

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

OCTOBER TERM, 1982

October 30, 1982

**BRIEF OF THE INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND
MOVING PICTURE MACHINE OPERATORS OF THE UNITED STATES AND CANADA,
AFL-CIO AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS.**

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TABLE OF AUTHORITIES

Cases

Diamond v. Chakrabarty, 48 U.S.L.W. 4714

Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978)

Miscellaneous

H. Rep. No. 487, 92nd Cong., 1st Sess. 7

H. Rep. No. 94-1476, 94th Cong., 2d Sess. 77

Statutes

United States Code, Title 17, Sec. 101, et seq.

United States Code, Title 17, Sec. 106

United States Code, Title 17, Sec. 106(4)

United States Code, Title 17, Secs. 107-118

United States Code, Title 17, Sec. 107

United States Code, Title 17, Sec. 108(f)(3)

United States Code, Title 17, Sec. 114(a)

Treatise

"Disc-Television": Some Recurring Copyright Problems in the Reproduction and
Performance of Motion Pictures, 34 University of Chicago Law Review, pp. 666, 694-
99 (1967)

Interest of Amicus Curiae.

Whether home-use recording constitutes copyright infringement directly affects this amicus curiae. IATSE is an international labor union lawfully representing, pursuant to collective bargaining agreements, employees of Universal City Studios, Inc., and other motion picture and television producers which produce theatrical motion pictures and/or motion pictures made for television. The interests of IATSE could be catastrophically affected if Appellants prevail.

Employer contributions to IATSE Pension and Health and Welfare Funds are based on monies collected by licensing, to television stations across the country, post-1960's theatrical motion pictures. The Trust Funds receiving these contributions are threatened by drastic reductions if Appellants prevail. Respondents and other motion picture producers could not continue licensing because of the adverse effect home copying would have on potential markets. The theatrical movie rerun market would be seriously diluted since potential licensees and advertisers of those stations would be reluctant to invest in a product which would not be in demand as a result of the proliferation of home copying.

This reduced market for reruns would also cause dramatic unemployment among the members of IATSE since the production of many theatrical motion pictures would have to be curtailed. Many motion pictures are not profitable until they are licensed for television. The production of movies made for television would be similarly reduced because their rerun market would be damaged by viewer ability to copy and reproduce first-run movies appearing on television. The inevitable result of the foregoing would be industry-wide cost cutting, and reduction in production resulting in layoffs of IATSE members as well as other workers throughout the industry.

INTRODUCTION: The Brief amicus curiae is submitted by the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL-CIO (hereinafter "IATSE") Consents have been obtained from all the parties, copies of which have been filed with the Clerk of this Court.

Respondents Universal City Studios, Inc. and Walt Disney Productions seek the affirmance of a Judgment and Opinion of the United States Court of Appeal for the Ninth Circuit. IATSE supports their Petition.

Summary of Argument.

The Ninth Circuit held that only "productive" uses of copyrighted materials could be fair uses under the Copyright Revision Act of 1976, 17 U.S.C., Section 101, et seq. (1976). This correct holding expresses Congress' express mandate as well as its intent. The Court's opinion is in harmony with other decisions of this Court. The questions concerning fair use decided by the Ninth Circuit were correctly reasoned and in compliance with other decisions. The interests of the public as well as the interests and rights of copyright owners require that this Court affirm the Ninth Circuit's decision.

The public interest issue in this controversy has two sides. The public's "right to copy", if any, must be weighed against the public's "right" to jobs and a secure retirement.

ARGUMENT.

I.

The New Act Does Not Contain a Home Recording Exception.

On its face, the language of the 1976 Copyright Act clearly prohibits home recording of copyrighted motion pictures. The only exceptions from liability are contained in Sections 107 through 118. Each exception is clearly set forth in the 12 sections that follow the broad grant of rights set forth in Section 106. The Ninth Circuit correctly applied the well-settled rule of statutory construction that courts should not disturb what Congress had specifically and unambiguously mandated. The Act contains only those exceptions which diminish the intended broad rights of copyright holders, and the Ninth Circuit correctly assumed its duty "to give faithful meaning to the language Congress adopted in the light of the evident purpose in enacting the law in question." 659 F.2d 963, 966 (1981). (Citations omitted.)

While Section 106(4) is modified to accommodate sound recording by Section 114(a), which exempted off-the-air sound recordings for non-commercial private use, no provision was made for the taping of audio-visual materials. Congress was aware that science had developed videotape recording capability, but no specific exemption for home recording was made, and none should be implied.

The Ninth Circuit did consider the legislative history of the Act, although not required, since Congress spoke clearly and unequivocally in its drafting of the statute. The legislative history Appellants contend supports their position concerns a brief discussion of children's taping of one or two songs off the radio. H. Rep. No. 487, 92nd Cong., 1st Sess. 7. There were opinions expressed that home recording was not an infringement, but those discussions can hardly be construed as upholding the position that there is some implied home videotaping exception. The drafters were aware of the problem, but chose not to take affirmative statutory action at that time.

There was further discussion of videotaping of news programming by libraries or archives, and Section 108(f)(3) of the Act contains this very limited exception. However, the lawmakers refused to extend this right as far as "documentary... magazine-format or other public affairs broadcasts dealing with subjects of general interest to the viewing public." H. Rep. No. 94-1476, 94th Cong., 2d Sess. 77.

This Court, in *Diamond v. Chakrabarty*, 48 U.S.L.W. 4714, had reason to examine statutory construction of a similar nature involving patents. It reaffirmed the principle of closely adhering to the language of a statute:

"[W]ords will be interpreted as taking their ordinary, contemporary, common meaning. We have also cautioned that courts should not read into the patent laws limitations and conditions which the legislature has not expressed." *Id.*, at 4715. (Citations omitted, emphasis added).

In *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978), this Court considered whether an implied hardship exception for a federal agency was contained in the Endangered Species Act of 1973. In finding no implied exception, it reasoned that the only hardship cases were those which Congress had intended to exempt in its drafting of the Act. The copyright statute in question is surely as carefully drafted as the Endangered Species Act. The Ninth Circuit applied the standards of *Diamond* and

TVA v. Hill by refusing to find any implied exception for home video recordings.

II.

The Fair Use Defense Never Protected Complete or Entire Copying.

Section 107 of the Act identifies four factors courts are to consider in determining whether a use is fair: the nature of the copied work, the purpose of the copying, the substantiality of the copying, and the effect of the copying on the potential market for the work. Traditionally, fair use has been a defense where the use of the primary work has been incorporated into a secondary work. However, mere reproduction of a work intended for the same use as that of the original was not intended as fair use. Fair use has not been and never was intended to protect mass copying of a protected work.

The Ninth Circuit clarified the application of the doctrine of fair use by eliminating the "loophole" which threatened to undermine all copyright holders by refusing to hold "ordinary and intrinsic" use as within the boundary of fair use. As the Court noted, fair use should be the productive use of a primary work -- a use which furthers research, criticism, or education. Neither convenience nor entertainment is a productive use, and the Court so held.

The Ninth Circuit followed established case law in reaching the decision that home videotaping was infringement and not protected by the doctrine of fair use. However, the Court continued the analysis by examining its four elements. Of prime interest to IATSE is the fourth element -- the effect on the potential market.

As one commentator noted, materials copied by videotape recorders do more harm than copying of materials which are purely sound:

"The pirating user of a motion picture... appropriates not merely the plot and dialog, but also the best and only production containing the services of artists and actors otherwise unavailable, [and] can give unlimited identical performances in any place for any gathering, which compete with and destroy the value of the work for the copyright owner and his legitimate exhibition licensees."

"Disc-Television": Some Recurring Copyright Problems in the Reproduction and Performance of Motion Pictures, 34 University of Chicago Law Review 666, 694-99 (1967).

Respondents will be forced to compete with their own products if mass copying is allowed. Furthermore, IATSE is concerned that when millions of videotape recorder owners copy movies and other first-run and copyrighted features, the marketplace will be so diminished by disinterest that their primary fears will be realized -- production curtailment. Since the Pension Trust Funds are financed by a percentage of the licensing fees movie theaters and television stations pay, IATSE is concerned that retirement plans will be jeopardized. If the Act is interpreted to allow this indiscriminate copying, members of IATSE and other entertainment industry employees will view the practice as taking bread from their tables.

Mounting production costs have steadily reduced the number of new releases. For many production companies, the rerun market was the break-even point. If mass taping results in a diluted marketplace for these films, motion picture producers will be reluctant to fund new films. The inevitable result will be massive layoffs in the

entertainment industry. In addition, future contributions to the IATSE Pension Trust Fund will be further reduced. The public interest issue in this controversy has two sides. The public's "right to copy", if any, must be weighed against the public's "right" to jobs and a secure retirement.

Conclusion.

The Ninth Circuit's decision is correct and is in harmony with the decisions of all other courts in considering the issue of fair use regarding home video recording. It has expressly and clearly interpreted the provisions of the 1976 Copyright Act. Furthermore, isolated quotations from the legislative history of the Act are not determinative where the language of the statute is clear. In that the Ninth Circuit's holding will serve the public interest of protecting employment in the entertainment industry and protecting the IATSE Pension Trust Fund, IATSE respectfully urges this Court to affirm the decision of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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Dated: October 27, 1982.