

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

OCTOBER TERM, 1982

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

BRIEF FOR THE COMMITTEE ON COPYRIGHT AND LITERARY PROPERTY OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, AMICUS CURIAE

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INTEREST OF THE AMICUS CURIAE

The Committee on Copyright and Literary Property (the "Committee") of the Association of the Bar of the City of New York (the "Association") monitors and reports on the development of copyright law, to educate Association members and to contribute to this development. While, in their individual practices, Committee members represent clients with specific economic interests and must advocate positions to advance these interests, sitting as a Committee the members attempt to analyze issues of copyright law objectively and to reach conclusions based upon this analysis, rather than upon a prejudged outcome.

This case presents a face-off between traditional property rights and new technology. By using a video cassette recorder ("VCR"), individuals can reproduce easily and at modest expense a motion picture or television program transmitted into the individual's home on VHF, UHF or cable, thereby obtaining possession of a copy of a copyrighted work without the consent of -- and without payment to -- the copyright proprietor. Because of this technology and its increasing use, this Court's review will have implications beyond the interests of the two producers and one manufacturer who are parties to the case. Within the entertainment and electronics industries, competing economic interests are at stake. Those who derive income from the sale of VCRs or tapes urge the Court to find no copyright infringement in off-the-air reproduction. Those who produce motion pictures or television programs and who see videotaping as a threat to the value of their productions urge the Court to find that off-the-air copying is an infringement.

The Committee, which will not be directly affected by the Court's decision, files this brief because the implications of the case go beyond home video recording. New technology -- in the form of computers and photocopiers designed for both office and home -- now affords, or will soon afford, individuals the ability to replicate easily a host of copyrighted works. If the Court reaches the issue of infringementⁿ¹ and if it holds that home video recording is not an infringement, the most basic right of a copyright proprietor -- control over reproduction of his work -- will be greatly diminished, both in the face of new technology and through more traditional infringements, as well. While recognizing the difficult economic and social issues inherent in this case, the Committee respectfully urges this Court to preserve the protections afforded copyright proprietors under the Copyright Revision Act of 1976, 17 U.S.C. §§ 101-810 ("1976 Act" or "Act"), by refusing to create a new and open-ended authorization of verbatim copying of copyrighted works.

ⁿ¹ At this juncture, there is no individual user of a VCR among the parties; the defendants who petitioned the Court include a manufacturer and distributor of VCRs, various retail stores and an advertising agency. Unless the Court affirms the court of appeals' finding that these defendants are liable for contributory infringement, the issues of infringement and remedy need not be resolved.

Ultimately, the Committee believes, Congress should resolve the range of economic interests as well as policy issues presented by home recording; the opportunities of new technology and the incentives for creativity inherent in copyright protection must be reconciled. The Committee has endorsed the approach of proposed legislation which would exempt non-commercial home recording for personal use from copyright liability while providing a reasonable compulsory license to compensate producers. Amendment No. 1333 to S. 1758, 97th Cong., 1st Sess.

(1981), 128 Cong. Rec. S1675 (March 4, 1982) (introduced by Sen. Mathias). Such an approach would achieve a fair balance between the producers of programming and the manufacturers of tapes and recorders, resolving, at least in this instance, the tension between new technology and copyright protection. n2

n2 Because the Committee's prime concern in filing the brief is that a ruling in favor of petitioners could seriously erode the protections provided by the 1976 Act, we limit our analysis to the question of infringement arising under the 1976 Act only. We do not discuss the contributory infringement issue, which has less pervasive implications for copyright protection and which, in any event, turns on differing views of the evidence before the trial court. Nor do we address below the remedy issue, which neither of the lower courts has, as yet, determined.

We also note that this brief is filed only on behalf of the Committee. The Association's Committee on Communications Law has taken the position (by a vote of 12-6, with the chair dissenting and 10 members not voting) that "it is not a violation of the United States copyright laws to utilize Betamax or similar home recording technology to copy copyrighted material in the home for use in the home." For the reasons set forth in this brief, the Committee on Copyright and Literary Property has reached a different conclusion.

INTRODUCTION: This brief is submitted on behalf of the Committee on Copyright and Literary Property of the Association of the Bar of the City of New York, as amicus curiae, pursuant to the written consent of all parties on file with the Clerk of the Court.

SUMMARY OF ARGUMENT

Off-the-air recording of a copyrighted program without authorization of the copyright proprietor constitutes an act of infringement, which is neither permitted by statutory exemption nor justified by the defense of fair use or First Amendment principles.

The 1976 Act and accompanying reports are rich in detail. Congress attempted not only to set forth the general principles of copyright law but also to anticipate and address a myriad of specific situations. Despite the care and compromises that are apparent in the statute, there is no reference to, much less an exemption for, home video recording. Petitioners ask the Court to engage in legislative legerdemain, to find that Congress slipped an implied exemption into law without attracting the attention of the long list of lobbyists who participated in the revision process. This analysis does not rest on sound legislative construction. As this Court has held, Congress, not the Court, creates exemptions in a statutory structure.

Nor is home video recording permitted under the defense of fair use. That defense serves a limited purpose: it provides a safety valve to assure that the copyright statute advances, rather than retards, the Constitutional purpose of "promot[ing] the Progress of Science and useful Arts." An author is generally given exclusive control over his work, as an incentive to induce creation. Where, however, a second author needs to make limited use of a copyrighted work in order to contribute to "the Progress of Science and useful Arts" and a strict enforcement of the copyright monopoly would preclude his contribution, the law might allow a narrow "fair use"

defense. An off-the-air copy of an entire copyrighted work made for the sole purpose of a viewer's convenience does not constitute fair use. To find otherwise would be to gut the protections of the 1976 Act.

So, too, would a holding that a First Amendment "right of access" to entertainment programming overrides the property right conferred by the Copyright Clause of the Constitution and by the 1976 Act. This argument advanced by petitioners and certain amici cannot be reconciled with recent decisions of this Court and of the courts of appeals. If adopted, an unfettered right of access would authorize individuals to take another's property without paying -- be it a newspaper, a VCR or a copyrighted program -- in order to argument their sources of news or entertainment. Free speech does not mean free property; a copyright owner may justly expect compensation for use of his work, and the First Amendment is not violated.

TEXT: ARGUMENT

OFF-THE-AIR VIDEO RECORDING OF AN ENTIRE COPYRIGHTED WORK INFRINGES THE COPYRIGHT PROPRIETOR'S EXCLUSIVE RIGHT TO CONTROL REPRODUCTION OF THE WORK.

A. The 1976 Act expressly grants to the copyright proprietor exclusive control over reproduction of his work.

Reproduction of a copyrighted work, without authorization from the copyright proprietor, constitutes an act of infringement under the 1976 Act. Such infringement gives rise to liability, unless the reproduction is exempt under one of the Act's narrowly defined exemptions or fits within the limited fair use defense. This is the starting premise. See generally 2 M. Nimmer, Nimmer on Copyright ("M. Nimmer") § 8.01[A] (1982 ed.).

Section 106 of the 1976 Act provides:

Subject to sections 107 through 118, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

(1) to reproduce the copyrighted work in copies or phonorecords. The legislative reports accompanying the 1976 Act make clear that reproduction of the "whole" or "substantial part" of a copyrighted work constitutes an infringement:

Reproduction. -- Read together with the relevant definitions in section 101, the right "to reproduce the copy righted work in copies or phonorecords" means the right to produce a material object in which the work is duplicated, transcribed, imitated [sic], or simulated in a fixed form from which it can be "perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." As under the present law, a copyrighted work would be infringed by reproducing it in whole or in any substantial part, and by duplicating it exactly or by imitation or simulation.

H.R. Rep. No. 1476, 94th Cong., 2d Sess. 61 (1976), reprinted in 1976 U.S. Code Cong. & Ad. News 5659, 5675 ("House Report") (emphasis added).

The right conferred by section 106(1) is broad. Reproduction, even if for private use and even if only a single copy, is an infringement. House Report at 61; 2 M. Nimmer, *supra*, § 8.02[C], at 8-26, § 8.02[D], at 8-26.1. The breadth of this right is designed to ensure that a copyright proprietor will be compensated for his work. In

some respects, control over reproduction is the most critical right of the copyright; revenue for many types of copyrighted works -- including books, lithographs, and prerecorded video cassette tapes -- is derived through the sale of copies. If unauthorized copies of a work can be made without liability, the copyright proprietor will lose the source of his income and -- under the Constitutional scheme -- the incentive for his creativity. See *Mazer v. Stein*, 347 U.S. 201, 219 (1954).

Several amici argue that video recording of a copyrighted program or motion picture is no different from renting a book, lending it to a friend, or reading it at the purchaser's convenience. See, e.g., Brief of Amicus Curiae Pfizer Inc. at 11-12. This comparison of a book and a home video recording -- while drawn to a wrong conclusion -- helps frame the issue before the Court.

Copies of books are sold; the author derives income from these sales. The 1976 Act expressly provides that the purchaser of a book, or other copyrighted work -- having paid for a copy -- has control over that particular copy (but not the underlying work). 17 U.S.C. § 109(a). But a copy of a copyrighted work derived from off-the-air recording has been appropriated, not purchased; the copyright proprietor, in this instance, has not been compensated for the copy. And, the statute gives the infringer no rights in the misappropriated copy. See 17 U.S.C. § 109(c) (privileges of control over copy do not arise when ownership of it is not purchased). The correct analogy is not ownership of a book and off-the-air recording, but rather ownership of a book and ownership of an authorized and purchased prerecorded video cassette. n3

n3 That copyright proprietors should obtain income from reproductions of their motion pictures or television programs creates no fundamental inequity. On the contrary, petitioners and most of the amici supporting them seek, indirectly, to derive income from such copyrighted works. Manufacturers and retailers of video cassette recorders or tapes have, as their main selling point, the ability of the recorder and tape to capture off-the-air a copyrighted work; the revenues are tied directly to unauthorized reproductions of copyrighted works. It must also be observed that petitioner Sony is deriving income by exploiting its patent rights related to the Betamax, licensing companies to sell the recorder under their own brand names. See A \$1300 Christmas Toy made in Japan, *FORTUNE*, Sept. 1977, at 179.

Thus, off-the-air recording infringes the right of reproduction afforded by § 106(1). Three arguments have been advanced to excuse this infringement: that Congress implicitly created an exemption for home video recording; that home recording falls within the defense of fair use; and that the First Amendment provides a right to record programs at home. We now turn to these arguments and show that each, in turn, is without merit.

B. Congress has not exempted off-the-air home video recording from copyright liability.

The district court held, and petitioners urge here, that Congress has already -- albeit implicitly -- determined this dispute, by exempting home video recording from copyright liability if it is done for private non-commercial purposes. While this argument reflects creative lawyering, it does not -- as the court of appeals properly concluded -- rest on sound statutory construction. Congress may, of course,

ultimately speak to the subject, as the Committee believes it should; but it is equally clear that, to date, Congress has not done so.

If the Court were to find a statutory exemption for home video recording already in place, it would expose one of the greatest lobbying coups of recent years. For more than twenty years, Congress considered a wholesale revision of the copyright law. See generally House Report at 47-50. During that time, multitudinous interest groups presented their views. See National Commission on New Technological Uses of Copyrighted Works, Final Report App. A (July 31, 1978). As changes in technology emerged, additional issues arose, were debated and were resolved -- if only by deferring them. Ringer, *The Unfinished Business of Copyright Revision*, 24 U.C.L.A. L. Rev. 951, 952 n.2, 955 (1977). Even with this exhaustive review and revision of the law, there is no indication that Congress focused its attention at all on the issue of home video recording; certainly, Congress did not devote the attention which resolution of the issue will ultimately demand.

In sharp contrast to this absence of Congressional consideration of home video recording prior to adoption of the 1976 Act, there have been a plethora of proposals and a parade of witnesses before the Congress since the Ninth Circuit's opinion in this case forced the dispute to center stage. See Lardner, *Video Wars*, Washington Post, May 2, 1982, at F1. Many views have been heard; many conflicts must still be reconciled. It would be extraordinary if Congress -- despite these many views and conflicts -- had definitively resolved the issue by implication, slipping an exemption into law without full hearing or debate and without express statutory language.

The language of the 1976 Act -- especially its layers of detail, qualifications and exceptions -- precludes the conclusion petitioners urge. When Congress intended an exemption to the broad, basic rights conferred by § 106, it said so clearly; it did not leave the most critical issues to implication.

For example, subsection 118(d)(3), one of two exemptions which expressly relate in any manner to off-the-air reproduction, permits governmental bodies or non-profit institutions to make off-the-air reproductions of published nondramatic musical works and published pictorial, graphic and sculptural works as may be contained in public broadcasting programs. ⁿ⁴ However, the statute specifically requires that the reproduction be destroyed at the end of seven days from the transmission; it also states that no person supplying a reproduction to a government body or non-profit institution shall have liability if the recipient fails to destroy the copy, provided that such person gave notice of the requirement of destroying the copy (but the recipient itself shall be deemed to have infringed). The words of the statute, as can be seen, elaborately define the limits of the exemption and resolve problems of application. The legislative reports take this statutory detailing to an even greater refinement. See, e.g., House Report at 120 (confirming that the provisions of § 118(d)(3) are applicable to schools).

ⁿ⁴ Apart from § 118, § 108(f)(3) provides a limited exemption for videotaping by libraries and archives, to permit them to reproduce newscasts for use in research. See House Report at 76-77.

Despite the care -- and, yes, the compromises -- that are apparent throughout the 1976 Act and accompanying reports, there is no express mention of home video

recording. n5 In view of the details Congress provided for the exemptions it intended to create in a precise regulatory scheme involving a delicate balance of competing interests, a court should not attempt to construct additional, unlimited exemptions. This Court has reiterated this rule. *Diamond v. Chakrabarty*, 447 U.S. 303, 308 (1980); *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 188 (1978).

n5 The closest reference, appearing in the Senate Report, suggests that no exemption was intended. In addressing off-the-air reproduction by schools located in a remote geographical area, the Senate Report specifically states that off-the-air copying by such schools solely for purposes of "convenience" would not "under any circumstances" be considered fair use. The report reads as follows:

The committee's attention has been directed to the special problems involved in the reception of instructional television programs in remote areas of the country... The committee believes that the making by a school located in such a remote area of an off-the-air recording of an instructional television transmission for the purpose of a delayed viewing of the program by students for the same school constitutes a "fair use." The committee does not intend to suggest however, that off-the-air recording for convenience would under any circumstances, be considered "fair use." S. Rep. No. 473, 94th Cong., 1st Sess. 65-66 (1975)(emphasis added).

Petitioners would have the Court ignore this rule and, instead, engage in a "cut-and-paste" approach to legislative history, drawing together isolated sections from statements made at different times by different people in different contexts. They argue that the legislative history of the 1976 Act is composed of 20 years of collected materials; that, in the course of enacting the Sound Recording Act of 1971, P.L. 92-140, 85 Stat. 391 (the "1971 Act"), Congress expressed an intention to exempt home recording of audio tapes; and that this supposed exemption was carried over into the 1976 Act, and applied, sub silentio, to video recording. Petitioners' Brief at 32-39.

The court of appeals properly rejected this contention, accepting -- as we do -- Professor Nimmer's analysis. *Universal City Studios, Inc. v. Sony Corp. of America*, 659 F.2d 963, 967 n.5 (9th Cir. 1981) (quoting 3 M. Nimmer, § 13.05[F][5], at 13-96 n.159); see also Note, *Universal City Studios, Inc. v. Sony Corp.: "Fair Use" Looks Different on Videotape*, 66 Va. L. Rev. 1005, 1011-12 (1980). The legislative fabric of the 1976 Act is not to be rewoven with loose threads of testimony from the 1971 Act. Cf. *Securities & Exchange Commission v. Sloan*, 436 U.S. 103, 121 (1978) (plain meaning of statute prevails over isolated statement in legislative report, which might not reflect full awareness of Congress). Significantly, petitioners place great weight on extemporaneous comments made by the then Assistant Register of Copyright in 1971 (Petitioners' Brief at 35); however, when the Copyright Office formally addressed the issue of home video recording this year, it opposed any exemption unless compensation is assured for copyright proprietors and rejected petitioners' conclusion that an exemption had already been established. Statement of David Ladd before the Committee on the Judiciary, United States Senate, 97th Cong., 2d Sess., April 21, 1982 at 6, 25 ("Ladd Statement").

In short, Congress has created a broad right to control reproduction, subject to limited, narrowly defined exemptions. The words of Congress are controlling; snippets lifted from a record of twenty years of legislative review cannot prevail over

the words ultimately enacted into law. Congress has not exempted home video recording from liability. n6

n6 Nor has Congress created any general exemption for otherwise infringing reproductions if made at home; the locus of the act does not alter its character. For example, an individual can, with two VCRs in his home, duplicate a tape. It would be a clear infringement for that individual to rent a copyrighted prerecorded cassette and then to make a duplicate copy for his later use or for swapping with a friend.

C. Off-the-air home video recording of an entire copyrighted work does not constitute fair use.

Unless the defense of fair use is expanded well beyond its present limits and its basic purpose fundamentally altered, it cannot justify the home video recording of an entire copyrighted work -- even if made solely for the user's personal convenience. The Committee respectfully urges the Court to preserve the limited nature -- and reach -- of the fair use doctrine by affirming the court of appeals' determination of the infringement issue.

This case involves, at a minimum, off-the-air recording of entire copyrighted programs, without either authorization from or compensation to the copyright proprietors, for the sole purpose of permitting users to watch these programs at their own convenience and -- where prerecorded cassette versions of the programs are for sale or rent -- to avoid paying for authorized copies of them. At least two elements in this fact pattern preclude the application of fair use, as traditionally framed. First, no case has held that unlimited and unsupervised reproduction of entire copyrighted works, without authorization, constitutes fair use. See note 9, *infra*. Second, no case has held as "fair" a use which in no way contributes to the "Progress of Science and useful Arts," U.S. Const. art. I, § 8, cl. 8, but rather merely facilitates the convenience of the user or permits him to avoid paying the copyright proprietor. To hold, as petitioners urge, that home video recording of televised programs or motion pictures is fair use would invite unauthorized copying of these and other types of copyrighted works whenever new technology provides a feasible and inexpensive means of reproduction. Moreover, such a broad defense -- tied to no quantitative limit on the amount copied and advancing no purpose inherent in copyright law -- would soon undermine the protections conferred by Congress on all copyright proprietors. See 3 M. Nimmer, *supra*, § 13.05[E], at 13-81.

1. The limited purpose of the defense: to facilitate, not impede, creative contributions.

The question of fair use has typically been described by the lower courts as "the most troublesome in the whole law of copyright." See, e.g., *Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171, 1174 (5th Cir. 1980) (quoting *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir. 1939)). As an equitable defense, it requires the court in each case to isolate and then to balance often numerous competing interests in order to decide ultimately whether an otherwise infringing use should nonetheless be found to be permitted. See generally L. Seltzer, *Exemptions and Fair Use in Copyright* 18-48 (1978) ("Seltzer"). No general definition to guide this analysis has emerged either in the long line of cases or in the 1976 Act. Rather, reflecting the presence of competing interests and objectives, a line must be drawn between the infringing and the permitted uses of a

work based upon all of the facts at hand. See *Meeropol v. Nizer*, 560 F.2d 1061, 1068 (2d Cir. 1977), cert. denied, 434 U.S. 1013 (1978).

This flexible standard enables the doctrine to be invoked for a clear purpose: to ensure the enforcement of the copyright statute, without "stifl[ing] the very creativity which that law is designed to foster." *Iowa State University Research Foundation, Inc. v. American Broadcasting Cos.*, 621 F.2d 57, 60 (2d Cir. 1980). While historically called the "fair use" doctrine, the concept is more precisely one of "permitted use." Under the Copyright Clause and implementing legislation, an author, as the fundamental precept, is given exclusive control over his work. With this control, the author can derive income by exploiting his work directly or by licensing others to do so. In turn, the opportunity for income provides an incentive for creation. See *Mazer v. Stein*, 347 U.S. at 219.

Where, however, the strict enforcement of a copyright monopoly would unduly interfere with the ability of a second author to contribute to the "Progress of Science and useful Arts," the fair use defense provides a safety valve. The second author, in order to complete his contribution, may be permitted to make a "fair use" -- a use which advances the Constitutional purpose, which is limited in amount, and which does not potentially harm the original copyright proprietor. See *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541, 544 (2d Cir.), cert. denied, 379 U.S. 822 (1964).

In effecting this Constitutional purpose, courts are asked in fair use cases to determine what use, if any, of a copyrighted work should be permitted, without authorization of the copyright proprietor and without compensation to him, in order that a second creation be completed. See *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303, 306 (2d Cir. 1966), cert. denied, 385 U.S. 1009 (1967). The decision in *Meeropol v. Nizer*, 520 F.2d 1061, illustrates the approach to this defense. There, plaintiffs, sons of Julius and Ethel Rosenberg, sued Louis Nizer, who wrote a book on the Rosenberg case, as well as his publishers, alleging that the Nizer book incorporated, without authorization, substantial portions of copyrighted letters written by the Rosenbergs. These excerpts amounted to some 1957 words, less than one percent of the book.

Reversing the district court's entry of summary judgment in favor of defendants, the court of appeals held that this incorporation of the letters could not, as a matter of law, be said to constitute fair use. The court focused principally on the extent of use, in particular the presence of verbatim reproduction. 560 F.2d at 1070. It observed that, even though biographers often quote from earlier works, verbatim portions of 28 letters had been taken. The court also directed the trier of fact to determine what effect defendants' use would have on the potential market for the letter, which had been out of print for 20 years. Setting forth the relevant fair use factors, the court stated:

The purpose and character of the use of the copyrighted material, the nature of the copyrighted work, and amount and substantiality of the work used, and its effect upon the potential market for the copyrighted material are factors which must be evaluated in concert... If the effect on the market by an infringing work is minimal, for example, far greater use may be privileged than where the market value of the copyrighted material is substantially decreased. Similarly, where use is made of underlying historical facts such use will be entitled to complete freedom but it is otherwise if there is verbatim copying of original, copyrighted material. "The fair use privilege is based on the concept of reasonableness and extensive verbatim copying

or paraphrasing of material set down by another cannot satisfy that standard." 560 F.2d at 1069-70 (emphasis supplied; citations omitted).

The fair use defense, as evolved in case law, was codified for the first time in § 107 of the 1976 Act. Congress did not intend to "change, narrow, or enlarge [the doctrine] in any way." House Report at 66. Thus, in applying the statute, the purpose of the fair use defense -- revealed in the case law -- is to be served.

Each of the four factors contained in § 107 reflects the basic objective of the defense. For example, in examining the purpose and character of the use, a court must consider the contribution to be made by the second author which might be precluded by a strict enforcement of a copyright monopoly. Uses which "promote the Progress of Science and useful Arts" may be encouraged, while a completely commercial exploitation of a work might be barred. *MCA, Inc. v. Wilson*, 677 F.2d 180, 182-83 (2d Cir. 1981); *Rubin v. Boston Magazine Co.*, 645 F.2d 80 (1st Cir. 1981); *Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc.*, 626 F.2d at 1171. The preamble to § 107 recites the most common illustrations of fair use: "criticism, comment, news reporting, teaching... scholarship, or research." 17 U.S.C. § 107. n7

n7 In virtually all instances where the fair use defense has been sustained, the use in question has resulted in a second work of authorship; there has been a contribution to the "Progress of Science and useful Arts." See generally 3 M. Nimmer, *supra*, § 13.05. The two exceptions traditionally recognized and specifically mentioned in § 107 are in the areas of education and research; certain uses of works may be made in the context of classroom teaching or by libraries or archives. See House Report at 66-72, 74-79. The 1976 Act frames these exceptions in narrow confines. *Id.* There is neither statutory nor case support -- especially outside the areas of education and research -- for a broad application of the fair use defense where no second work is created and where only the user's convenience is served.

Similarly, under the second factor, a court must view the nature of the copyrighted work and consider whether certain uses would defeat the author's expectations, and deter further creativity. See *Seltzer, supra*, at 29-30, 34. Thus, a later researcher or author may draw on historical facts contained in a copyrighted biography for a subsequent book; facts, in themselves, cannot be copyrighted and even a slight use of protectable expression in a later work may be permitted under the fair use defense. *Wainwright Securities Inc. v. Wall Street Transcript Corp.*, 558 F.2d 91, 95-96 (2d Cir. 1977), cert. denied, 434 U.S. 1014 (1978). However, verbatim replication of a work designed to provide entertainment -- the value of which is in its creativity -- is generally not permitted. 3 M. Nimmer, *supra*, § 13.05[A], at 13-62.

Having analyzed the proposed use and the nature of the work, the court must evaluate the quantitative and qualitative amount of the taking, to measure whether such use is in fact required to permit the second contribution and whether such use - - if too extensive -- might discourage creativity. *Meeropol v. Nizer*, 560 F.2d at 1070 (quoting *Folsom v. Marsh*, 9 F. Cas. 342, 347 (C.C.D. Mass. 1841) (No. 4901)). Finally, the court must analyze the effect of the proposed use on the "potential market for or value of the copyrighted work." 17 U.S.C. § 107(4) (emphasis supplied). Again, the focus is on whether the Constitutional purpose -- the assurance of an economic incentive to create -- will be diminished. *MCA, Inc. v.*

Wilson, 677 F.2d at 182-83. This factor looks not only to the single instance of infringement before the court, but also requires the court to determine what effect on the copyrighted work would occur if the proposed use could be made by others. 3 M. Nimmer, *supra*, § 13.05[B], at 13-65.

In sum, fair use is a limited doctrine, providing a safety valve when the incentive to create the underlying work -- the copyright monopoly -- could also prevent a valid contribution by a second author. The line between permissible use and infringement may, at times, be difficult to draw. Nonetheless, this limited defense has, in practice, enabled courts to resolve competing interests, protecting the rights conferred under the Copyright Clause while enabling later authors to draw, when required, upon what has come before.

2. The court of appeals properly concluded that home video recording does not fall within the boundaries of fair use.

The court of appeals properly concluded that the "fair use doctrine does not sanction home videorecording." 659 F.2d at 971. While the court did examine the four factors of § 107, its framing and analysis of a threshold issue -- whether invocation of fair use here would advance the Constitutional purpose -- was sound. Taking this broader view first, the court recognized that the infringement here does not result in any contribution at all; it is simply an appropriation of an unauthorized copy of a copyrighted work -- what the court termed an "intrinsic," rather than "productive," use. *Id.* at 969-72; see Seltzer, *supra*, at 24; Note, *supra*, 66 Va. L. Rev. at 1012-14.

A review of each of the four factors of § 107 supports the court's conclusion. n8 The first factor, the character of use, weighs against the defense, because only the convenience of the user is achieved. All that exists after the infringing use is extra copies of copyrighted works; there has been no new creation. A use designed to avoid payment for an authorized copy and which in no direct way relates to the creation of a scholarly or cultural work is an unlikely candidate for fair use protection. See 3 M. Nimmer, *supra*, § 13.05[B], at 13-70.

n8 Rather than deal with the purpose and the intended scope of the statutory factors, petitioners have attempted to inject into fair use various factors that are totally irrelevant to that analysis. Thus, they discuss, under the fair use title, the lack of suits by other authors (Petitioners' Brief, at 29) and cases dealing with access to the airwaves (*Id.* at 24-26). Neither set of considerations is germane. The public's "right" to receive a broadcast has nothing to do with fair use. See Section D, *infra*. Nor does the fact that certain copyright proprietors have consented to home video recording; a waiver of rights by one author has never been held to extinguish valid copyrights of other authors of similar types of works.

The second factor, the nature of the work, also weights against application of fair use. With certain works, especially collections of information, the Constitutional purpose of fair use is advanced when the research of the first work facilitates completion of a second work. Fair use is less often applied when creative works are infringed. 3 M. Nimmer, *supra*, § 13.05[A], at 13-62. The 1976 Act, recognizing the risks and expenses required to produce motion pictures, includes special protections for such works. Ladd Statement, *supra*, at 20.

The third factor, amount and substantiality of use, is virtually dispositive here. Concededly, VCR users reproduce verbatim copies of entire copyrighted works. Such use is necessarily an infringement. See *Meeropol v. Nizer*, 560 F.2d at 1070; *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978), cert. denied, 439 U.S. 1132 (1979); *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303, 310.

Finally, the fourth factor, the effect on the "potential market or value" of the copyrighted work, also compels a rejection of fair use. The court of appeals properly recognized that the infringing use must be reviewed not as a singular example, but as a type of use which -- if made by others -- could affect the value of the copyrighted work. 659 F.2d at 973; See 3 M. Nimmer, *supra*, § 13.05[B], at 13-65. The court concluded that the cumulative effect of home copying will harm the potential market for the copyrighted works. n9

n9 Petitioners, as did the district court, place great reliance on *Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd* by equally divided Court, 420 U.S. 376 (1975), which held that photocopying of articles from learned journals by government libraries to permit scientific research constitutes fair use. The Court of Claims' decision has been subject to strong criticism. 3 M Nimmer, *supra*, § 13.05[E], at 13-83. However, whether or not *Williams & Wilkins* was properly decided, its holding would not support unauthorized reproduction through home video recording. First, the nature of the use and of the works are quite distinct. In *Williams & Wilkins*, scholarly works were being used to promote scientific research; indeed, the very purpose of the authors in allowing publication was to disseminate knowledge and to facilitate further research. Here, entertainment programming is being copied solely for the viewer's convenience. Second, even though copies of particular articles were made by the government libraries, the reproduction of copyrighted works was not unrestricted. The Court of Claims was careful to note that entire journals were not copied, and reproduction of articles for any one user was monitored and limited. 487 F.2d at 1354-55. Here, the use is unrestricted and unsupervised.

Home video recording of entire copyrighted works, for the benefit of the user only, does not advance the Constitutional purpose at the core of the fair use defense; it threatens the protection given to copyright proprietors without creating new works. It is not a fair use.

D. The First Amendment does not override the right to control reproduction of a copyrighted work.

Asserting various rights under the First Amendment, petitioners and several amici contend that restricting home video recording would be unconstitutional. Simply put, it is contended that freedom of speech entails a correlative right to "hear" or "receive information." See, e.g., *Brief of Amicus Curiae Virginia Citizens' Consumer Council, Inc., et al.* In turn, these "rights" are said to entitle consumers to use whatever may be necessary to facilitate their gathering of information -- including home video recording.

This resort to the First Amendment is without merit. First and foremost, this Court decisively rejected such contentions in *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977). Petitioners' thesis would, without any basis, require this Court

to overrule that recent decision -- and, moreover, to do so where the asserted First Amendment interest is de minimis.

In *Zacchini*, petitioner Hugo Zacchini performed a "human cannonball" act for a living. During one performance, a reporter from the Scripps-Howard Broadcasting Company, without permission, videotaped Zacchini's act and later broadcast it on a news program. Zacchini sued for damages, alleging a violation of his state-law "right of publicity." The Ohio Supreme Court ruled for the broadcasters on First Amendment grounds. This Court reversed.

As the Court observed, the broadcasters had not simply reported facts about Zacchini's performance. 433 U.S. at 569. Rather, they had "broadcast a[n]... entire act without [the performer's] consent." *Id.* at 575. Expressly analogizing Zacchini's "right of publicity" to federally created patent and copyright laws, the Court held that the First Amendment did not entitle respondents to "appropriat[e]... the very activity by which the entertainer acquired his reputation...." *Id.* at 576. Quoting from *Mazer v. Stein*, 347 U.S. 201 (1954), the Court set forth this rationale for protecting Zacchini's rights, notwithstanding the broadcasters' First Amendment claim:

"The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.' Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered." 433 U.S. at 576 (quoting *Mazer v. Stein*, 347 U.S. at 219).

Like the broadcasts in *Zacchini*, the wholesale copying of creative works through home video recording cannot be defended on First Amendment grounds. A VCR, by design, copies not simply a producer's ideas but also every inch of his product. Indeed, this Court's holding in *Zacchini* applies with even greater force in this case. For we deal here not with a broadcaster who wishes to present a copyrighted performance for newsworthy purposes; on the contrary, home video recording involves nothing more than the private, unauthorized consumption by viewers. Moreover, unlike the "right of publicity" in *Zacchini*, copyrights are constitutionally rooted and are authorized by clear Congressional mandate. The First Amendment defense pressed in *Zacchini* must, a fortiori, fall even harder in this case.

Further, the First Amendment claim in this case is, as a practical matter, untenable. Taken to its logical limit, the "rights" urged would not only impair fundamental copyright law; they would substantially undermine basic principles of private property -- potentially entitling consumers, as a matter of law, to appropriate whatever may be necessary to secure "access to information." To exercise the "right to hear," after all, the consumer must have a VCR and television in the first place. But the First Amendment surely cannot be construed to give consumers a right to appropriate VCRs and televisions without payment. The "right to hear" simply proves too much.

Significantly, no precedential support for this broad "right to hear" has been cited. Indeed, the courts of appeals that have considered such putative First Amendment claims have uniformly rejected them -- in favor of the rights of copyright holders. See, e.g., *Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc.*, 600 F.2d 1184 (5th Cir. 1979); *Wainwright Securities Inc. v. Wall Street Transcript Corp.*, 558 F.2d 91; *Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp.*, 562

F.2d 1157 (9th Cir. 1977). The First Amendment is satisfied so long as access to ideas is not foreclosed. Since copyright protection extends only to the expression of an idea -- and not to the idea itself -- recognition of a copyright cannot transgress the First Amendment. See, e.g., *Wainwright Securities Inc. v. Wall Street Transcript Corp.*, 558 F.2d 91. Where, as here, a VCR user copies an entire product -- the expression, in addition to the ideas -- the First Amendment cannot shield him from copyright liability. n10

n10 In rejecting the broadcasters' First Amendment defense in *Zacchini*, the Court also relied on *Goldstein v. California*, 412 U.S. 546 (1973), which upheld a California law prohibiting unauthorized duplication of recordings. The Court noted that the *Goldstein* decision had rejected a broad-based constitutional challenge because the law -- like the federal copyright laws -- placed "[n]o restraint... on the use of an idea or concept." 433 U.S. at 577 n.13 (quoting *Goldstein v. California*, 412 U.S. at 571). The Court went on to observe, with apparent approval, that a number of federal courts had "rejected First Amendment challenges to the federal copyright law on the ground that 'no restraint [has been] placed on the use of an idea or concept.'" 433 U.S. at 577 n.13 (quoting *United States v. Bodin*, 375 F. Supp. 1265, 1267 (W.D. Okla. 1974)).

This Court -- in addition to the squarely controlling *Zacchini* -- has rejected, time and again, the contention that the First Amendment guarantees an unalloyed right to maximum information. See, e.g., *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974) (federal policy prohibiting press interviews with prisoners does not abridge any First Amendment right of access to sources of information); *CBS, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973) (no First Amendment right to place editorial advertising on the radio); *Zemel v. Rusk*, 381 U.S. 1, 17 (1965) ("The right to speak and publish does not carry with it the unrestrained right to gather information"). As Justice Brennan noted in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980):

While freedom of expression is made inviolate by the First Amendment, and, with only rare and stringent exceptions, may not be suppressed,... the First Amendment has not been viewed by the Court in all settings as providing an equally categorical assurance of the correlative freedom of access to information... 448 U.S. at 585 (Brennan, J., concurring).

Finally, petitioners' reliance on a First Amendment right to "hear" ignores the firm -- and settled -- constitutional rights on the other side of the balance. Copyrights are authorized by Article I, § 8, cl. 8, and have been duly implemented by Congress. 17 U.S.C. § 101 et seq. Indeed, as one court of appeals has aptly noted in rejecting an infringer's First Amendment defense, "[t]he judgment of the constitution is that free expression is enriched by protecting the creations of authors from exploitation by others...." *Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc.*, 600 F.2d at 1187. By undermining the copyright scheme, petitioners' thesis damages -- not furthers -- First Amendment values.

CONCLUSION

The narrow question before the Court is whether home video recording of entire copyrighted works without authorization from or compensation to the copyright proprietors is an infringing use under the 1976 Act, as presently written. For the

reasons stated above, we respectfully urge the Court to hold that home video recording is an infringement, for which there is neither an existing exemption nor defense. But even more, we respectfully urge the Court to preserve the rights specifically conferred on copyright proprietors in § 106 of the 1976 Act. To hold that additional exemptions can arise by implication from isolated passages in a 20-year legislative record, that unauthorized reproduction of entire works for the sole purpose of a user's convenience can be fair use, or that a First Amendment right of access can override a proprietor's control over reproduction of his work would result in a serious erosion of copyright protection. Congress can -- and, we believe, should -- address the competing economic and social interests presented by the advent of VCR's and determine whether an amendment to the 1976 Act is warranted. But unless and until Congress acts, the law exists in its present form -- with no express or implied exemption for home video recording.

Respectfully submitted,

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