

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

No. 81-1687

*1981 U.S. Briefs 1687*

October Term, 1981

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

BRIEF OF AMICUS CURIAE PFIZER INC. IN SUPPORT OF PETITIONERS

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Interest of the Amicus Curiae

This action, the "Betamax Case," has become the most famous copyright case in history. It is also one of the most important. In holding non-commercial home recording of television programs to be a violation of the copyright laws, the court below has produced consequences that threaten to intrude into the privacy of millions of homes, to halt technological progress, and to injure a large segment of the national economy.

The interest of amicus curiae Pfizer Inc. arises out of its production and sale of magnetic particles used in the manufacture of electronic recording tapes, including videotapes. Because of its technological expertise in the rapidly growing electronic recording industry, Pfizer has found this business segment sufficiently attractive to justify the investment, over the past four years, of more than \$ 80 million in construction of new and expanded research and production facilities in Easton, Pennsylvania, Valparaiso, Indiana, and East St. Louis, Illinois. At a time when the national average unemployment rate exceeds 9%, these facilities employ more than 350 workers in locations suffering even greater recession. Unemployment exceeds 11% in Easton, 14% in Valparaiso, and in East St. Louis, Pfizer is the last major employer still in business.

What television viewers use videotapes made with Pfizer's components for -- time-shifting, archiving, home movies, pre-trial testimony, educational instruction -- is something over which Pfizer has no control and makes no recommendation. What does concern Pfizer, however, is the very real possibility that the dispute at bar, involving a small number of parties, representing narrow industry segments, and involving no actual injury, may produce economic disruptions extending to Pfizer and to thousands of workers throughout the nation and the world.

Pfizer's interest, therefore, is that of protecting its investment by urging this Court to apply the Copyright Act, 17 U.S.C., with the flexibility intended by Congress, in order to promote the goals intended by the Constitution, while taking account of the economic disruptions already caused by widespread recession. This will require reversing the

arbitrary and unbending approach adopted by the court below.

Amicus curiae Pfizer Inc. ("Pfizer") submits this brief in support of Petitioners Sony Corporation of America, et al., and pursuant to the joint consent to the submission of briefs of amici curiae, previously filed with this Court by all parties. Pfizer adopts the arguments presented by Petitioners and by other amici curiae supporting Petitioners, and respectfully urges that this Court reverse the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered on October 19, 1981, *Universal City Studios, Inc., et al. v. Sony Corporation of America, et al.*, 659 F. 2d 963 (9th Cir. 1981), and reinstate the opinion and judgment of the District Court, 480 F. Supp. 429 (C.D. Cal. 1979).

### Statement of the Case

This case involves the non-commercial home recording of copyrighted television programming by the use of videotape recorders ("VTRs") manufactured, sold, and advertised by Petitioners. This rapidly growing field has won wide acceptance by the viewing public because it allows through its principal use, time-shifting, a greater freedom and flexibility in gaining access to information and entertainment.

Respondents, producers of copyrighted television programs, allege that all off-the-air recording of their programs constitutes a violation of their copyrights, for which they are entitled to relief. Although Respondents' evidence at trial showed no actual injury, they have urged, nonetheless, that they are entitled to an injunction that would prohibit all arguably infringing home recording (and, inescapably, noninfringing recording as well), or to statutory damages or an accounting of Petitioners' profits. All or any of these remedies would likely put Petitioners out of business, and would severely affect Pfizer and numerous other related and dependent businesses.

Because the individual viewers who are actually involved in recording copyrighted television programs (or in the many other, clearly noninfringing, uses of VTR equipment) are not readily identifiable or susceptible to suit without enormous expense and massive invasions of privacy, Respondents sued the more compact target of the manufacturers, sellers and advertisers of VTR equipment, charging them with contributory infringement.

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\* A similar action against most of the other videotape and VTR equipment manufacturers and advertisers is now pending in the District Court. *Universal City Studios, Inc. v. RCA Corporation, et al.*, 81 Civ. 5723 (C.D. Cal., filed November 6, 1981), and a second, similar action against Petitioners herein has been commenced by Respondents. *Universal City Studios, Inc. v. Sony Corporation of America, et al.*, 82 Civ. 3271 (C.D. Cal., filed June 28, 1982).

Respondents argue that in spite of the fact that they have prospered since the advent of the VTR era, home video recording does inflict at least a theoretical injury -- that time-shifting, recording a program for viewing at a later time, would preempt the viewing of a later program; that archiving will result in smaller audiences for broadcast reruns, which will in turn reduce advertising revenues, and thus lower the prices Respondents can command for copyrighted programming; and that archiving will also result in smaller audiences for later theater revivals of recorded broadcast films.

The District court made extensive and detailed findings of fact, concluding, as to the first argument, that because most home recording is for time-shift purposes, it actually

benefits respondents; that the second argument is flatly contradicted by Respondents' trial evidence; and that the third is entirely speculative. Because of the lack of proof of any injury to Respondents, the impossibility of equitable enforcement as against those who are actually recording off the air, and the drastic economic and social consequences of squelching an entire industry, the District Court found non-commercial home recording to be a fair use of the recorded programs. *Universal City Studios, Inc., et al. v. Sony Corporation of America, et al.*, 480 F. Supp. 429 (C.D. Cal. 1979).

The Court of Appeals for the Ninth Circuit reversed, 659 F.2d 963 (9th Cir. 1981), giving no weight to Respondents' lack of injury, or to the drastic social and economic consequences of its holding, or to Congress's intent to provide a broad and flexible fair use exemption, or to the policy of the Copyright Clause of the Constitution, Art. I, sec. 8, cl. 8, "to promote the Progress of Science and the useful Arts." Instead, the court completely ignored the trial court's detailed findings of fact and insisted on a literal application of an arbitrary rule of law not contained in the Copyright Act, with inequitable and potentially disastrous consequences.

### Summary of Argument

Although numerous grounds for reversing the Court of Appeals's decision are presented in the briefs of Petitioners and of other amici curiae, this brief will focus on the application of the fair use exemption to non-commercial home recording.

Point I below will show that the non-commercial home recording at issue here is the kind of use that the courts have traditionally held to be a fair use because of the lack of harm resulting to copyright owners and because of the overall policies of the Constitution relating to the grant of copyrights and to the free flow of information.

Point II will show that application of each and all of the four tests for fair use contained in Section 107 of the Copyright Act of 1976, 17 U.S.C. § 107, also compels the conclusion that non-commercial home recording should be held to be a fair use.

Point III will show that the legislative history of the Copyright Act of 1976, and particularly of Section 107, demonstrates that Congress specifically considered the issue of home recording of both audio and video materials and specifically intended to exempt such recording from the reach of the copyright laws.

Finally, Point IV will show that the detailed findings of fact made by the trial court, and upon which it based its conclusion that non-commercial home recording is a fair use, should be held to control in the light of the Court of Appeals's failure to credit them properly and its erroneous application instead of an incorrect rule of law.

### ARGUMENT

1. Case law principles and the constitutional policy of promoting science and the useful arts compel the conclusion that non-commercial home recording is a fair use.

Article 1, section 8, clause 8, of the Constitution empowers the Congress "To promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their writings and Discoveries..."

The very sentence structure of the Constitution shows that its focus is on the "progress of science and the useful arts," and not on the reward to authors or inventors or the value or strength of a copyright. A copyright is only a means to an end, and the public weal is given precedence over the prosperity of authors.

This brief is not the proper forum for a treatise on the continuing role of the idea of

progress in the legal, social and economic history of the United States; suffice it to note that progress is the key word in the Constitutional provision quoted above. The First Amendment offers additional means of furthering progress and the common weal, by encouraging the widest possible dissemination of information and ideas to the public.

These preliminary observations are of critical importance in resolving the issues presented here because this case involves at least two aspects of the progress of science and the useful arts -- Respondents' copyrighted television programs *and* Petitioners' VTR technology. The result in this case will affect not only the home recording at issue, but all of the other, clearly non-infringing uses for VTR technology that may be impaired if the decision below is allowed to stand. Neither form of progress should be unduly restricted; nor is it likely that either will be if non-commercial home recording is left unimpeded. After all, the evidence shows that home recording for time-shift purposes aids in promoting the widest possible dissemination of copyrighted programs, and it thereby promotes not only both aspects of progress at issue, but also both of the principal Constitutional policies involved.

A copyright can be a two-edged sword, promoting some forms of progress while suppressing others. While protecting the work to which it attaches, it can also restrict the expression and flow of information, ideas, and opinions. The degree to which exclusivity of a copyright is enforced must therefore be carefully balanced. Monopolies were no more favored at the time the Constitution was drafted than they are today. The Copyright Clause permits Congress to act in spite of that disfavor, where such an incentive is found necessary to further the goals of progress contained in Article I of the Constitution; but the grant of a monopoly must be subject to those goals, and should not be permitted to impinge on other, equally important policies.

Hence, the exclusive rights granted by Section 1 of the Copyright Act of 1909, 17 U.S.C. § 1 (1909), and by Section 106 of the Copyright Revision Act of 1976, 17 U.S.C. § 106 (1976), have been construed by the courts to be subject to certain restrictions in the interests of fairness or of policy. One result has been the doctrine of fair use, described by the court in *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967), as:

"a privilege in others than the owners of a copyright to use the copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner." [ 366 F.2d at 306.]

More specifically, the fair use doctrine was developed by the courts as a sort of rule of reason to act as a safety valve for this purpose. In *Meeropol v. Nizer*, 560 F.2d 1061 (2d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978), the court described fair use as:

"a means of balancing the exclusive right of a copyright holder with the public's interest in the dissemination of information affecting areas of unusual concern, such as art, science, history or industry." [ 560 F.2d at 1068.]

Similarly in *Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by equally divided Court*, 420 U.S. 376 (1975), the Court of Claims reiterated the view of the House Committee that drafted the 1909 Copyright Act, that:

"copyright was '[n]ot primarily for the benefit of the author, but primarily for the benefit of the public.' H.R. Rep. No. 2222, 60th Cong., 2d Sess., p. 7. The Supreme Court has stated that 'The copyright law, like the patent statutes, makes reward to the owner a secondary consideration.' *Mazer v. Stein*, 347 U.S. 201..." [ 487 F.2d at 1352.]

In practice, this subordination means that copyright holders may not be able to achieve the maximum financial benefit from their monopoly, a circumstance recognized and accepted in *Meeropol v. Nizer*, *supra*. At the trial level, 417 F.Supp. 1201 (S.D.N.Y.

1976), the court said:

"there are occasionally situations in which the copy right holder's interest in a maximum financial return must occasionally be subordinated to the greater public interest in the development of art, science, and industry." [ 417 F.Supp. at 1206.]

Virtually identical language was used in *Rosemont Enterprises, Inc. v. Random House, Inc.*, *supra*, 366 F.2d at 307, quoting *Berlin v. E.C. Publications Inc.*, 329 F.2d 541, 544 (2d Cir.), *cert. denied*, 379 US 822 (1964), to illustrate the point that the mere fact that a copyright owner might be deprived of the maximum financial return is not sufficient to overcome a finding of fair use where larger policies are at stake.

Thus, in *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151 (1975), this Court explained:

"The limited scope of the copyright holder's statutory monopoly, like the limited copyright duration required by the Constitution, reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts." [ 422 U.S. at 156; footnotes omitted.]

Most fair use cases involve a so-called "productive" use, "the use by a second author of a first author's work," as in a quotation for purposes of criticism, comment, scholarship, or the like. *See*, 17 U.S.C. § 107; Pet. App. 14-15, and authorities there cited. Numerous exceptions have extended fair use to include "intrinsic" uses such as that approved in *Williams & Wilkins Co. v. United States*, *supra*, or the less dramatic, but none the less "intrinsic" (and commercial) uses approved in *Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc.*, 626 F.2d 1711 (5th Cir. 1980); *New York Times Co. v. Roxbury Data Interface, Inc.*, 434 F.Supp. 217 (D.N.J. 1977); and *Time, Inc. v. Bernard Geis Associates*, 293 F.Supp. 130 (S.D.N.Y. 1968).

The rationale for the cases cited in the preceding paragraph becomes apparent when they are contrasted with such cases producing opposite results as *Meeropol v. Nizer*, *supra*; *Wainwright Securities, Inc. v. Wall Street Transcript Corp.*, 558 F.2d 91 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978); *Eisenschiml v. Fawcett Publications, Inc.*, 246 F.2d 598 (7th Cir.), *cert. denied*, 355 U.S. 907 (1957); *Iowa State University Research Foundation, Inc. v. American Broadcasting Companies, Inc.*, 621 F.2d 57 (2d Cir. 1980); and *Marvin Worth Productions v. Superior Films Corp.*, 319 F.Supp. 1269 (S.D.N.Y. 1970). The distinction is that in the former cases a public policy goal was promoted by the copying, whether or not the use was "productive" or "intrinsic," whether or not the copier's motivation was commercial, and whether or not the copyright owner suffered economic injury. These policy goals include the progress of medical science (*Williams & Wilkins*); increased understanding of significant historical events (*Bernard Geis*); greater access to information archives (*Roxbury Data Interface*); and enhanced competition (*Triangle Publications*).

On the other hand, the cases refusing to declare the use at issue fair all involve a commercial exploitation by which the copier seeks to substitute the copy for the original, thereby diverting an economic return on copyrighted material from the copyright owner to himself, and in the process adding no net gain in progress, dissemination, or access to the public.

Applying the rule thus derived to non-commercial home video recording, it is clear that the result is to promote dissemination of VTR technology, to promote dissemination of Respondents' programs in the very manner they intended, to take away no economic advantage from Respondents, to obtain no economic advantage for the VTR user, and, when tapes are erased after viewing, to minimize or eliminate entirely whatever residuum of purely theoretical harm may result from the fact of copying at all.

The ephemeral nature of broadcast programming gives rise to some awkwardness in applying guidelines, especially the sort set forth in Section 107 of the Copyright Act, 17 U.S.C. § 107. This awkwardness results from the fact that the statute is a codification of case law, which in turn deals most frequently (and most effectively) with the most traditional medium -- print. With varying degrees of wrenching or stretching, the statutory and common law fair use tests can be applied to works in other media, but the process is most strained when the subject is a work that is apprehended visually -- instantaneously and as a whole -- such as a statue or a painting, rather than linearly or in parts, such as a printed text. Thus, a short quotation for fair use in a review might involve a paragraph from a book; but how does one make similarly limited use of a statue or painting? Does a short quote consist of a bronze arm or a square inch of canvas, or is it an entire statue or painting, but seen only for a moment, or in miniature, or in monochrome?

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\* This analysis, calling for differing standards for determining fair use depending on the medium in which a copyrighted work is produced, is undertaken more fully in S. Timberg, "A Modernized Fair Use Code for the Electronic As Well As the Gutenberg Age", 75 NW. U.L. REV. 193, 203-16 (1980).

Visually apprehended materials, including television broadcasts, must be treated differently from books because they are received and apprehended differently by their audience. Forbidding the non-commercial home recording of a television broadcast so that the viewer or his family can see it later or see it again is most analogous to forbidding the purchaser of a book to reread it or to allow others in his family to read it. Home recording would be analogous to infringing activities like copying or republishing a book only if it involved rerecording, or selling or leasing the copy, or showing it or rebroadcasting it commercially. But the home television recorder's activity in this case is, by definition, private and non-commercial and is thus more analogous to rereading a page or a chapter of a book, or merely putting off reading the book until sometime after purchasing it, none of which has ever been regarded as a copyright infringement. To regard time-shift recording followed by erasure as an infringement is analogous to requiring that a book be read immediately upon purchase or not at all. Yet because most home VTR copies are erased within a short time, even this unwarrantedly narrow view of copyright is honored.

At the same time, the fact of such erasure enhances the distinctions between print and more ephemeral media. This further demonstration of the inappropriateness of traditional, print-oriented analysis is caused by addition of a time factor that actually reduces the danger that home use may not be fair by assuring -- as the evidence in the record shows -- that the risk of commercialization is eliminated by erasure. Such a will-o-the-wisp is the recording soon erased, and so limited is its function, that it should no more be regarded as a "copy" than the amplification by a CATV station or the reception by a restaurateur's radio should be regarded as performances, *See Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968), and *Twentieth Century Music Corp. v. Aiken*, *supra*, respectively.

The public benefit to be derived from the progress of science and the useful arts as represented by Petitioners' VTR technology is threatened by the Court of Appeals's decision, whereas the aspect of such progress represented by Respondents' copyrighted television programming is neither threatened nor impaired by non-commercial home video recording. One form of such Constitutionally favored progress ought not to be sacrificed to another by imposition of a destructive and entirely unnecessary remedy when both can -- and do -- flourish. See *Time, Inc. v. Bernard Geis Associates*, *supra*.

An established industry that answers the needs and desires of the public and of the

Constitution, as exercised in the privacy of individual homes, without the least demonstrated harm to copyright owners, cannot be taxed without gross inequity, cannot be policed without drastic invasions of privacy, and cannot be prohibited without massive and unnecessary economic disruptions.

For these reasons the opinion and judgment of the Court of Appeals should be reversed and the judgment of the District Court should be reinstated.

II. Application of the four factors in Section 107 compels the conclusion that non-commercial home recording is a fair use.

Section 107 of the Copyright Act, *17 U.S.C. § 107*, provides that:

"In determining whether the use made of a work in any particular case is a fair use, the factors to be considered shall include:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work."

The statutory direction is clear. All of the enumerated factors must be considered, and others may be considered in addition. The statute does not say that any one factor is or may be conclusive, nor does it suggest what relative weights they are to be given. This openness is consistent with the equitable nature of the inquiry, the variety and unpredictability of factual situations, and the flexibility determined by Congress to be appropriate in resolving fair use issues. *See*, Point III below.

Application of each and all of the factors quoted above requires a reversal of the judgment of the Court of Appeals, as well as a disapproval of its reliance on a single factor (the first), and an erroneous view of it at that.

1. *The purpose and character of the use (17 U.S.C. § 107(1))*. Non-commercial home recording is in no way designed to harm Respondents or to profit at their expense or to do anything other than to receive and view, perhaps later, perhaps more than once, programs broadcast freely and without restriction for precisely such reception and viewing.

Home recording is not undertaken with any commercial motive and especially not with any intent to compete with Respondents. *Compare, Iowa State University Research Foundation v. American Broadcasting Companies, Inc.; Wainwright Securities Inc. v. Wall Street Transcript Corp.*, both *supra*. A commercially motivated purpose to *compete* with Respondents by substituting the home-recorded copy for the original would involve the kind of "intrinsic" use the Court of Appeals might properly have been concerned with in this case *See* Pet. App. at 18-19), even though at least one other court has refused to take such a doctrinaire approach. *Williams & Wilkins Co. v. United States, supra*.

But in considering and determining to exempt home recording, Congress refused to adopt so simplified a notion of "intrinsic" use. Indeed, *Williams & Wilkins* was decided before the 1976 Copyright Act was passed, and was thus included as a part of the case law Congress intended Section 107 to codify. Moreover, the four factors listed in Section 107 are taken directly from the *Williams & Wilkins* opinion, *supra*, 487 F. 2d at 1352. *See also*, Point III below. In fact, the kind of economic inquiry that leads to a proper condemnation of commercially competitive intrinsic use is utterly inapposite to the peculiar posture of the parties in this case, where the intention of Respondents is to

broadcast their copyrighted work as widely as possible to the public for free and unrestricted reception, while the Petitioners are not even involved in the actual home recording at issue.

Numerous courts have considered a second class of cases involving a commercially motivated use not done in order to compete directly with the copyright owner. *E.g.*, *Triangle Publications, Inc. v. Knight Ridder Newspapers, Inc.*; *New York Times Co. v. Roxbury Data Interface, Inc.*; *Time, Inc. v. Bernard Geis Associates*, all *supra*. In all of these cases, in spite of a commercial motive, the courts determined that the use involved was fair. Where, as in the instant case, the use is not only not in competition with Respondents, but cannot in any manner be characterized as commercial, then *a fortiori* it should be a fair use, whether or not "intrinsic."

In addition to the intent and economic effect of the use, its physical and temporal nature -- an electronic recording soon erased -- is so ephemeral and insubstantial as barely to rise to the level of a "copy" at all. *See* Point I above.

2. *The nature of the copyrighted work (17 U.S.C. § 107(2))*. The nature of the Respondents' copyrighted programs is one which has been produced for sale at a profit, which has been sold, and on which any profit that can be made will be made utterly independently of the viewers' acts -- whether or not the program is recorded or seen at all. Thus any case involving commercial or competitive copying cannot be relevant here because the harm in such a case arises from a diversion of revenues from the copyright owner to the copier. *See, e.g.*, *Meeropol v. Nizer*; *Wainwright Securities Inc. v. Wall Street Transcript Corp.*, both *supra*.

Respondents' programs are freely broadcast for reception by anyone possessing a television set, without limitation and without charge. \* The benefit to Respondents is greater with a larger audience, and to the extent that time-shifting produces a larger audience for their programs (and for accompanying commercials), Respondents *benefit* from home recording. Because the record in this case shows that by any measure the vast majority of home recording is done for time shifting, any suggestion of harm is nullified.

\* Of course, the public does pay for programming indirectly through higher prices for goods advertised on the commercial television stations that purchase Respondents' programs.

Finally, the copyrighted works at issue here are ones designed to be broadcast into individual homes and received and viewed there in private. Unless some feature of that reception and viewing, whether or not immediately upon reception, and whether or not more than once, can be shown to cause some harm to Respondents the inquiry should stop at the door of the viewer's home. The property rights of Respondents are not the only values at issue, and because no compelling need or loss of Respondents has been shown, no grounds exist for disrupting activities done in the privacy of individual homes to enforce an unnecessary regulation.

3. *The amount and substantiality of the portion used in relation to the copyrighted work as a whole (17 U.S.C. § 107(3))*. In this case, of course, it is virtually entire. But as Judge Wyatt made clear in *Time, Inc. v. Bernard Geis Associates*, *supra*, 293 F.Supp. at 144, in discussing the substantial use found not to be a fair use in *Folsom v. Marsh*, 9 Fed. Cas. 343, No. 4901 (C.C. Mass. 1841), the mere fact that the proportion of the whole used was substantial is not the controlling factor; rather, "the test of fair use was primarily the degree of injury to the plaintiff." Home recording of the entirety of a program, including commercials, \* actually ensures that Respondents' intent is carried out through free and unrestricted home reception by the widest possible audience. In any event, as the Court of Claims stated in *Williams & Wilkins Co. v. United States*, *supra*,

487 F.2d at 1353: "There is, in short, no inflexible rule excluding an entire copyrighted work from the area of 'fair use.'"

\* Home recording has no effect on the reception of commercials. To edit out commercials the viewer must watch and record the program at the time it is broadcast and must pay particular attention to commercials in order to activate the VTR on-off switch, an attention not required by ordinary viewing. Such erasure of commercials is not possible during automatic time-shift recording.

4. *The effect of the use on the potential market for or value of the copyrighted work, 17 U.S.C. § 107(4)*. This is the factor that the courts have consistently held to be the most important. *E.g., Triangle Publications, Inc. v. Knight Ridder Newspapers, Inc., supra, 626 F.2d at 1175; New York Times Co. v. Roxbury Data Interface, Inc., supra, 434 F.Supp. at 223.*

In this case the effect on the market for or value of Respondents' copyrighted works is zero. This is shown by logic, by Respondents' trial evidence and admissions, and by the continued uncomplaining payment by advertisers for commercial television time, without adjustment for the supposed effects of home videotape libraries or of any other aspect of home recording. Indeed, because the time-shift use of video recording actually increases the viewing audience, and far outweighs other allegedly infringing uses, the VTR provides a net benefit to Respondents, and another reason for characterizing such recording as a fair use. *See, Time, Inc. v. Bernard Geis Associates, supra, 293 F.Supp. at 146.*

Application of the statutory tests for fair use in the manner outlined above may require some flexibility; but that is precisely what Section 107 prescribes and is entirely consistent with the House Committee's caution that it had "no disposition to freeze the doctrine [of fair use] in the statute, especially during a period of rapid technological change." H.R.Rep. No. 94-1476, 94th Cong., 2d Sess., at 66 (1976). On the contrary, this case provides an extraordinarily apt vehicle for employing the fair use provision in precisely the manner and spirit envisioned by the Congress, required by the Constitution, and compelled by the realities of technological advance.

III. The legislative history of the Copyright Revision Act shows that Congress intended non-commercial home recording of both audio and video materials to be fair use.

The Ninth Circuit's refusal to consider and to give effect to the legislative history of the Copyright Revision Act was error. *Train v. Colorado Public Research Group, 426 U.S. 1 (1976)*.

Indeed, the Court of Appeals's reason for refusing to consider the legislative history -- that it is not necessary to do so when the meaning of the statute is clear [Pet. App. 11-12] -- is erroneous on two counts. First, even when a statute appears to be clear, the inquiry will aid in confirming that conclusion. More importantly in this case, however, the Court of Appeals missed the point that the fair use provision, Section 107, was intentionally left open and ambiguous in order to allow the courts to adapt the reach of the exemption in the light of anticipated technological change -- in short, to do exactly what the District Court did. Thus, the final House report on the 1976 Act stated:

"[T]he endless variety of situations and combinations of circumstances that can rise in particular cases precludes the formulation of exact rules in the statute... [T]here is no disposition to freeze the doctrine [of fair use] in the statute, especially during a period of rapid technological change... [T]he court must be free to adopt the doctrine to particular situations on a case-by-case basis." [H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. at 66;

Pet. App. 67.]

Had the Court of Appeals undertaken an unbiased inquiry into the legislative history it would have reached the conclusion of the trial court, that Congress considered the issue of non-commercial home recording of audio *and* video materials and determined that both should be regarded as fair use because such copying is not commercial, not injurious, and not controllable.

The trial court's examination of the legislative history is reproduced at Pet. App. 58-65, and will be discussed below only insofar as required to refute the Court of Appeals's contentions that such an inquiry is not necessary and that the references to home recording at the time of the 1971 amendment are "entirely beside the point." Pet. App. at 11. To the contrary, this Court has recognized that so long as "the essence of the legislation remain[s] constant," legislative proceedings spanning a lengthy period of time are "relevant to a full understanding of the final legislative product." *Dawson Chemical Co. v. Rohm & Haas Co.*, 448 U.S. 176, 204 (1980).

The Copyright Revision Act of 1976 was the culmination of a lengthy process dating back as far as 1955, when Congress commissioned a study of copyright issues. That study, done by Alan Latman, noted that although the question had not previously been dealt with the Congress or the courts, the prevailing view among commentators appeared to be that "anyone may copy copyrighted materials for the purposes of private study or review," and that "private use is completely outside the scope and intent of restriction by copyright." A. Latman, "Fair Use of Copyrighted Works", Senate Judiciary Comm. Study No. 14, 86th Congress, 2d Sess., at pp. 11-12.

In 1961, the Report to Congress of the Register of Copyrights predicted that:

"New technical devices will probably make it practical in the future to reproduce television motion pictures in the home. We do not believe the private use of such a reproduction can or should be precluded by copyright." [Register of Copyrights, Report on the General Revision of the U.S. Copyright Law 5, 86th Cong., 1st Sess. (Comm. Print 1961).]

As the drafting process was extended by the political process, Congress was still not yet ready to enact a full revision in 1971, when it became apparent that an interim legislative remedy for record piracy was necessary. This 1971 amendment, The Sound Recording Act of 1971, P.L. 92-140, 85 Stat. 391 (1971), was intended as a part of the then pending overall copyright revision, and it was anticipated that it would be reincorporated into the final general revision when that was eventually enacted. S. Rep. No. 72, 92nd Cong., 1st Sess. at 7-8 (1971). This indeed proved to be the case.

The Congress's closer focus on the recording industry at the time of the 1971 amendment called for inquiry into the particular application of certain principles previously considered only in general terms, including issues of home recording and fair use. It was in this context that the now famous colloquy occurred between Rep. Beister and Barbara Ringer, then Assistant Register of Copyrights, in which the latter went on to refer to the impossibility of controlling *video* recording or "going into anyone's home and preventing this sort of thing, or forcing legislation that would engineer a piece of equipment not to allow home taping." The colloquy then continued:

"MR. BEISTER: Secondly with respect to video cassettes, are we approaching an additional problem, *not with respect to private use*, but with respect to public distribution after it has been retrieved over a home set?

"MISS RINGER: The answer is very definitely, "yes." For years the motion picture industry has been faced with bootlegging problems... [that are] going to undergo a quantum increase when video cassette recorders are freely available. But I could say there

is a big difference, and I think it is something you might consider. In that area [bootlegging], they have got copyright protection, and in *this area [private home recording], who knows? It is certainly not protectable under the Federal statute.* " [Hearings on S. 646 and H.R. 6927 Before Subcommittee No. 3 of the House Judiciary Committee, 92nd Cong., 1st Sess. at 22-23 (1971), Pet. App. at 62, 63; emphasis added.]

The now equally famous colloquy between Reps. Kazen and Kastenmeier, in which home recording was specifically stated to be exempted by fair use, also occurred in this context, including Rep. Kazen's specific reference to television:

"MR. KAZEN: In other words, if your child were to record off a program which comes through the air on the radio *or television*, and then used it for her own personal pleasure, for listening pleasure, this would not be included under the penalties of this bill?

"MR. KASTENMEIER: This is not included in this bill... On page 7 of the report, under 'Home Recordings,' Members will note that under the bill the same practice which prevails today is called for; namely, *this is considered both presently and under the proposed law to be fair use.* The child does not do this for commercial purposes. This is made clear in the report." [117 Cong. Rec. 34748-49 (October 4, 1971); Pet. App. 64; emphasis added.]

The report referred to by Rep. Kastenmeier, H.R. Rep. No. 487, 92nd Cong., 1st Sess. (1971), stated:

#### "Home Recording

"In approving the creation of a limited copyright in sound recordings it is the intention of the Committee that this limited copyright not grant any broader rights than are accorded to other copyright proprietors under the existing Title 17. Specifically, it is not the intention of the Committee to restrain the home recording, from broadcasts or from tapes or records, of recorded performances, where the home recording is for private use and with no purpose of reproducing or otherwise capitalizing commercially on it. This practice is common and unrestrained today, and the record producers and performers would be in no different position from that of the owners of copyright in recorded musical compositions over the past 20 years." [*Id.*, at 7; Pet. App. 60-61.]

The views of Rep. Kastenmeier and Miss Ringer are, of course, entitled to great weight in the light of their respective positions as committee chairman, floor manager, and legislative sponsor, and as administrative expert witness for both the 1971 amendment and the 1976 Copyright Revision Act. *See, Simpson v. United States*, 435 U.S. 6, 13 (1978); and cases cited at Pet. App. 62n.

From the foregoing and from the analysis undertaken by the District Court (Pet. App. 58-65), it is clear that the legislative history, if consulted, establishes at least the following points:

1. The effort to revise the copyright laws was a single legislative process of which the 1971 record piracy amendment was an integral part, specifically seen as such both before and after its enactment. By the force of circumstance, that amendment was considered and enacted out of sequence, but it was intended to be, and was thereafter, reintegrated into the final whole. Hence, the 1971 legislative history cannot be considered in isolation, but is rather to be seen as closing the entirety of the process, including the development of Section 107. It is by no means "beside the point."

2. Congress specifically considered non-commercial home recording of both audio and video materials.

3. Congress specifically intended that the law governing home recording, a practice "common and unrestrained today [in 1971]," H.R. Rep. No. 487, *supra*, at 7, Pet. App. 61, not be frozen, "especially during a period of rapid technological change." H.R. Rep.

94-1476; *supra*, at 66, Pet. App. 67.

4. Congress specifically intended home recording to be a fair use, whether or not it is characterized as an "intrinsic" use, because it is (a) non-commercial, and (b) not controllable without raising the spectre of unacceptable invasions of privacy. The former reason merely restates the conclusion that the balance of equities shows neither harm to the copyright owner nor the user's intent to profit or to inflict harm. The latter reason may be more a concession to practical reality than an example of doctrinal purity, but that is the price to be paid for a political process of legislation. It is not the only instance in which copyright is made subservient to some other policy or value and it is certainly not sufficient to justify the Court of Appeals's determination to ignore the intent of Congress.

Given the establishment of these points, as well as the demonstrated intent of Congress to leave the statutory fair use test flexible enough to accommodate both unforeseen fact situations and technological change, it is immaterial that one or more of the four factors listed in Section 107 might not fit this case with mathematical precision. Congress has still given sufficient guidance to allow the work of the courts to be done correctly. The Court of Appeals's refusal to heed that guidance requires reversal.

IV. The Court of Appeals's refusal to credit the District Court's findings of fact and its application of an erroneous rule of law to the fair use issue both require reversal.

Rule 52(a) of the Federal Rules of Civil Procedure states that findings of fact shall not be set aside unless clearly erroneous.

Both Congress and numerous courts have held that the issue of fair use is a question of fact, to be determined on a case-by-case basis, and upon a balancing of the equities. *See, e.g., Eisenschiml v. Fawcett Publications; Meeropol v. Nizer*, both *supra*. The District Court followed this approach and achieved a reasoned and correct result; the Court of Appeals did not.

In *Meeropol v. Nizer, supra*, the court stated:

"The line which must be drawn between fair use and copyright infringement depends on an examination of the facts in each case. It cannot be determined by resort to any arbitrary rules or fixed criteria." [ 560 F.2d at 1068.]

This is wholly consistent with the view of Congress, expressed in the House Report accompanying the Copyright Revision Act:

"[S]ince the doctrine [of fair use] is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts." [H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 65 (1976)].

Courts of Appeals have held that the "clearly erroneous" standard of review in Rule 52(a) of the Federal Rules of Civil Procedure applies to fair use determinations. *Eisenschiml v. Fawcett Publications; Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc.*, both *supra*.

After five weeks of trial in the case at bar, the District Court, sitting without a jury, made extensive and detailed findings of fact, filling more than thirty pages of the Petitioners' Appendix (Pet. App. 35-54, 75-87). After considering these facts, the court concluded that the use made of Respondents' copyrighted television programming by non-commercial home recording was fair. This conclusion involved a balancing of equities, rather than the application of arbitrary rules or fixed criteria. Both the result and the procedure by which it was reached were meticulous, complete, and correct; they were in conformity with the standards laid down by both the courts and Congress for making such determinations; and they were consistent with the policies of the Copyright Act and of the Constitution.

On appeal, the Ninth Circuit committed two flagrant errors that require reversal by this Court. First, it ignored entirely the findings of fact made by the District Court; and secondly, it reached its result by application of a single arbitrary rule -- that an "intrinsic" use can never be a fair use (Pet. App. 18). This rule is contrary to the mandate of Section 107 of the Copyright Act, *17 U.S.C. § 107*; contrary to the intent of Congress in avoiding any arbitrary standards; and contrary to the only significant precedent, *Williams & Wilkins Co. v. United States, supra*. Resort to such a rule is contrary to the accepted practice for determining fair use issues; and application of the rule requires a disregard of the contrary findings of fact by the District Court, in violation of the mandate of Rule 52(a) of the Federal Rules of Civil Procedure. These errors require reversal.

#### Conclusion

For the reasons stated above, the opinion and judgment of the Court of Appeals should be reversed and the judgment of the District Court should be reinstated.

Respectfully submitted,

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