

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

OCTOBER TERM, 1982

October 27, 1982

**BRIEF AMICUS CURIAE OF THE NATIONAL MUSIC PUBLISHERS' ASSOCIATION, INC.
IN SUPPORT OF RESPONDENTS**

JON A. BAUMGARTEN, (Counsel of Record), SUSAN BANES HARRIS, CRAIG R.
MICHEL, PASKUS, GORDON & HYMAN, 2005 Massachusetts Avenue, N.W.,
Washington, D.C. 20036, (202) 638-1930, Attorneys for Amicus Curiae

TABLE OF AUTHORITIES

CASES

American Trucking Associations, Inc. v. Atchison, Topeka & Santa Fe Railway Co.,
387 U.S. 397 (1967)

Department of Air Force v. Rose, 425 U.S. 352 (1976)

Diamond v. Chakrabarty, 447 U.S. 303 (1980)

Esquire, Inc. v. Ringer, 591 F.2d 796 (D.C. Cir. 1978), cert. denied, 440 U.S. 908
(1979)

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

Hawkes v. IRS, 467 F.2d 787 (6th Cir. 1972)

Libby Rod & Gun Club v. Poteat, 594 F.2d 742 (9th Cir. 1979)

Oscar Mayer & Co. v. Evans, 441 U.S. 750 (1979)

Rainwater v. U.S., 356 U.S. 590 (1958)

Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4 (1942)

Teleprompter Corp. v. CBS, 415 U.S. 394 (1974)

United States v. Dubilier Condenser Corp., 289 U.S. 178 (1933)

Zuber v. Allen, 396 U.S. 168 (1969)

REPORTS, HEARINGS, AND FLOOR DEBATES

H.R. Rep. No. 92-487, 92d Cong., 1st Sess. (1971)

S. Rep. No. 92-72, 92d Cong., 1st Sess. (1971)

H.R. Rep. No. 93-1581, 93d Cong., 2d Sess. (1974)

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

H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. (1976)

H.R. Rep. No. 94-1733, 94th Cong., 2d Sess. (1976)

H.R. Rep. No. 97-495, 97th Cong., 2d Sess. (1982)

Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law (July 1961) (House Committee Print, 87th Cong., 1st Sess.)

Copyright Law Revision -- Part 2: Discussion and Comments on Report of the Register of Copyrights (February 1963) (House Committee Print, 88th Cong., 1st Sess.)

Copyright Law Revision -- Part 6: Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law (May 1965) (House Committee Print, 89th Cong., 1st Sess.)

Congressional Record, September 22, 1976

Congressional Record, October 14, 1981

Hearings on S. 646 Before Subcommittee No. 3 of the House Judiciary Committee, 92d Cong., 1st Sess. (1971)

Nimmer, M.B., "The Legal Status of Home Recordings of Copyrighted Works," Appendix 7 to the Statement of the Recording Industry Association of America, Inc. (to be reprinted in Hearings on S. 1758 before the Senate Committee on the Judiciary, 97th Cong., 2d Sess. (April 21, 1982)

STATUTES

Sound Recording Act of 1971, P.L. 92-140, 85 Stat. 391 (1971)

Act of December 31, 1974, P.L. 93-573, 88 Stat. 1853 (1974)

Copyright Revision Act of 1976, 17 U.S.C.

§ 101

§ 106

§ 107

§ 108

§§ 108-118

§ 118

MISCELLANEOUS

Davis, K.C., Administrative Law Treatise (1978)

Nimmer, M.B., Nimmer on Copyrights (1976)

Nimmer, M.B., Nimmer on Copyrights (1982)

Remarks of David Ladd, Register of Copyrights, to the Internationale Gesellschaft Fur Urheberrecht, in Toronto, Canada (September 23, 1981)

INTERESTS OF AMICUS CURIAE

National Music Publishers' Association, Inc. ("NMPA") is a trade association of approximately three hundred music publishers. Since 1917, NMPA, or its predecessor organization, has been the industry spokesman for the common interests of music publishers in a variety of regulatory, legislative, legal, and other activities.

NMPA has a particular interest in this case, deriving from its lengthy and prominent representation of music publishers in matters pertaining to the copyright laws. NMPA was a principal participant in the administrative and legislative consultations, meetings and hearings that culminated in the 1976 Copyright Act. It was directly involved in, and music publishers remain substantially affected by, the delicate process of accommodation of interests that is central to the 1976 Act -- a balance threatened by the revolutionary interpretation of fair use urged by petitioners and its supporters herein.

This case is of vital concern to the music publishing industry NMPA represents because it involves fundamental principles of copyright law that will be felt beyond the particular issue of home video recording; because music publishers are the owners of copyright in musical works included in motion pictures and television programs taped off-the-air and do not consent to such recording; * and because music publishers have unquestionably suffered substantial damage from other forms of private or home recording of their musical works that have had a grave impact upon their market.

* Music publishers regularly grant motion picture and television producers limited "synchronization" rights permitting the use of existing music in films and programs for theatrical and television exhibition. These rights do not include home recording. Petitioners' bald suggestion (petitioners' brief at 4-10) that "only" respondents object to off-air video recording is not only deficient as a matter of proof, but also simply ignores the valuable interests of music publishers as owners of works included in motion pictures and television programs. Music publishers most certainly do object to the unauthorized off-air video recording of their works.

NMPA submits this brief (with the consent of the parties) in support of respondents' position that home recording is not a privileged "fair use" of copyrighted works, and is not otherwise exempt from copyright infringement. Our

emphasis will be on the issue of legislative history.

SUMMARY OF ARGUMENT

There is no exemption from infringement for home recording of copyrighted works under the 1976 Copyright Act. There is no statutory or implied exemption, and home recording is not fair use.

Legislative history does not show that home recording is fair use or is otherwise exempt from infringement. The history of the 1976 Act does show that home recording is not so privileged.

The 1971 Sound Recording Amendment did not exempt the home recording of motion pictures or musical works, and did not even clearly exempt the home duplication of sound recordings. In any event, that amendment is not pertinent and fragments of its history relied on by petitioners are not part of the 1976 Act.

Fair use is essentially supplementary in nature. It does not permit the home recording of entire copyrighted works for the purpose of entertainment.

TEXT: ARGUMENT

I. LEGISLATIVE HISTORY DOES NOT SHOW THAT HOME RECORDING IS FAIR USE OR OTHERWISE EXEMPT FROM INFRINGEMENT

Petitioners claim that the legislative history of the 1976 Copyright Act and 1971 Sound Recording/Anti-Piracy Law shows that Congress intended home recording to be a fair use. However, consideration of the record demonstrates no Congressional intent to exempt home recording from infringement, whether under the fair use doctrine or otherwise.

A. The 1976 Copyright Act

Section 106(1) of the 1976 Act gives copyright owners the exclusive right to "reproduce" their works in copies or phonorecords. Home recording is clearly such a reproduction of copyrighted works. See 17 U.S.C. § 101. The Act then sets forth a number of detailed exceptions and limitations on the rights of copyright owners. 17 U.S.C. §§ 108-118. These exceptions and limitations clearly do not permit home recording. n1 There is thus no basis for recourse to legislative history.

n1 Petitioners do not now claim any exemption other than under fair use. As noted, home recording is not permitted by any of the detailed limitations expressed in the Copyright Act. As will be shown, there is no basis for an additional "implied" exemption; and the construction of such an implication would not only be unsupported, it would also be manifestly inconsistent with Congress' deliberate design of first setting out the copyright owner's rights, and then subjecting them to carefully developed, detailed, and balanced explicit limitations. See, e.g., S. Rep. No. 94-473, 94th Cong., 1st Sess. 57, 59 (1975); H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 61, 62 (1976). Home recording cannot be freed from infringement by "limitations and conditions which the legislature has not expressed." *Diamond v. Chakrabarty*, 447 U.S. 303, 308 (1980), quoting *United States v. Dubilier Condenser Corp.* 289 U.S. 178, 199 (1933).

In any event, the legislative reports accompanying the 1976 Act are devoid of any suggestion that Congress considered home recording to be privileged as a fair use, or otherwise exempt. ⁿ² But the reports are quite pertinent to the issue. They show an awareness of relevant recording technology, concern with its impact upon copyright owners, and a desire to limit permissible unauthorized reproduction of copyrighted works by recording devices to narrow circumstances. The reports, at the least, refute petitioners' reliance on legislative history as specific authority for fair use treatment of home recording. But more than that, they show that Congress did not exempt home recording or consider the fair use doctrine to be of the breadth and effect argued by petitioners.

ⁿ² The same is true of the hearing record on the omnibus revision bills that culminated in the 1976 Act.

The House Report, for example, expressly acknowledged that "infringement takes place whenever all or any substantial portion of the actual sounds that go to make up a copyrighted sound recording are reproduced in phonorecords by... recapturing off the air...." H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 106 (1976) ("1976 House Report"). The Senate Report emphasized that "[t]he 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. 94-473, 94th Cong., 1st Sess. 66 (1975) ("1975 Senate Report"). It is futile to attempt reconciliation of these statements with a presumed Congressional intent to exculpate home recording of any works -- whether motion pictures, musical compositions, or sound recordings.

But Congress did not close its eyes to the popular availability of recording technology. Instead, it sought to balance the apparent use of recording devices with the rights of copyright owners, and to restrict permissible unauthorized recording to narrowly defined circumstances, hallmarked by particular factors. Thus, for example, Congress endorsed certain "guidelines" for educational uses of musical works under the fair use doctrine. These guidelines restrict fair use treatment of unauthorized recordings of music to those made from performances by students "for evaluation or rehearsal purposes" or from phonorecords owned by an educational institution or teacher "for the purpose of constructing aural exercises or examinations." 1976 House Report 71; H.R. [Conference] Rep. No. 94-1733, 94th Cong., 2d Sess. 70 (1976) ("Conference Report"). Congress also specifically exempted off-air recording of noncommercial educational broadcasts of music by nonprofit institutions for educational use, but only under stringently limiting conditions (17 U.S.C. § 118(d)(3)); ⁿ³ and it indicated that the fair use doctrine could apply to off-air taping by educational institutions only in "limited" circumstances. ⁿ⁴ It is equally fruitless to attempt reconciliation of this carefully limited treatment of recording for the favored purpose of education with an asserted intent to permit widespread home recording for personal enjoyment and "convenience."

ⁿ³ This exclusion hardly suggests Congressional acquiescence in any "nonprofit" or "non-commercial" use. In fact, the reports accompanying the 1976 Act show that Congress carefully and deliberately avoided imposing a general "not-for-profit" or "non-commercial" exemption on the rights of copyright owners. E.g., 1975 Senate Report 59; 1976 House Report 66. (In view of the potential impact of home

recording copies on an individual's inclination to purchase market copies, it may be doubted that home recording even deserves the sobriquet of "nonprofit" or "non-commercial.")

In section 108(f)(3) of the 1976 Act, Congress also expressly permitted off-air recording of certain news programs by particular qualifying libraries "for limited distribution to scholars and researchers for use in research purposes." 1976 House Report 77 (emphasis added). This exception was intentionally "narrowly drafted." 1975 Senate Report 69. That Congress did not intend to give carte blanche to recording for even scholarly purposes is also shown by the fact that the House Judiciary Committee, when specifically considering the audio duplication of recordings for purposes of scholarly research by musicologists, did not even suggest that the Act exempted such use. Instead, it noted that the issue was being handled by licenses from copyright owners and that, should it become necessary to go beyond this, additional legislation could be undertaken. 1976 House Report 107.

n4 1975 Senate Report 65-66 ("The committee believes that the making by a school located in... 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 [sic.] 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.'"); 1976 House Report 71 ("The Committee believes that the fair use doctrine has some limited application to off-air taping for non-profit classroom use.") The House Judiciary Committee requested the parties to develop guidelines for fair use in such circumstances. These guidelines were adopted and endorsed by Chairman Kastenmeier of the House Copyright Subcommittee. See Congressional Record, October 14, 1981 at E 4751. They include strict conditions and limitations on even this educational use; and Mr. Kastenmeier observed that "beyond these guidelines specific permissions from copyright owners may be required under the Copyright Law." *Id.* See also, H.R. Rep. No. 97-495, 97th Cong., 2d Sess. 6-12 (1982).

Congress also felt that fair use could apply to off-air recording by non-profit educational institutions for the deaf and hearing-impaired, but only "as long as clear-cut restraints are imposed and enforced." Congressional Record. Sept. 22, 1976 at H 10875, approved in Conference Report at 70.

Petitioners try to obfuscate this issue by denying any distinction between education and entertainment (petitioners' brief at 29). The simple fact is that there is -- for purposes of the Copyright Act -- a difference. It is clear that a distinction between "educational" and "entertainment" (or "convenience") uses is fundamental to both the careful Congressional balancing that characterizes the 1976 Copyright Act as a whole, and proper judicial application of the fair use doctrine in particular. Cf., e.g., *Esquire, Inc. v. Ringer*, 591 F. 2d 796, 805 (D.C. Cir. 1978) (courts should generally not discriminate between genres of art, but this principle should not be extended to "undermine... plainly legitimate goals of copyright law"), cert. denied, 440 U.S. 908 (1979).

Petitioners rely (petitioners' brief at 33) on an isolated statement from the 1961 Register's Report n5 to support their argument that the "legislative history" of the 1976 Act permits home recording as fair use. This reliance is misplaced. The Register's statement was made in the context of discussing performance rights in

motion pictures. It was not addressed to reproduction rights, n6 and referred only in passing to possible "future" home recording. 1961 Register's Report at 29-30. Although, in that context and at that time, the Register indicated that he did "not believe the private use [i.e., performance] of such a reproduction can or should be precluded by copyright," he did not recommend any statutory exemption for private reproduction, or any limitation on the reproduction right to public situations or dissemination. See 1961 Register's Report at 30, 149-160. n7

n5 Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law 30 (July 1961) (House Committee Print, 87th Cong., 1st Sess.) ("1961 Register's Report").

n6 Under both the 1909 and 1976 Copyright Acts, performance rights were limited to "public" activity. See generally, 2 M.B. Nimmer, Nimmer on Copyrights § 8.14[C] (1982). No such limitation has applied to the reproduction right under either law, and (subject only to fair use or express statutory limitations) "copyright infringement occurs whenever an unauthorized copy or phonorecord is made, even if it is used solely for the private purposes of the reproducer...." 2 M.B. Nimmer, Nimmer on Copyrights, § 8.02[C] at 8-25 -- 26 (1982).

n7 In the passage of the 1961 Register's Report appearing between the two quotations relied on at pages 33-34 of petitioners' brief, the Register also declined to extend copyright to private performances of motion pictures in "schools, libraries, and the like." Petitioners' argument would lead to the conclusion that the Register therefore condoned a general practice of unauthorized reproduction of motion pictures by such entities, a clearly erroneous result. See 1961 Register's Report at 25.

Additionally, the discussion of fair use in the same report is completely at odds with petitioners' assertion that home recording is privileged under that doctrine. Thus, the Report explained that fair use "means that a reasonable portion of a copyrighted work may be reproduced without permission when necessary for a legitimate purpose which is not competitive with the copyright owner's market for his work" [1961 Register's Report at 24], and gave a list of examples of fair uses that did not include anything even remotely analogous to home recording [see *id.* and Point II, *infra*].

Moreover, petitioners ignore the nature of the 1961 Report. Its purpose was only to give "tentative" and "preliminary" views of the Register. 1961 Register's Report at IV, IX. It did not reflect the intent of revision bills prepared by the Copyright Office and first introduced in the Congress, after extensive discussion, revision, and refinement, three years later, n8 much less the intent of Congress, either generally n9 or in passing a law a decade and a half later. The Register's off-hand comment about the possible "future" of home recording did not reflect anyone's "considered" review [Zuber v. Allen, 396 U.S. 168, 186 (1969)], or the "investigation, examination, and study" of Congress [Diamond v. Chakrabarty, 447 U.S. 303, 317 (1980)], or the contemporaneous nature, that are necessary to elevate it to the conclusive stature urged by petitioners.

n8 See Copyright Law Revision, Part 6, Supplementary Report of the Register of

Copyrights on the General Revision of the U.S. Copyright Law IX-XI (May 1965) (House Committee Print, 89th Cong., 1st Sess.) ("1965 Register's Supplementary Report"). Many views of the Register changed between 1961 and 1965, and many were not reflected in the 1976 Act as finally passed by Congress.

n9 See *American Trucking Associations, Inc. v. Atchison, Topeka & Santa Fe Railway Co.*, 387 U.S. 397, 418 (1967).

A proper view of the role of the 1961 Register's Report as "an experimental device for provoking discussion and suggestions" (1965 Register's Supplementary Report at XI) is particularly important because: (a) in discussions immediately following its issuance, copyright owners did assert that their works should not "be physically copied in homes... without our permission, if new technologies were to permit [their] duplication... by taking the same off a television screen onto a tape or wire recorder, or by duplicating a rented film, tape, or wire;" n10 and (b) the Register's next report, which included many variations from his 1961 views that were prompted by such discussions, did not offer any suggestion of privileged treatment for home recording. In fact, the 1965 Supplementary Report indicated an increased concern over the impact of home recording on copyright owners. It observed:

n10 Copyright Law Revision, Part 2: Discussion and Comments on Report of the Register of Copyrights 341, 345 (February 1963) (House Committee Print, 88th Cong., 1st Sess.)

"... the imminent development of home video tape recordings seems likely to make ephemeral recordings by authorized transmitters a minor source of danger." n11

n11 1965 Register's Supplementary Report 47. "Ephemeral recordings by authorized transmitters" refers to recordings made for broadcast purposes by stations licensed to transmit a copyrighted work. The Register had proposed an ephemeral recording exemption for broadcasters, and the motion picture companies objected, leading to the quoted response of the Register.

This statement obviously recognizes the comparatively "major" danger then seen to be posed by home recording. It defies logic to assume that the Register, sub silentio, recommended subjecting copyright owners to that spectre. n12

n12 The Register was well aware, in his 1965 Supplementary Report, of the potential impact of "advancing technology" on copyright owners, and he acknowledged that a "real danger to be guarded against is that of confining the scope of an author's rights on the basis of the present technology so that, as the years go by, his copyright loses much of its value because of unforeseen technical advances." 1965 Register's Supplementary Report 13-14.

In sum, the history of the revision bills that resulted in the 1976 Copyright Act does not indicate any Congressional (or administrative) recognition of home recording as fair use or exempted activity, but does reflect quite the contrary.

B. The 1971 Sound Recording/Anti-Piracy Law

Petitioners' argument that home recording was "intended" to be treated as fair use under the 1976 Copyright Act rests most heavily on a few fragments taken from the record of the House of Representatives' consideration of a different statute: the 1971 Sound Recording/Anti-Piracy Amendment to the 1909 Copyright Act, P.L. 92-140, 85 Stat. 391. But these isolated references in the proceedings of a single chamber with respect to a prior law are not determinative of a fair use or other exemption for home recording under the current Act. n13

n13 As will be shown below, these references did not establish a general home recording exemption (a) even under the 1971 Amendment for the limited class of works (sound recordings) affected by the Amendment, or for other works (such as musical compositions and motion pictures) not affected by the pertinent provisions of that Amendment; or (b) under the 1976 Copyright Act. Nor could they show the "intent" of the 1909 Copyright Act. See, e.g., *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 758 (1979) (intent of enacting Congress is controlling).

Consideration must initially be given to the nature of the 1971 Amendment. It was enacted as a temporary measure only, and was hurriedly passed in response to the immense growth of record piracy in order to provide a deterrent to a specific activity -- commercial record piracy -- while leaving time for full consideration of all pertinent issues during the course of omnibus copyright revision. See, e.g., H.R. Rep. No. 92-487, 92d Cong., 1st Sess. 2-3 (1971). The amendment was originally scheduled to terminate, and to be inapplicable to recordings made after January 1, 1975. It was extended at the very last minute, in December 1974, only when it appeared that omnibus revision would not be completed before the terminal date and that to allow expiration would leave record piracy rampant and our treaty obligations unfulfilled. Act of December 31, 1974, P.L. 93-573, 88 Stat. 1853. See H.R. Rep. No. 93-1581, 93d Cong., 2d Sess. 2-3 (1974). The Amendment did not purport to regulate all questions of sound recording protection, and its accompanying record can hardly be viewed as a considered treatment of anything but commercial piracy. See *Libby Rod & Gun Club v. Poteat*, 549 F. 2d 742 (9th Cir. 1979).

Additionally, the "intent" of the 1971 Amendment could not have accorded special treatment to the home recording of musical works n14 or motion pictures. Accord, M.B. Nimmer, *Nimmer on Copyrights* § 13.05[F] at 13-96 n.159 (1982). The Amendment was directed toward an entirely new form of limited n15 protection to be accorded sound recordings; it did not in any way purport to limit the protection already long established under the then-controlling 1909 Copyright Act, without any hint whatsoever of a "private," "home" or "non-commercial" reproduction exemption, for other works, such as musical compositions or motion pictures. The 1971 Congress could not determine the "intent" of the 1909 Congress or the meaning of its enactments. See, fn. 13, *supra*, and text at fn. 18, *infra*. And, of course, it could not define the "intent" of the 1976 Congress.

n14 The protection accorded to "sound recordings" must not be confused with that available to "musical works," although both may be embodied in the same disc or tape. Phonograph records and pre-recorded tapes commonly embody two entirely distinct copyrighted works, each having its own particular history in the development

of copyright legislation: (a) the recorded "musical work" representing the efforts of individual composers and lyricists and their publishers; and (b) the "sound recording," representing the efforts of performing artists and record companies (see 17 U.S.C. § 101). Until the 1971 Amendment, the copyright law did not provide a copyright in sound recordings, while musical compositions have been protected by copyright since 1831 without any "private use" or like restrictions on reproduction rights.

n15 The protection accorded to sound recordings under the 1971 Amendment was acknowledged to be "limited" and more restricted than that available to other copyrighted works. See, e.g., H.R. Rep. No. 92-487, 92d Cong., 1st Sess. 1-2 (1971); S. Rep. No. 92-72, 92d Cong., 1st Sess. 1-2 (1971); see generally, 1 M.B. Nimmer, *Nimmer on Copyrights* § 109.21 (1976 ed.).

Moreover, the few references to home recording in the history of the 1971 Sound Recording Amendment appear only in the course of House proceedings, after Senate passage of the bill embodying that Amendment, and in connection with the Senate bill. No similar considerations appear in the pertinent Senate proceedings. These isolated observations in the course of House consideration cannot be assumed to reflect any "intent" of the originating chamber or of Congress generally with respect to musical works or motion pictures (or even sound recordings). See fn. 18, *infra*.

In these contexts, the references relied upon by petitioners cannot be given significance. All of them, for example, were made in the course of comparing the activities of private duplicators with commercial "pirates" toward whom the bill was specifically directed, and of acknowledging only the difficulties of enforcement against the former; not in the context of full consideration of the degree, nature, impact, or treatment of home recording itself, nor of the scope of rights in works other than sound recordings. For example, in the full colloquy between the then-Assistant Register of Copyrights and Congressman Beister, quoted only in part in petitioners' brief, n16 the Assistant Register acknowledged only that the sound recording bill did not "point to" home recording and that "this legislation is not addressed to" the issue of home recording. Significantly, she noted that home recording then -- unlike now -- was not in a state of "crunch," but that it was coming. These carefully qualified remarks clearly did not confer an immutable, or any, fair use status or other privilege upon home recording. See 1976 House Report 66 and 1975 Senate Report 62 (fair use not "frozen" in time, "especially during a period of rapid technological change"). And the full exchange shows further that the Assistant Register was not even speaking in terms of fair use or exemption, but rather of detection and enforcement. n17

n16 Petitioners' brief at 35 n. 39. The portion of the colloquy represented by an ellipsis in petitioners' brief is:

"My own opinion, whether this is philosophical dogma or not, is that sooner or later there is going to be a crunch here. But that is not what this legislation is addressed to, and I do not see the crunch coming in the immediate future.

Other countries have felt it more directly than we, partly because record prices are lower here than, say, in Germany. In that situation there is a range of legal devices for trying to keep the practice under reasonable control."

Hearings on S.646 Before Subcommittee No. 3 of the House Judiciary Committee, 92d Cong., 1st Sess. 22 (1971).

n17 Several of petitioners' supporting amici, following the error of the District Court, rely on a subsequent portion of this colloquy, in which the Assistant Register used the phrase, "It is certainly not protectable under the Federal Statute." Brief of Amicus Curiae Pfizer, Inc. in Support of Petitioners, at 21; Brief of McCann Erickson, Inc. et al., Amici Curiae at 14. But these parties distort the meaning of that phrase. It referred only to the fact that at that time sound recordings (unlike motion pictures, and musical works) were not protected by the Copyright Act; it did not suggest that home recording of protected works was a privileged activity. See also, Nimmer, "The Legal Status of Home Recording of Copyrighted Works," Appendix 7 to the Statement of the Recording Industry Association of America, Inc., to be reprinted in Hearings on S. 1758 before the Senate Committee on the Judiciary, 97th Cong., 2d Sess. (April 21, 1982).

The single passage of the 1971 House Report relied on at page 36 of petitioners' brief does make some reference to recorded musical works. H.R. Rep. No. 92-487, 92d Cong., 1st Sess. 7 (1971). But no similar reference appears in the Senate's report. n18 Moreover, the amendment simply did not deal with scope of rights in musical works; hence this reference could, at most, have been the 1971 House Committee's unstudied reflection on the rights accorded to music under the 1909 Copyright Act. It could not have been probative of the meaning or "intent" of the 1909 statute. n19 E.g., *Rainwater v. U.S.*, 356 U.S. 590, 593 (1958). See also, fn. 13, *supra*. Additionally, the 1971 Report referred to "unrestrained" home recording, a categorization probably best attributable to a lack of enforcement (under the circumstances and considering off-air technology of the preceding decades), and not even to an assumed exemption from copyright.

n18 "The basic principle is that the content of the law must depend upon the intent of both Houses, not of just one; no one can ever know whether the Senate Committee or the Senate would have concurred in the restrictions written into the House Report." K.C. Davis, *Administrative Law Treatise* § 5:3 at 313 (1978); see also, e.g., *Department of Air Force v. Rose*, 425 U.S. 352, 366 (1976); *Hawkes v. IRS*, 467 F.2d 787, 797 (6th Cir. 1972).

n19 Like considerations apply to the related colloquy relied on at 37 (fn. 42) of petitioners' brief.

But, most fundamentally, from its inception the 1971 Amendment was designed to be, and was, supplanted by the more thorough and comprehensive revision efforts that culminated in the Copyright Act of 1976. As discussed above, the legislative history of the 1976 Act does not accord privileged status to home recording. Petitioners' attempt to read portions of the legislative history of the 1971 Sound Recording Amendment into the 1976 Copyright Act lacks any support. Although portions of the House Report on the 1971 Amendment were repeated in the Senate and House Reports on the 1976 Act, the earlier report's single reference to home recording is pointedly omitted from the 1976 Act reports; in its stead, the 1976 reports (a) declare that "infringement" does result from "recapturing [sounds] off the air" (1976 House Report 106); (b) state that "off-the-air recording for convenience"

would not be considered fair use (1975 Senate Report 66); and (c) together with sections of the Act, demonstrate Congress' concern with the use of recording devices and its imposition of limits on their non-infringing uses (see pp. 4-6, supra). As Professor Nimmer has noted:

"[T]he failure to repeat in the Committee Reports for the current Act an intention to recognize the home recording exemption referred to in the House Report for the 1971 Amendment is at least as consistent with an altered intention upon the part of the Congress enacting the Act of 1976 [as it is with an unchanged intent]. This is particularly true in view of the fact that other passages from the House Report for the 1971 Amendment were incorporated verbatim in the House Report for the current Act."

M.B. Nimmer, *Nimmer on Copyrights* § 13.05[F] at 13-96 (1982) (emphasis added). In light of factors (a), (b), and (c) above, the conclusion of altered intent is more compelling.

Petitioners' authority (petitioners' brief at 37-38) for the "reading in" of the prior references is strained. It consists of, first, a letter written in 1971 referring to the merger of the amendment into the general revision, but which referred to no works other than sound recordings and -- of course -- could not determine the intent of Congress five years later; and, second, the Register of Copyrights' failure to discuss home recording before Congress in 1975. But the Register's silence cannot establish Congressional intent, any more than could the silence of Congress itself. See e.g., *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4 (1942). And, as indicated above, Congress was not silent.

C. Conclusion as to Legislative History

Amicus herein believes that a review of the administrative and legislative record conclusively shows that home recording is not fair use or otherwise exempt from infringement. At the very least, however, it is clear that legislative history does not cloak home recording with a particular claim to fair use or privilege. See 1976 House Report 66 ("taping" does not have "any special status" under the fair use provisions). As will be shown in Point II, it is equally clear that home recording does not fit within the contours of the fair use doctrine.

II. HOME RECORDING IS NOT FAIR USE

Although it is true that fair use cannot be precisely defined with respect to all of its potential applications, it does have a central, characteristic feature: "fair use is essentially supplementary by nature..." 1975 Senate Report 65. The examples of fair use given in section 107 of the Copyright Act share this feature. The same is true of other examples of fair use that may be given. See, e.g., 1961 Register's Report 24; 1976 House Report 65. These examples are not exclusive, but there is no support -- judicial, administrative, or legislative -- for the notion that fair use should be applied to circumstances lacking this essential feature. Yet that is what petitioners seek in this case, and it must be rejected.

There is nothing "supplemental" about home recording. It consists of unauthorized reproduction of entire, copyrighted works for the purpose of individual entertainment -- precisely the function for which they are created and disseminated. It is hardly surprising, therefore, that home recording fails, as found by the court below, to meet even a single criterion of the fair use doctrine.

Apart from expanding the application of fair use beyond its proper bounds, petitioners seek to give that doctrine offices that it does not have. Fair use is not designed to grant legislative authority to courts. Thus, petitioners' arguments that it be used to accommodate alleged conflict between the copyright and communications laws must be rejected. n20 If such an accommodation is appropriate, that is a job for Congress. See *Teleprompter Corp. v. CBS*, 415 U.S. 394, 414 (1974); *Fortnightly Corp. v. United Artists Television, Inc.* 392 U.S. 390, 401 (1968). And fair use cannot serve to cloak infringing activity with legitimacy simply because it occurs in private and may therefore be difficult to control or detect. If private activity were to be so authorized it would substantially defeat the purposes and value of the copyright system to amicus, to respondents, and to the public. This is because unauthorized private duplication of copyrighted works is increasingly a characteristic impact of technological progress. See Remarks of David Ladd, Register of Copyrights, to the Internationale Gesellschaft fur Urheberrecht in Toronto, Canada (September 23, 1981). The Court of Appeals properly recognized that "privacy" may be pertinent to the form of relief, but that it is not relevant to the question of liability.

n20 Amicus does not concede any conflict between the copyright and communications laws or any such need for accommodation here. The emphasis of petitioners and their supporting amici on the "public airwaves" ignores one simple fact: without the creative efforts of copyright owners the public airwaves would be simply a void in space.

CONCLUSION

For the foregoing reasons, the Ninth Circuit Court of Appeals correctly decided that home recording is not privileged by legislative history, exemption, or fair use.

Respectfully submitted,

Jon A. Baumgarten, (Counsel of Record), SUSAN BANES HARRIS, CRAIG R. MICHEL, PASKUS, GORDON & HYMAN, 2005 Massachusetts Avenue, N.W., Washington, D.C. 20036, (202) 638-1930, Attorneys for Amicus Curiae National Music Publishers' Association, Inc.

Dated: October 27, 1982, Washington, D.C.