theatrical feature films, and other audiovisual works. The CBS Television Network distributes such works for broadcast by five CBS-owned television stations and approximately 200 affiliated stations; n3 CBS also distributes such works to cable systems and markets them on videodiscs and videocassettes for home viewing. n4 Many of the works that CBS distributes are supplied by independent producers. Nearly all of the works it produces or distributes are copyrighted.

n3 The five CBS-owned stations also broadcast substantial amounts of non-network programming.

n4 In addition, CBS is a major manufacturer of phonograph records and audio tapes.

CBS's interest as a distributor of prerecorded videocassettes would, in the short run, be served if petitioners should prevail in this case. The marketing of prerecorded videocassettes depends upon the purchase by the public of videocassette recorder-players such as those here at issue. The primary use for which such equipment is now being sold to the public is home reproduction of copyrighted works broadcast by television stations. Any restriction on the home use of such equipment or increase in its price would work against the short-run interest of CBS in maximizing the number of videocassette recorders in use.

The interests of CBS as a broadcaster look in the opposite direction. If the broadcasting of copyrighted material creates a right to make home copies without compensation to the copyright owner, the price CBS pays for the right to broadcast will tend to go up. And because, for a variety of reasons, videotape viewers are less valuable to advertisers than are off-the-air viewers, the higher cost of licensing these works will not be compensated by revenues from any increased viewing that home taping might permit.

In the long run, the primary interest of CBS in all the noted fields is to ensure that the copyright system continues to provide adequate compensation to copyright owners for the use of their works. CBS depends on the continuing creative efforts of America's authors, playwrights, screenwriters, composers, performing artists, and

other creators of "intellectual property." By giving an author (or his assignee) the exclusive right to "reproduce" a creative work and hence the right to charge others for reproduction rights, the copyright system provides the economic incentive for those efforts. If the intended audience for a creative work is free to make home copies without direct or indirect payment to the copyright owner, the economic incentive for creative activity inherent in the copyright system will be eroded.

INTRODUCTION: CBS Inc. ("CBS") n1 respectfully submits this brief Amicus curiae in opposition to the Petition for a Writ of Certiorari. n2

n1 CBS Inc. has no parent companies, subsidiaries (except wholly owned subsidiaries), or affiliates. (We construe the terms "parent companies," "subsidiaries" and "affiliates" to mean corporations whose shares are publicly traded and which, in the case of "parent companies," own a majority of the shares of a party; or, in the case of "subsidiaries and affiliates," a majority of whose shares are owned by a party.)

n2 The consents of the parties are on file with the Clerk.

SUMMARY OF ARGUMENT

This case does not, at this stage, warrant the exercise of the Court's discretionary review power. The court of appeals' decision that home video taping of a copyrighted television program is an infringement of copyright and that petitioners are liable as contributory infringers follows directly from clear statutory language and settled legal principles. Nor does the court's decision create any conflict between federal courts on any issue. While this case may well present novel and interesting questions concerning the scope and nature of relief, those questions are not now before the court and, in light of pending legislative proposals, may never be. Accordingly, the Petition for a Writ of Certiorari should be denied.

TEXT: ARGUMENT

I. The Court of Appeals' Holding on the Issue of Liability for Copyright Infringement Is Plainly Correct

The decisions below n5 involved essentially three questions: Is the right to make or authorize home recordings of copyrighted works one of the rights granted by statute exclusively to the copyright owner? If so, does such recording constitute a fair use which is, therefore, not an infringement of copyright? If such recording is an infringement of copyright, are manufacturers and sellers of machines and tapes used to make those recordings liable as direct or contributory infringers?

n5 Universal City Studios, Inc. v. Sony Corp. of America, 480 F. Supp. 429 (C.D. Cal. 1979), rev'd in part and aff'd in part, 659 F.2d 963 (9th Cir. 1981).

The court of appeals' answer -- that home recording of copyrighted works is an infringement of copyright for which petitioners are contributorily liable -- was plainly correct: As the very term "copyright" implies, the right to reproduce a creative work is the oldest and most basic of the rights that have been granted to copyright

owners. There is no question that the right to make home recordings is one of the exclusive rights conferred by § 106 of the Copyright Act. n6 Indeed, petitioners have now apparently abandoned any contention that Congress, without saying so, created a statutory exemption for home taping. n7

n6 Among the district court's reasons for holding home taping of copyrighted works not to be an infringement was the fact that copyright owners "voluntarily choose to have [their works] telecast over public airwaves to individual homes free of charge." 480 F. Supp. at 453. But the mere broadcast performance of a work no more justifies its unlicensed reproduction than would a stage performance. In *Walt Disney Prods. v. Alaska Television Network, Inc.*, 310 F. Supp. 1073 (W.D. Wash. 1969), the court held squarely that the broadcast performance of a work did not justify either the making of a videotape by a cable system operator or the work's later retransmission through the cable system.

n7 Relying on the legislative history of the Sound Recording Amendment of 1971, the district court had found in the 1976 Act an unstated exemption for home copying of audio materials, which it then extended to audiovisual materials. The court of appeals disagreed and petitioners now concede that, "under the 1976 Act, exceptions or limitations as to the § 106 'exclusive rights' are codified, including 'fair use' in general (§ 107) and various express usages in particular (§§ 108-118)." Pet. at 14. None of those sections purports to create a special exemption for home recording.

Although this case does not involve audio materials and the implied-exemption argument on which the district court relied has been abandoned, it should be noted that the district court's premise was wrong: there is no unstated exemption for home copying of audio materials.

The Copyright Act of 1909 protected composers (and their assignees) against unauthorized mechanical reproduction of musical works. The Sound Recording Amendment of 1971 created an additional copyright protecting performing artists, record companies, and others against unauthorized reproduction of a particular recorded rendition of a musical work. Unauthorized copying violates both copyrights.

After the 1971 Act had passed the Senate, language appeared in the House Report that the district court read as creating an unstated exemption for home copying. But as noted by Professor Nimmer in a passage from his treatise quoted by the court of appeals, 659 F.2d at 968, n.5, these remarks, never joined in by the Senate, contain no hint of an intention to amend the composer's copyright that had existed since 1909 and do not purport to carve out any special exemption from the sound recording (rendition) copyright.

The 1976 Act preserved both the musical copyright and the sound recording copyright. There is no suggestion in the legislative history of the 1976 Act of any exemption for home taping. To the contrary, the 1976 Act was "not intended to give [taping] any special status under the fair use provision or to sanction any reproduction beyond the normal and reasonable limits of fair use." H.R. Rep. No. 1476, 94th Cong., 2d Sess. 66 (1976), reprinted in 1976 U.S. Code Cong. & Ad. News 5659, 5679. See generally 3 Nimmer on Copyright § 13.05 [F][5], at 13-95-96 n.159 (1981). Moreover, the 1976 Act protects in separate subsections the copyright owner's exclusive right to "reproduce" the work, § 106(1), and his right "to distribute copies or phonorecords," § 106(3), making it clear that unauthorized

reproduction is infringement even if there is no distribution.

Nor is there any real doubt that the manufacturers and sellers in this case -- who designed, manufactured, advertised and sold the Betamax primarily to record copyrighted programs off-the-air, 659 F.2d at 975, and who made no effort to discourage or prevent that use, 480 F. Supp. at 436, 462 -- fit the black-letter definition of a contributory infringer accepted by both lower courts in this case: "one who, with knowledge of the infringing activity, induces, causes, or materially contributes to the infringing conduct of another...." n8 The district court's answer was that the machine is a "staple item of commerce," but since the infringing uses of the Betamax plainly predominate, that exception does not apply.

n8 *Gershwin Publishing Corp. v. Columbia Artists' Management, Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971), Quoted below, 659 F.2d at 975; 480 F. Supp. at 459.

The court of appeals correctly ruled that a finding of fair use under the circumstances of this case would "stretch[] fair use beyond recognition. ..." 659 F.2d at 970 (emphasis in original). As the Second Circuit has said, the doctrine of fair use "permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster." n9 Implicit in the concept of fair use, then, is the requirement that the use of the work be incidental to some distinct, productive purpose. Nimmer has termed this requirement the "functional test": if the defendant's use performs the same function as the copyrighted work -- if it supplants the use of the copyrighted work by that work's intended audience -- the use is not fair. 3 Nimmer on Copyright § 13.05[B], at 13-62-64 (1981). n10 The statutory examples of fair use Congress provided in § 107 of the 1976 Act -- "reproduction... for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research" -- reflect the categories of uses Congress considered "fair." n11

n9 *Iowa State University Research Foundation, Inc. v. American Broadcasting Cos.*, 621 F.2d 57, 60 (2d Cir. 1980).

n10 The Senate Committee on the Judiciary echoed this view in its 1975 Report on the Proposed revision of the Copyright Act: "With certain special exceptions (use in parodies or as evidence in court proceedings might be examples) a use that supplants any part of the normal market for a copyrighted work would ordinarily be considered an infringement." S. Rep. No. 473, 94th Cong., 1st Sess. 65 (1975).

n11 The 1975 Senate Report suggests that Congress did not consider home taping to be fair use. Noting that schools located in time zones several hours removed from the point of origin of educational television transmissions might need to record that programming for delayed presentation to students, the Committee stated that it believed such recording to be a fair use. But the Committee was careful to point out that it "[did] not intend to suggest, however, that off-the-air recording for convenience would under any circumstances, be considered 'fair use'." *Id.* at 66.

The use involved in this case -- home videotaping of creative works in their

entirety solely for the convenience and enjoyment of the VCR owner -- lacks the fundamental, productive character of a fair use. It is copying that directly supplants the copyrighted work in meeting the viewing needs of that work's intended audience, thereby reducing the value of the work for future broadcast or other uses. In short, it is simply infringement. n12

n12 Petitioners rely heavily on the statements in the legislative history of the 1971 Sound Recording Amendment discussed above at not 7 to argue that Congress in 1976 must have intended home recording to be treated as a fair use. See Pet. at 14-16. But these remarks about the state of the judicially developed doctrine of fair use are not controlling. Indeed, as already shown, supra note 11, the Senate Committee in 1975 expressed the contrary view that home recording does not constitute fair use. The important point is that both houses made it plain that the 1976 Act was intended to codify the existing judicial doctrine of fair use, neither enlarging nor narrowing it. See H.R. Rep. No. 1476, 96th Cong., 2d Sess. 66 (1976), reprinted in 1976 U.S. Code Cong. & Ad. News 5659, 5680; S. Rep. No. 473, 94th Cong., 1st Sess. 62 (1975). Thus, the fair use question in this case must be resolved according to settled principles of fair use case law.

The only case that petitioners have cited in support of their contrary argument is *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). But *Williams & Wilkins* involved copying by the National Institute of Health and the National Library of Medicine of isolated articles from medical and scientific journals to fill single requests of library patrons, generally scientists and physicians. The Court of Claims found this to be a fair use, in part because it was "convinced that medicine and medical research will be injured by holding these particular uses to be an infringement." n13 487 F.2d at 1354. No comparable scholarly use is involved in this case. Furthermore, the *Williams & Wilkins* problem apparently has been resolved legislatively by §§ 108(a) and (d) of the 1976 Act, which provide that, in most situations, it is not an infringement of copyright for a library to reproduce no more than one copy of a journal article if the copy becomes the property of the requesting patron and the work is to be used for private study, scholarship or research. This fact suggests Congress was skeptical that the use at issue in *Williams & Wilkins* was a fair use. At any rate, the case creates no live conflict and is not authority for the proposition that home video recording of copyrighted creative works for convenience and entertainment purposes is a fair use.

n13 It should be noted that § 107 of the 1976 Act lists reproduction for "scholarship" and "research" as examples of fair use.

In sum, the liability of petitioners is clear. Their contrary argument is, at best, an attempt on policy grounds to carve an exception out of a statute that does not contain one. But where an activity is clearly an infringement under the Copyright Act, as it is in this case, the courts should apply that statute as written. As the Court said in *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968), a case involving the question whether retransmission of copyrighted television programming by a cable television system was an infringing "performance" under the 1909 Act:

"We have been invited by the Solicitor General in an amicus curiae brief to render a compromise decision in this case that would, it is said, accommodate various competing considerations of copyright, communications, and antitrust policy. We decline the invitation. That job is for Congress. We take the Copyright Act of 1909 as we find it." Id. at 401-02 (footnotes omitted).

II. The Remaining Issues Petitioners Seek To Raise Are Not Ripe for Review

The novel and interesting question about unauthorized home taping of copyrighted works is not whether the practice is an infringement, but what to do about the fact that it obviously is. It is neither desirable nor practical to prohibit or meter taping done in private homes, yet the copyright owner is entitled to appropriate compensation for the use of his property. It is this conflict between the right to privacy and the right to compensation that has attracted the attention of the press and public. The relief issue, however, is not ripe for review, and the Court should follow its customary practice and decline to consider that issue at this point in the litigation.

The lower courts have not yet examined the complex question of relief in light of the holding of liability. The court of appeals remanded without limiting the district court's discretion as to remedy but with the strong suggestion that it consider imposing a "continuing royalty." n14 In proceedings on remand, the parties and the lower courts could consider such questions as how to measure the economic value of the right to tape copyrighted works, how to measure the economic harm to copyright owners when such taping occurs, and how to measure the contribution made to such infringing activity by defendants' machines and tapes. The Court should give the lower courts and the parties an opportunity to examine these real and substantial questions and the courts an opportunity to fashion appropriate relief. n15

n14 The court of appeals also made clear that concern for intrusion on the privacy of VCR owners was a fully appropriate consideration at the relief stage. 659 F.2d at 972.

n15 Petitioners' claim that no compulsory licensing and royalty arrangement could be worked out within the existing statutory framework is likewise premature. On the present state of the record there is no reason to believe it infeasible to develop a private market-clearing mechanism, perhaps relying on statistical sampling of home use as a basis for allocating royalties. Copyright owners have obvious incentives to develop such a mechanism.

Denying the writ at this stage seems particularly appropriate in the present case since, as petitioners acknowledge, "the Court of Appeals' decision prompted instant Congressional action" in the form of proposals designed to accommodate the various interests at stake in this litigation. Pet. at 13. See Amendment No. 1333 to S. 1758, which is sponsored by more than 15 Senators, and H.R. 5705, which is sponsored by 60 members of the House. n16 If either of those proposals is adopted, the problem of how to fashion relief in cases of this sort would be resolved.

n16 The Senate Committee on the Judiciary is actively considering these

proposals. Hearings were held on November 30, 1981 and again on April 21, 1982, and Committee action may be taken within the next several weeks. The Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Committee on the Judiciary held hearings on April 12, 13 and 14, 1982, and plans one further day of hearings in the near future.

A remedy, whether judicial or legislative, that balances the various goals in some such fashion makes eminent sense. The essence of copyright is to encourage creativity by giving authors a property right, so that they may obtain royalties from those who wish to make copies. The system works well when copying can be monitored, but technology has now made possible the making of copies in private homes, without yet making precise monitoring of home use both practical and unintrusive. There is no reason why continuing changes in technology should result in a denial of the rights plainly granted and the compensation that Congress plainly intended the copyright owner to have. What is needed is the development of means to assure that reward under the conditions that technology has created. We repeat, however, that the question of how such a means may lawfully be developed is not now, and may never be, before the Court.

CONCLUSION

For the foregoing reasons, CBS respectfully urges this Court to deny the Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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