

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

OCTOBER TERM, 1981

May 7, 1982

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

**BRIEF OF MOTION PICTURE ASSOCIATION OF AMERICA, AMICUS CURIAE, IN
OPPOSITION**

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TABLE OF AUTHORITIES

Cases

Aro Mfg. Co. v. Connertible Top Replacement Co., 377 U.S. 476 (1964)

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

Henry v. A.B. Dick Co., 224 U.S. 1 (1912)

Kalem Co. v. Harper Brothers, 222 U.S. 55 (1911)

Motion Picture Patents Co. v. Universal Film Mfg. Co., 243 U.S. 502 (1917)

Teleprompter Corp. v. Columbia Broadcasting System, 415 U.S. 394 (1974)

White-Smith Music Pub. Co. v. Apollo Co., 201 U.S. 1 (1908)

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)

Statutes and Bills

Copyright Act of 1909, Ch. 320, 35 Stat. 1075 (1909)

Copyright Act of 1976, 17 U.S.C. §§ 101 et seq. (1976)

17 U.S.C. § 101(e) (1964)

H.R. 4783, 97th Cong., 1st Sess. (1981)

H.R. 4794, 97th Cong., 1st Sess. (1981)

H.R. 5250, 97th Cong., 1st Sess. (1981)

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

S. 1758, 97th Cong., 1st Sess. (1981)

Amendment No. 1333 to S. 1758, 97th Cong., 1st Sess. (1981) (Mar. 4, 1982)

Other Authorities

3 Nimmer on Copyright (1981)

INTEREST OF THE AMICUS

The Motion Picture Association of America, Inc. is a not-for-profit corporation organized under the laws of the State of New York. It was originally incorporated in 1922 under the name, Motion Picture Procedures and Distributors of America. Its basic purpose as stated in its by-laws is:

"to foster the common interests of those engaged in the motion picture industry in the United States by establishing and maintaining the highest possible moral and artistic standards in motion picture production, by developing the educational as well as the entertainment value and the general usefulness of the motion picture, by diffusing accurate and reliable information with reference to the industry, by reforming abuses relative to the industry, by securing freedom from unjust or unlawful exactions and by other lawful and proper means."

The Association represents the major producers and/or distributors of motion pictures in the United States. Its present membership consists of the following eleven companies: Embassy Pictures; Columbia Pictures Industries, Inc.; Filmways Pictures, Inc.; Metro-Goldwyn-Mayer Film Co.; Orion Pictures Company; Paramount Pictures Corporation; Twentieth Century-Fox Film Corporation; United Artists Corporation; Universal Pictures, a division of Universal City Studios, Inc.; Walt Disney Productions/Buena Vista Distribution Co., Inc.; and Warner Bros., Inc.

The members of the association frequently license their products to pay television, television networks, and local stations for broadcasting over the airwaves. When broadcast, such products are subject to being copied on video recorders.

The Association has been actively involved in the efforts in the Congress, described in Part I below, to resolve legislatively the issues raised by the decision below.

Some (though not all) of the members of the Association are joining individually with certain other firms in a separate amicus brief.

INTRODUCTION: The Motion Picture Association of America, amicus curiae, submits this brief in opposition to the petition for a writ of certiorari seeking review of the judgment of the United States Court of Appeals for the Ninth Circuit in this case. The court's opinion is reported at 659 F.2d 963 (9th Cir. 1981).

All parties to this case have filed with the Court a letter of general consent to the filing of briefs by amici curiae in support of or in opposition to the petition for a writ of certiorari.

TEXT: REASONS WHY THE WRIT SHOULD BE DENIED

I. THE SUBSTANTIVE ISSUES PROPOSED FOR REVIEW -- ALL STATUTORY -- SHOULD BE LEFT TO THE CONGRESS

Each of the substantive questions proposed for review in the petition for certiorari involves the interpretation and application of a statute, the Copyright law, as revised in 1976, 17 U.S.C. §§ 101 et seq. (1976).ⁿ¹ Each also involves the harmonization of divergent economic interests -- those of makers of copyrighted works (including actors, actresses, musicians, and other artistic talent), and those of the manufacturers and distributors of video recording equipment. It is the conflict between the interests of these competing groups that has drawn attention to this case, and that conflict is a matter peculiarly suitable for resolution by the Congress.

ⁿ¹ Petitioners' fifth issue is a procedural one, which is not of general interest and does not warrant a grant of the writ.

It is now actively before the Congress. As petitioners acknowledge, "the Court of Appeals' decision prompted instant Congressional reaction." (Pet. 13.) Since the decision below last October, four bills have been introduced in the House of Representatives and two in the Senate to resolve definitively the issues proposed for review here. In the House, H.R. 4783 (introduced by Rep. Duncan), H.R. 4794 (introduced by Rep. Parris), and H.R. 5250 (introduced by Rep. Foley) would overturn the holding below; and H.R. 5705 (introduced by Rep. Edwards) would exempt owners of home audio and video recorders from copyright liability when taping in the privacy of their own homes, and also establish a mechanism to compensate owners of creative property for such copying. In the Senate, S. 1758 (introduced by Sen. DeConcini) would overturn the holding below; and Amendment No. 1333 to S. 1758 (introduced by Sen. Mathias) is similar to H.R. 5705. ⁿ²

ⁿ² Full citations of these legislative proposals are given in the Table of Authorities, *supra*.

Consideration of all these bills is moving forward expeditiously. The Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary held hearings on the four House bills on April 12, 13, and 14, 1982. The full Senate Committee on the Judiciary held hearings on S. 1758 on November 30, 1981, and on April 21, 1982.

Enactment by the Congress of any of these bills would definitively resolve the issues proposed for review, and thereby would make unnecessary, or of no general effect, a decision by this Court. Even if this Court were to grant certiorari and decide the case, the final word might well be that of the Congress, as the history of copyright treatment of new technologies illustrates. Cf., e.g., *White-Smith Music Pub. Co. v. Apollo Co.*, 209 U.S. 1 (1908) (player-piano rolls), compulsory license imposed by Congress in § 1(e) of the Copyright Act of 1909; ⁿ³ *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968) (cable TV) and *Teleprompter Corp. v. Columbia Broadcasting System*, 415 U.S. 394 (1974) (cable TV), compulsory license with royalties for copying of distant non-network signals imposed

by Congress in § 111 of the Copyright Act of 1976.

n3 Ch. 320, 35 Stat. 1075; see also 17 U.S.C. § 101(e) (1964).

As a legislative forum the Congress can address these policy issues more comprehensively, on the basis of a better factual record, with greater sensitivity to the competing economic interests, and with more diverse and creative substantive solutions than can a court, bound by the canons of statutory construction. Therefore, it would be appropriate for this Court, in the exercise of its discretion, to deny certiorari in this case out of deference to the ongoing Congressional process.

If the Congress should fail to resolve the issues proposed and other, similar cases should arise, the Court would still have ample opportunity to decide the issues. Its deliberations at that time would be aided by the consideration given to the issues by the Congress and by lower courts in other cases.

II. THIS CASE DOES NOT WARRANT THE GRANTING OF CERTIORARI

A. There Is No Conflict Any Decision of this Court.

There is no conflict between the decision below and any decision of this Court. Petitioners contend (Pet. 23) that there is a conflict with *Aro Mfg. Co. v. Convertible Top Replacement Co.*, 377 U.S. 476, 488-89 (1964); *Henry v. A.B. Dick Co.*, 224 U.S. 1, 48 (1912), overruled on other grounds in *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502, 517 (1917); and *Kalem Co. v. Harper Brothers*, 222 U.S. 55, 62-63 (1911). No such conflict exists, however.

Kalem was a suit by the holder of the copyright for a novel against the producer of a film that depicted events in the novel. The producer argued that it did not produce the infringing representations, but merely sold the film to others. This Court, in affirming a judgment for the plaintiff, answered: "The defendant not only expected but invoked by advertisement the use of its films for dramatic reproduction of the story. That was the most conspicuous purpose for which they could be used, and the one for which especially they were made." 222 U.S. at 62-63. In the instant case, the court of appeals determined that "[v]ideotape recorders are manufactured, advertised, and sold for the primary purpose of reproducing television programming," that "[v]irtually all television programming is copyrighted material," and that "[t]he corporate appellees 'know' that the Betamax will be used to reproduce copyrighted materials. In fact, that is the most conspicuous use of the product." (Pet. App. 25-26, 29) Thus, there is no conflict between *Kalem* and the decision below.

Nor is there any conflict with *Aro* or *Henry*. Both involved interpretations of the patent law rather than the copyright law. Even if indirectly relevant, neither is in conflict either with *Kalem* or with the decision below. Neither imposed any requirement for a contributory infringement suit that was not found to be satisfied by the Court in *Kalem* and by the court of appeals below.

B. There Is No Conflict Among the Circuits.

Nor is there any conflict among the circuits. The only decision relied on by petitioners as establishing such a conflict with the decision below 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). (Pet. 22.) That case was radically different from the instant one. It involved a different technology -- photocopying -- which raises different economic, policy, and legal issues. The copying in that case occurred at the National Library of Medicine and the National Institutes of Health, and was done on behalf of scientists for the purpose of advancing medical research. Here, the copying is done in quite different surroundings and for purposes of entertainment.

The doctrine of fair use involves the application of several general "factors to be considered" to individual factual settings. Decisions applying the doctrine tend to depend on their specific facts. n4 Although petitioners contend that "[t]he Court of Appeals expressly clashed head-on with" *Williams & Wilkins* (*id.*), in fact the court distinguished that case on the ground "that the Court of Claims was primarily concerned about the serious damage to medical science that would result if it held for the plaintiff." (Pet. App. 16.) No such damage to science is threatened in the instant case. n5

n4 3 *Nimmer on Copyright* § 13.05[A] (1981).

n5 *Nimmer* suggests a further distinction: "that the copyright owner may receive additional compensation by reason of off-the-air taping [and thus loses potential royalties]... while no such additional payment is forthcoming from photocopying." 3 *Nimmer on Copyright* § 13.05[E] at 13-87 n.119.1 (1981).

Moreover, the district court in the instant case correctly pointed out that *Williams & Wilkins* "has little precedential value. Its holding is specifically limited to its unique factual situation. Furthermore, it has been strongly criticized [citation to "e.g., 3 *Nimmer on Copyright* § 3.05[E]"...] " (Pet. App. 73 & n.2) n6

n6 On the limitation of *Williams & Wilkins* to the totality of facts uniquely present there, see 487 F.2d at 1362.

Finally, petitioners have not cited any case, apart from the decision of the district court below, that has joined *Williams & Wilkins* in holding that the copying of an entire work to perform the same function as that of the original is a fair use. n7 Therefore, it is fair to conclude that *Williams & Wilkins* is not exerting any influence on the point on which petitioners claim it differs from the decision of the Ninth Circuit below, and that consequently there is no conflict among the circuits warranting review by this Court.

n7 Since it was decided in 1973, *Williams & Wilkins* has been cited only infrequently, and except in the district court in the instant case never in a manner that conflicts with the view of the court of appeals below that the copying of an entire work for the same purpose as the original is not a fair use.

C. Review by this Court at this Time Would Be Premature.

It is too early for this Court to review the issues raised by the instant case. Video recording technology is only now being introduced widely into commerce, and the circumstances of its use have not been fully delineated. n8 This is the first case to present the copyright issues created by video recorder technology, and the Court does not now have the benefit of consideration of those issues in a range of factual settings by different lower courts. Petitioners themselves emphasize (Pet. 6-7) that the record in the instant case is quite limited: it involves only 32 instances of "home recording of free off-the-air TV, by four Betamax owners"; and there was little evidence of the kinds of damage that home recording causes, although there was evidence of the use of recorders to build libraries (Pet. App. 43-48). Therefore, this record by itself does not provide the Court with the materials needed for a thorough and definitive exploration of all relevant aspects of the home recording copyright problem. The Court would be left to guess about the full dimensions of the technological practices it would be ruling upon, at least implicitly.

n8 The district court noted: "The ramifications of this new technology are greater than the boundaries of this lawsuit." (Pet. App. 56.)

D. The Issue of Remedy Is Not Presented.

Finally, review of petitioners' fourth question presented -- relating to the availability of a "compulsory license" as a remedy for infringement -- would be premature at this stage. The court of appeals mentioned the possibility of a "continuing royalty," but has not ordered one in this case, nor has it even ruled that such a remedy would be appropriate. It has said merely that such a remedy "may very well be an acceptable resolution in this context" (Pet. App. 29), and it remanded the case to the district court "for a consideration of the appropriate relief." (Pet. App. 28-29.) Noting that "[t]he relief question is exceedingly complex," the court of appeals observed that "the district court is in a better position to resolve, in an appropriate fashion, [that] question." (Pet. App. 28.) Thus, there is no judgment relating to a continuing royalty (or "compulsory license") for this Court to review. Any review of that issue should await the imposition of a continuing royalty by the district court and the court of appeals (if that should occur), so that this Court could consider the remedy as actually formulated on a factual record, rather than as an abstract proposition. Nor is any issue of privacy or enforcement presented in the absence of a formulated remedy.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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