

SONY CORPORATION OF AMERICA, et al., Petitioners, v. UNIVERSAL CITY
STUDIOS, INC. and WALT DISNEY PRODUCTIONS, Respondents.

No. 81-1687

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October Term, 1982

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

BRIEF AMICUS CURIAE OF EDUCATORS AD HOC COMMITTEE ON
COPYRIGHT LAW IN SUPPORT OF REVERSAL

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INTEREST OF AMICUS

The Educators Ad Hoc Committee on Copyright Law (Ad Hoc Committee), pursuant to Rule 36 of the Rules of this Court, files this brief amicus curiae, having received consent in writing from all parties. A copy of the consent has been lodged with the clerk of the Court.

The interest of the Ad Hoc Committee arises out of the following circumstances.

The Educators Ad Hoc Committee on Copyright Law was first organized when Congress started to hold hearings on a general revision of the copyright law about twenty years ago. The Committee consists of nonprofit organizations representing virtually every school, college and library, public and private, and from kindergarten through graduate education, throughout the country. The names of the current participants in the Committee are listed in the appendix. The purpose of the Committee was to communicate to Congress the effect on education and scholarship of various proposals for amending the copyright law. The educators', scholars' and librarians' points of view were regularly communicated to the Congressional committees as the bills progressed through the legislative process.

One of the principal concerns of the Ad Hoc Committee was the preservation of the limited right of educators and scholars to make copies of any material that they needed for their teaching and research, without the hindrance of locating copyright owners and demands for excessive royalties. The constituency of the Ad Hoc Committee was satisfied to continue to operate under the authority of the fair use doctrine as the courts had been interpreting it. The Committee, therefore, was pleased that Congress expressly stated that, in writing fair use into § 107 of the Copyright Act, the intention was "not to

change, narrow or enlarge it in any way." The relevant portion of § 107 reads:

Notwithstanding the provisions of § 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright (emphasis added).

Since the new act was passed, the representatives of copyright proprietors, in the publishing, music and audio-visual fields, have persistently sought to restrict the effect of the fair use provision. The Ad Hoc Committee and educational, library and scholarly groups have been constrained to maintain constant vigilance lest those efforts succeed in frustrating the intent of Congress and the needs of teaching and scholarship. The present case is potentially an example of those efforts.

It should also be noted that, pursuant to request of Congressman Robert W. Kastenmeier, Chairman of the Subcommittee on Courts, Civil Liberties and Administration of Justice of the House Judiciary Committee, members of the Ad Hoc Committee and other educators joined with representatives of publishers, authors, television networks and other copyright owners to adopt "Guidelines for Off-Air Taping of Copyrighted Works for Educational Use." These Guidelines, formulated after two years of negotiation to reach a compromise on the wide variety of competing interests represented by the negotiators, were read into the Congressional Record by Congressman Kastenmeier on October 14, 1981. 127 Cong. Rec. E4751.

The decision of the Court of Appeals for the Ninth Circuit, decided on October 19, 1981, and reported at *659 F.2d 963*, was that off-the-air taping of copyrighted television programs for home use is an infringement of copyright, and that appropriate remedies may be applied. The defendants in this case, however, do not themselves do the copying that the complainants desire to preclude. Rather, they are the makers and distributors of equipment that produces the copies. The Court of Appeals' opinion states that, on remand, the district court "should reconsider" its determination "that an injunction against sale and distribution of equipment for off-air copying in the home would not be an appropriate remedy." *659 F.2d at 976*. That proposition could cause extreme damage to the interests of the educators and librarians.

School teachers and university professors regularly use off-air copying equipment in order to record broadcast programs for display to pupils and students in classrooms. That is expressly allowed as fair use under § 107 of the Copyright Act. Recording for classroom purposes, however, must on occasion be accomplished in homes in the evenings and on weekends when classes are not in session. If the defendants in the present case were enjoined from selling and distributing the necessary equipment, or were required to pay significant royalties for this fair use privilege granted to educators, the educational use of broadcast material would be seriously handicapped.

The teachers, scholars, and librarians are deeply concerned lest the fair use exception to copyright proprietors' exclusive rights be eroded by measures such as those sought by the plaintiffs in this case and apparently approved by the court below.

REASONS FOR AMICUS POSITION

In holding that home recording and use of taped copies of broadcasts of copyright material are not "fair use" under the Copyright Act and may be enjoined, the court below was not simply interpreting a statute in a dispute among major commercial interests. The outcome of this case, especially as treated in the opinion below, can affect adversely press freedom, education, and the public's right to hear, see and know. Those rights are

expressly within the purposes described in that part of the Constitution that forms the constitutional basis of the Copyright Act: "To promote the progress of science and useful arts..." United States Const., article I. § 8, cl. 8. The fair use exception, as judicially created and confirmed in the Act at 17 U.S.C. § 107, is a reconciliation of free speech protection of the First Amendment with the copyright protection authorized by that introductory phrase of clause 8 "... [T]he doctrine of fair use... has been precisely contoured by the courts to assure simultaneously the public's access to knowledge of general import and the right of an author to protection of his intellectual creation." *H.C. Wainwright & Co. v. Wall St. Transcript Corp.*, 418 F. Supp. 620, 624 (S.D.N.Y. 1976). See also *Keep Thompson Governor Comm. v. Citizens for Gallen Comm.*, 457 F. Supp. 957 (D. New Hampshire 1978); 1 Nimmer on Copyright, § 1.10[D] at 1-91 (1981). Without a right of fair use that prevents the Copyright Act from interfering with, "the progress of science and the useful arts," there would have been a serious clash with the Constitutional clause that specifies the promotion of progress. The command of the Constitution "to promote the progress of science," has been the motivating force, usually unspoken, behind the judicially created right. Students of the history of the subject have regularly alluded to this as the source of the doctrine. See the many citations in Mary S. Lawrence, "Fair Use: Evidence of Change in a Traditional Doctrine", in Copyright Law Symposium, Number Twenty-seven, American Society of Composers, Authors and Publishers, New York, 1982, pp. 71-79. When Congress wrote § 107 into the 1978 revision, without intending to change, narrow or enlarge "fair use" in any way, it was doing no more than codifying the judges' reconciliation of the restrictive protection of the statute with the liberal Constitutional aspiration.

Unlike the users of copyrighted material specifically addressed by the complaint in this case, the constituency represented by the Amicus Ad Hoc Committee, consisting of professors, teachers and librarians, does not make copies of broadcasts "for home use." Their concern is with copying for teaching, including classroom use, which is specifically defined as "fair use" in § 107. The availability of copying equipment, such as that made and sold by the defendants in this case, is essential for that purpose.

The opinion below, however, stated that the "district court... should reconsider its action" in determining "that an injunction would not be an appropriate remedy." 659 F.2d at 976. The court concluded that "the result of applying fair use to intrinsic use cases... is a fundamental restructuring of the copyright system not justified by the statutory scheme or traditional notions of fair use." 659 F.2d at 971. The opinion errs in this description of the fair use rule, as indicated in the following parts of this brief. Even if the opinion below should be held to state the law correctly as to home use, however, the suggestion of an indiscriminating injunction against sale and distribution of the Betamax and similar recording devices is wholly improper.

I. AN INJUNCTION AGAINST SALE WOULD PREVENT ALL FAIR USE OF OFF-AIR RECORDINGS

The injunction sought by the plaintiffs and sanctioned by the Court below would deprive educators at all levels of the opportunity to record material needed for effective teaching. As previously set forth in the statement of interest of amicus curiae, teachers regularly use off-air copying equipment in order to record broadcast programs for display to pupils and students in classrooms. That is expressly allowed as fair use under § 107 of the Copyright Act. Recording for classroom purposes, however, must on occasion be accomplished in homes in the evening and on weekends when classes are not in session. If the defendants in the present case were enjoined from selling and distributing the necessary equipment, or were required to pay significant royalties for this fair use privilege granted to educators, the educational use of broadcast material would be seriously handicapped.

The Court is fully aware of the number of pupils and students in schools and colleges throughout the country. The educational opportunities of all of them would be affected adversely by denial of access to one of the most important technological developments of recent years. Further, a decision that copying for educational purposes may not be done on videotape recorders could also affect the similar use of other technologies in education, such as photocopying machines, word processors, satellite transmissions and telecopying.

The remedy suggested by the court below would threaten to make all of this kind of activity practically impossible. Whether or not the court correctly interpreted the fair use provisions of the Act as applied to home use, the remedy of preventing other, legitimate uses of the recording equipment is equivalent to throwing out the baby with the bath water. It is far more protective of the interests of copyright proprietors than is necessary or justified. The need for correction of that part of the decision below on a question of federal law of nationwide importance warrants reversal of the judgment below.

II. RECORDING OFF-AIR FOR EDUCATION IS FAIR USE

In deciding that recording off-the-air for home use is an infringement of copyright, the court below, at *659 F.2d, page 970*, indicated approval of the position expressed by Leon Seltzer in his book, *Exemptions and Fair Use in Copyright*, 24 (1978), that the statutory definition of "fair use" refers to use "by a second author of a first author's work," and does not cover "mere reproduction of a work in order to use it for its intrinsic purpose to make what might be called "ordinary" use of it. The Act, however, states expressly that copying for "teaching (including multiple copies for classroom use)" is fair use. *17 U.S.C.A. § 107*. No citation of authority is needed to defend a position so clearly supported by statute. There are, moreover, no cases to the contrary.

Using a broadcast work for teaching is clearly placing it in "ordinary" use for its "intrinsic purpose," that is, to be seen and heard by viewers. When the viewers of the copy are students in a classroom, the use of the copy is, by the express statutory definition, "fair." The nature of the use determines the fairness; there is no infringement if the copy is used as the Act permits. Thus, it is not the act of copying that alone constitutes an actionable infringement. In expressly approving the making of copies for uses that are "fair", the Act establishes a kind of condition subsequent to determine whether a copying is an infringement. After the copy is made and used for a purpose that is "fair", there is no cause of action. By express statutory declaration, a copy that is put to an educational use is fairly used.

III. MANY OTHER FORMS OF COPYING ARE PRIVILEGED

The privilege of copying copyrighted material, whether by home recorder or otherwise, without the consent of the copyright owner is obviously not limited to the specific circumstances listed in § 107 as "included" under fair use. Court decisions, for example, have denied infringement liability for copying in parody and satire cases (*Berlin v. E.C. Publications, Inc.*, *329 F.2d 541 (2d Cir. 1964)*) and in the use of copies for comparative advertising (*Triangle Publications, Inc. v. Knight Ridder Newspaper, Inc.*, *626 F.2d 1171 (5th Cir. 1980)*). No specific exemption has been needed for copies to be used extensively in judicial proceedings. See *Nimmer*, § 13:05 D[2] and *Marvin Worth Products v. Superior Films Corp.* *319 F. Supp. 1269 (S.D.N.Y. 1970)*. Even more clearly, classroom use may be made of copies of broadcast material for which no copyright protection is authorized. Works in the public domain, either by expiration of copyright or original ineligibility, have no copyright monopoly. Materials emanating from government sources cannot be the subject of copyright. Copyrighted materials covered by a specific license to copy are often used in classrooms. Photographs that are "news" may not be withheld from public viewing by a claim of copyright. *Time, Inc. v. Bernard Geis Associates*, *293 F. Supp. 130 (S.D.N.Y. 1968)*. In fact, Congress was fully aware that

courts have consistently supported the principle that there is no infringement by copies that are used for non-commercial purposes and that cannot be shown to do harm to the copyright owner. *Williams & Wilkins Co. v. U.S.* 487 F.2d 1345, at 1354, 1359 (Ct. Cl. 1973), aff'd 4-4, 420 U.S. 376 (1975). All of these materials may be copied freely, regardless of the intended use, and without any express statutory exception. They would become inaccessible, however, for classroom teaching if the injunction proposed by the court below were imposed.

The fact that home, non-commercial use of recorded video broadcasts was not expressly defined in the statute as fair use, or otherwise made an exception to the proprietor's exclusive rights, certainly did not indicate that Congress considered that kind of use an infringement. Indeed, the opposite conclusion is warranted by the assumption of the Congressional Committees, without an express provision in the law, that home copying of audio broadcasts is not an infringement. (See floor statement by Rep. Kastenmeier, 117 Cong. Rec. 34748 (1971)). No need to incorporate an express exception for copying video broadcasts for noncommercial home use was perceived.

IV. CONSTITUTIONAL RIGHTS OF "USERS" ARE ABRIDGED

First Amendment

Often publishers, authors and other copyright owners argue that they have a "constitutional property right" guaranteed by the U.S. Constitution which is superior to any "rights" put forth by the public, by educators or others. However, that is not so. In fact, no "rights" exist at all except as conferred by Congress in order to promote the public interest in the arts and science.

The Constitution provides in Article 1, § 8, cl.8:

"The Congress shall have Power... to make all Laws which shall be necessary and proper... to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right in their respective Writings and Discoveries...

The framers of our Constitution included this section, not in order to protect individual property interests, but to promote the public interest in securing scientific discoveries and works of art. To the extent that the Copyright Act provides otherwise by attempting to create a complete monopoly, it exceeds the authority of the Congress. 50 *Notre Dame Law* 790, *The Constitutional Dimension of Fair Use in Copyright Law*, Harry N. Rosenfeld.

Amicus as a committee of educators, is as interested in promoting the Arts and Sciences as are the Respondents but, unlike Respondents, Amicus does not believe that enjoining or taxing the use of home video recorders is the way to do it. The interest of Arts and Sciences is not promoted if the "rights" given to Authors and Scientists by the Congress are so complete as to preclude the public from enjoying the work produced.

In the words of the 2d Circuit in *Berlin v. E.C. Publications, Inc.*, 329 F. 2d. 541 (1964)),

"[C]ourts in passing upon particular claims of infringement must occasionally subordinate the copyright holder's interest in a maximum financial return to the greater public interest in the development of art, science and industry."

If one is to pit the expressed First Amendment free speech rights of the public against the implicit rights secured by the Congress pursuant to Constitutional authorization, surely the First Amendment rights are superior. It is the province of Congress to come up with a means to promote the public's interest in the creation of new televised works, while also protecting the First Amendment rights of the public to view the works.

Further, the doctrine of "fair use" has developed in the courts, and is included in the Copyright Act, for a two-fold reason: to preserve individual First Amendment rights and to protect the rights of "teachers, researchers and scholars who, in the bona fide exercise of their profession and without plagiaristic motivation, contribute to the advancement of art, science, and industry." 75 NW U.L. No. 2, April 1980 A Modernized Law Use Code for the Electronic as well as the Gutenberg Age, Sigmund Tumberg.

As the Supreme Court stated in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969)

"But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistent with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.

It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which trust truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the government itself or a private licensee."

In comparing the case at bar with the Supreme Court's dilemma in *Williams and Wilkins Co.*, where the court balanced the benefit to medicine against the copyright benefit - the Ninth Circuit opined that "there is no countervailing societal benefit to 'weigh' against the copyright interests of the author." *Universal City Studios v. Sony*, 659 F.2d 963, 971 (1981). This statement is surprising in light of the Supreme Court's frequent affirmations that the First Amendment is the essence of self-government and that this amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." *Associated Press v. U.S.*, 1, 20 (1944). Any curtailment of the dissemination of information through an injunction or otherwise, would necessarily implicate First Amendment rights. It is incumbent on this court to answer the ultimate question of whether the restrictions placed on First Amendment rights by an injunction against home use of video tape recorders or by royalty or tax on the sale of recorders and tapes - is warranted only by a proven and substantial damage to the public interest in the protection of copyrighted televised works. Amicus submits that Respondents have shown nothing more than the opinion of certain producers of copyrighted entertainment works that their financial benefit will be lessened to some unknown extent if the Sony Corporation and others are allowed to continue to produce the video recorders for use in the home. At the most, Respondents have shown that a possibility exists that some owners of video recorders may use the video in violation of the Copyright Act, but the economic effect of that use remains undetermined. It could also be argued that some users of photocopy machines, or cameras may use them in violation of the Copyright Act. Should the use of such machines also be enjoined?

"The limited monopoly of copyright is predicated upon the dual premises that the public benefits from the creative activities of authors and that the copyright monopoly is a necessary stimulus to the full realization of such creative activities." Nimmer, 17 *UCLA L. Rev.* 1180 (1970) Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press? In a case where the copyright monopoly is sought to be made absolute, which is the case here, there must be clear showing that the public interest is promoted by such an awesome intrusion on the First Amendment rights of the public. No such showing has been made by Respondents. There is no showing that an injunction against use of recorders in the home is the only way to protect the public interest in the creative interests of the copyright holders, and that it is worth the extreme measures of complete suppression of the First Amendment rights of video recorder owners. Amicus submits it is not.

V. FIFTH AMENDMENT AND ARTICLE I, § 8, cl. 1

Respondents, in their brief in opposition to the granting of the petition for certiorari argued that this court should defer to the Congress which is considering certain bills to resolve the issue at bar. However, several of those bills include a royalty provision which is constitutionally suspect. Under the royalty provision in these bills, see e.g. S. 1758, 97th Cong. 1st Sess., 127 Cong. Rec. D1253 (1981), a royalty fee would be collected from importers and distributors of video tape recorders and video tapes. These royalty fees would be held by the Copyright Royalty Commission which would devise a mechanism for distributing the funds to the holders of copyrights. This sounds very neat and tidy except for the fact that it constitutes a "taking" of private property for a private use. It will be argued that there is a public use in the promotion of the arts and sciences. However, there is no evidence to show that is what the royalty provision would do.

In the context of education alone, (ignoring the many private uses), video tape recorders are used for a multitude of purposes which requires recording material off-the-air. Just some of the examples in education include:

- * providing an opportunity for students to see or hear themselves and thus improve their skills such as speech therapy classes, choir, music classes, acting classes, football and other sports activities, etc.

- * Recording of teacher lectures for later showing to home-bound students like handicapped children or students who have missed the class, etc.

- * Taping events for later showings in class, e.g., an operation in a hospital, a natural event such as an eclipse.

- * Creating original material for either curricular or extracurricular use, e.g., an original play, a simulated newscast.

- * Providing in-service training and evaluation of teacher performance.

Even where video recorders are used to tape off-the-air, much of the material taped by educators is not copyrighted - for example, presidential press conferences or addresses to Congress, formerly copyrighted material which is now in the public domain, material developed and broadcast by the school district through television stations owned and operated by the school district itself.

As stated, there are many uses to which video tape recorders are put which do not involve copyrighted material at all. There are also many uses of video tape recorders which involve copyrighted material, but which are fair and do not involve the violation of the Copyright Act and, thus, do not impede the Constitutional purpose to promote the arts and sciences. Respondents must provide a clear showing that video tape recorders are used primarily to tape copyrighted material, in violation of the Copyright Act. In the absence of such a showing there is no showing of a "public" use for which a "taking" might be justified. Thus, any royalty provision is in contravention of the 5th Amendment prohibition against "private property [be]ing taken for public use, without just compensation." Further, the power of the Congress to tax (certainly, a royalty is a tax) is limited by Article I. § 8, cl. 1 to "pay the Debts and provide for the common Defense and general Welfare of the United States". Without the showing that there is a public interest in imposing a tax, royalty, etc., in order to make payments to private copyright holders - the Congress has no power to levy the tax or royalty. *Kansas Gas & Electric Co. v. City of Independence, Kansas*, 79 F.2d 32 (C.C.A. 1935).

CONCLUSION

A prohibition against any copying of televised broadcasts, an exaction of a royalty on

the recording equipment, or an injunction against sale or distribution of the equipment as sought by the plaintiffs and sanctioned by the court below, would be an unwarranted interference with the rights of teachers, school systems and college and university professors under the Act. Even if the court below, while dealing with "home use" of copies, did not intend to impose the same kind of obstacle in the non-profit educational context, the decision below obviously sanctions it and would improperly diminish the "fair use" privilege. This Court is urged to correct that error.

Respectfully submitted,

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APPENDIX

AD HOC COMMITTEE ON COPYRIGHT LAW REVISION

Agency for Instructional Television

American Association of Law Libraries

American Association of School Administrators

American Association of University Women

American Council on Education

American Educational Theatre Association, Inc.

American Library Association

Association for Childhood Education International

Association for Educational Communications and Technology

Association of American Law Schools

Association of Research Libraries

Corporation for Public Broadcasting

Council for American Private Education

Council for Chief State School Officers

Independent Colleges Office

International Reading Association

Joint Council on Educational Telecommunications, Inc.

Modern Language Association

Music Educators National Conference

National Association of Independent Colleges and Universities

National Association of Schools of Music

National Clearinghouse for Bilingual Education

National Commission on Libraries and Information Science
National Council of Teachers of English
National Education Association
National Public Radio
National School Boards Association
Public Broadcasting Service
Speech Communication Association
Uniformed Services University of the Health Science