

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

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

**BRIEF OF AMICUS CURIAE RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC.
IN SUPPORT OF RESPONDENTS**

JAMES F. FITZPATRICK *, CARY H. SHERMAN, HAMISH R. SANDISON, ARNOLD & PORTER, 1200 New Hampshire Ave., N.W., Washington, D.C. 20036, (202) 872-6700, Attorneys for Amicus Curiae Recording Industry Association of America, Inc.

* Counsel of Record

Of Counsel: ERNEST S. MEYERS, MEYERS, TERSIGNI, KAUFMAN, DEBROT, FELDMAN & GRAY, 630 Third Ave., New York, N.Y. 10017, (212) 953-9000

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INTEREST OF AMICUS CURIAE

RIAA is a nonprofit New York corporation, whose membership consists of record companies accounting for more than 90 percent of the authorized prerecorded records and tapes manufactured and sold in the United States. Among RIAA's basic purposes is to represent its membership before legislative, regulatory and judicial bodies with respect to federal, state and local legislation and regulations affecting the entire recording industry. Thus, RIAA is intimately acquainted with the federal copyright law as it pertains to sound recordings.

RIAA's purpose in submitting this brief is to assist the Court in considering the current legal status of off-the-air taping of sound recordings by individuals in their homes for private noncommercial use. While the question of home audio recording is not directly before the Court, the petitioners and several amici supporting them rely upon the legislative history of the Sound Recording Amendment of 1971 in their effort to overturn the decision of the Court of Appeals for the Ninth Circuit. Moreover, the District Court relied upon the same legislative history in concluding that off-the-air taping of audiovisual works by individuals in their homes for private noncommercial use was not an infringement of copyright.

INTRODUCTION: The Recording Industry Association of America, Inc. (hereinafter "RIAA") hereby submits this brief amicus curiae in support of the respondents. n1

n1 The consents of the parties are on file with the Clerk of the Court.

SUMMARY OF ARGUMENT

Legal analysis of home audio recording reinforces the Ninth Circuit's conclusion that off-the-air copying of audiovisual works in the home infringes the copyright owner's exclusive right of reproduction. In the first place, this analysis refutes the petitioners' claim that the legislative history of the Sound Recording Amendment of 1971 establishes that home video recording is "fair use" under the Copyright Act of 1976. Second, the same analysis confirms the Ninth Circuit's opinion that there is no exemption for home video recording under the 1976 Act.

I.

The legislative history of the Sound Recording Amendment of 1971 does not show that Congress considered home recording to be "fair use" under the Copyright Act of

1976, as the petitioners erroneously contend. Section 107 of the 1976 Act -- the fair use provision -- does not even refer to home recording, and the legislative history accompanying it contains no suggestion that Congress intended or believed home recording to be fair use. On the contrary, section 107 gives examples of the creative uses traditionally considered fair, and specifically directs the courts to consider four criteria in determining whether a particular use is a fair use. Home recording is not a creative use, and it is not even mentioned in the statutory criteria. Thus, the per se rule of fair use claimed by the petitioners is without foundation under current law.

II.

The Court of Appeals for the Ninth Circuit was correct in concluding that there is no home video recording exemption under current law by analogy with an alleged "home audio recording exemption." Significantly, neither the petitioners nor the amici supporting them attempt to defend such an absolute exemption.

The District Court erred in holding that the Sound Recording Amendment of 1971 created a purported home audio recording exemption. The 1971 Amendment was intended to deal with the problem of commercial record piracy, not home taping. There was no mention of a home taping exemption either in the Amendment itself or in the Senate proceedings relating to it. The references to home recording during consideration of the 1971 Amendment by the House of Representatives did not suffice to create -- and were not intended to create -- a home audio recording exemption.

Moreover, the District Court erred in holding that a supposed home audio recording exemption was incorporated sub silentio into the Copyright Act of 1976. Neither that Act nor its legislative history contains any such exemption. The language, structure and legislative history of the 1976 Act all confirm that Congress did not intend to exclude home audio recording from the scope of the copyright owner's exclusive right of reproduction.

Accordingly, both video and audio home recording are fully subject to copyright infringement liability in the absence of a valid defense.

TEXT: ARGUMENT

The District Court concluded that home video recording does not constitute copyright infringement under current law. 480 F. Supp. at 442. This conclusion was based upon two alternative lines of reasoning.

First, the District Court reasoned that: (1) the legislative history of the Sound Recording Amendment of 1971 expressed a congressional intent to exempt home audio recording from infringement liability; (2) this legislative intent was incorporated into the Copyright Act of 1976; and (3) this intent is applicable to home recording of audiovisual works as well as home recording of sound recordings. 480 F. Supp. at 443-46. Second, as an alternative basis for its decision, the District Court reasoned that home video recording is "fair use" under the four criteria set forth in the current statute. 480 F. Supp. at 446-56.

The Court of Appeals for the Ninth Circuit rejected both lines of reasoning. It held that (1) neither the 1976 Act nor its legislative history provides for "a broad based home use exception," 659 F.2d at 968, and (2) home video recording does not

constitute fair use under the 1976 Act, 659 F.2d at 969-74.

The petitioners in their brief do not attempt to defend the District Court's conclusion that the legislative history of the 1971 Amendment amounts to an absolute home recording exemption apart from the fair use defense. Instead, they assert that "[b]y 1971... Congress had manifested clearly its belief and intention that all such [audio and video] home recording was fair use." Petitioners' Brief at 32 (emphasis in the original).

The following analysis of the legal status of home audio recording negates the petitioners' claim that the legislative history of the 1971 Amendment predetermines the fair use issue, and provides additional support for the Ninth Circuit's conclusion that there is no exemption for home video recording under the 1976 Act.

I. The Legislative History of the Sound Recording Amendment of 1971 Cannot Predetermine the Application of the Fair Use Provision of the Copyright Act of 1976

The doctrine of fair use was codified for the first time in section 107 of the Copyright Act of 1976, 17 U.S.C. § 107. n2 See H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 65 (1976), reprinted in [1976] U.S. Code Cong. & Ad. News 5659, 5678 (hereinafter "1976 House Report"); S. Rep. No. 94-473, 94th Cong., 1st Sess. 61 (1975) (hereinafter "1975 Senate Report"). There is no reference to home recording in section 107 or in the House and Senate reports accompanying it, and no suggestion that Congress considered home recording to be fair use. Yet the petitioners claim that "legislative history [of the Sound Recording Amendment of 1971] shows that Congress regarded and intended home recording, audio and video, to be fair use and thus to be precisely within the exceptions or limitations specified in § 107." Petitioners' Brief at 33. Such a per se rule of fair use is without foundation under section 107.

n2 Section 107 provides, in its entirety, as follows:

" § 107. Limitations on exclusive rights: Fair use

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

In the first place, section 107 does not purport to define fair use, or to determine that a particular use is a fair use. Instead, it gives examples of the kinds of creative uses of a copyrighted work that are traditionally regarded as fair uses ("reproduction... for purposes such as criticism, comment, news reporting, teaching..., scholarship, or research"), and lists four statutory criteria that are considered relevant in judging whether a given use is fair or infringing. The proper approach to the fair use issue under section 107 was explained by the 1976 House Report, in language identical to that contained in the 1975 Senate Report, as follows:

"The statement of the fair use doctrine in section 107 offers some guidance to users in determining when the principles of the doctrine apply. However, the endless variety of situations and combinations of circumstances that can arise in particular cases precludes the formulation of exact rules in the statute. The bill endorses the purpose and general scope of the judicial doctrine of fair use, but there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change. Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis. Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way." 1976 House Report, *supra*, at 66 (emphasis added); see also 1975 Senate Report, *supra*, at 62.

Home recording has nothing in common with the creative uses listed in section 107, and it is not even mentioned in the statutory criteria. Thus, the application of a *per se* rule that home recording is fair use would stretch section 107 beyond recognition and would flout the specific direction of Congress to consider the four criteria contained in that section. Moreover, it would be entirely at odds with the flexible "case-by-case" approach envisaged by Congress when it enacted section 107. Neither the petitioners nor the amici supporting them explain why the Court should disregard the plain language of section 107 in this way.

It should also be noted, as is perfectly plain from the 1976 House Report quoted above, that section 107 was intended to codify the existing judicial doctrine of fair use and not to recognize a purported Statutory or legislative rule. See 1976 House Report, *supra*, at 66; 1975 Senate Report, *supra*, at 62. Since the *per se* rule claimed by the petitioners is derived from the legislative history of the 1971 Amendment, Petitioners' Brief at 33-39, and has never been judicially applied, it follows that Congress cannot have intended to codify it in section 107.

Second, the legislative history relied upon by the petitioners pertained to a 1971 law that was repealed in its entirety by the Copyright Act of 1976. For the reasons given in Section II.B., *infra*, all of the evidence indicates that the views concerning home recording expressed in the legislative history of the 1971 Amendment were not incorporated into the 1976 Act or its legislative history. There is nothing in the language or the legislative history of the current law to suggest that Congress in 1976 regarded home recording as fair use.

Moreover, the *per se* rule of fair use claimed by the petitioners is expressly contradicted by the following statement in the 1976 House Report, reflecting a similar statement in the 1975 Senate Report:

"[T]he reference to fair use 'by reproduction in copies or phonorecords or by any other means' [in section 107] is mainly intended to make clear that the doctrine has as much application to photocopying and taping as to older forms of use; it is not intended to give these kinds of reproduction any special status under the fair use provision or to sanction any reproduction beyond the normal and reasonable limits of fair use." 1976 House Report, *supra*, at 66 (emphasis added); see also 1975 Senate Report, *supra*, at 62.

For all of the foregoing reasons, we concur with Professor Melville B. Nimmer, the nation's foremost copyright scholar, that "[t]he conclusion is... inescapable that audio home recording was not singled out by Congress for special fair use treatment under the Copyright Act of 1976." Nimmer, "The Legal Status of Home Audio Recording of Copyrighted Works" 19 (Apr. 21, 1982), to be reprinted in Hearings on S. 1758 before the Senate Committee on the Judiciary, 97th Cong., 2d Sess. (1982) (Statement of Recording Industry Association of America, Inc., Appendix 7) (hereinafter "Nimmer Memorandum"). Thus, the question of fair use now before this Court must be determined -- as it was determined by the Ninth Circuit -- by carefully considering whether home video recording is the kind of creative use traditionally regarded as fair use in light of the four criteria enumerated in section 107 of the current statute. The legislative history cited by the petitioners cannot predetermine this fair use issue. There is no *per se* rule that home recording constitutes fair use.

n4 This brief does not discuss the Ninth Circuit's conclusion that home video recording does not constitute fair use under section 107. This issue is not of unique application to sound recordings, and it has been comprehensively briefed by the respondents. It is sufficient here to note that RIAA endorses the Ninth Circuit's analysis and conclusion with respect to fair use.

II. There Is No Home Recording Exemption Under Current Law

It is not disputed by any of the parties that section 106(1) of the Copyright Act of 1976, 17 U.S.C. § 106(1), gives copyright owners the exclusive right to reproduce their copyrighted works, and that this right is not expressly limited by a home recording exemption either in the statute or its legislative history. Nonetheless, the District Court concluded that "Congress did not intend this broad statement [in section 106(1)] to include reproductions of sound recordings for home use" or "to give copyright holders of audiovisual works monopoly power over off-the-air recording of their works for home use." 480 F. Supp. at 443. Thus, the trial court found an absolute exemption where the current statute and its legislative history provide none. Not even the petitioners attempt to defend this conclusion.

To find support for a supposed home recording exemption under current law, the District Court was obliged to go back to the Sound Recording Amendment of 1971 -- a statute that was repealed by the 1976 Act -- and draw the following inferences: first, notwithstanding the contrary language of the 1971 Amendment, Congress intended in 1971 to create a home audio recording exemption; second, notwithstanding the contrary language of the 1976 Act and its legislative history, such intention was incorporated into the current statute; and third, notwithstanding the contrary language of the 1976 Act and its legislative history, such intention is

applicable to audiovisual works as well as sound recordings.

The Ninth Circuit correctly rejected the trial court's overreaching inferences:

"When one analyzes whether there exists an implied home video recording exception, apart from the fair use doctrine, in the light of the statutory framework, it is manifest that the district court's conclusion was erroneous." 659 F.2d at 966. The Ninth Circuit found that "[t]he statutory framework is unambiguous; the grant of exclusive rights is only limited by the statutory exceptions," 659 F.2d at 966, and it concluded that "[t]he statute itself and the House and Senate Reports accompanying the 1976 Act do not provide for a broad based home use exception," *id.* at 968. The following analysis of home audio recording reinforces the Ninth Circuit's conclusion.

A. The Sound Recording Amendment of 1971 Did Not Create a Home Audio Recording Exemption

The Sound Recording Amendment of 1971, P.L. No. 92-140, 85 Stat. 391 (1971), granted federal copyright protection to sound recordings for the first time. There was no mention of a home audio recording exemption either in the bill considered by Congress, n5 or in the Senate proceedings relating to it, n6 or in the statute as finally enacted. After approval by the Senate, the bill was referred to the House Judiciary Committee, whose report contained a passage relied upon by the District Court -- as well as by the petitioners and several amici supporting them -- as the principal evidence of legislative intent in 1971:

n5 S. 646, 92d Cong., 1st Sess. (1971); H.R. 6927, 92d Cong., 1st Sess. 1971).

n6 See S. Rep. No. 92-72, 92d Cong., 1st Sess. (1971); 117 Cong. Rec. 2002 (1971); 117 Cong. Rec. 12,762-65 (1971); 117 Cong. Rec. 35,284 (1971).

"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." H.R. Rep. No. 92-487, 92d Cong., 1st Sess. 7 (1971), reprinted in [1971] U.S. Code Cong. & Ad. News 1566, 1572 (hereinafter "1971 House Report").

Several reasons compel the conclusion that this passage did not suffice to create -- and was not intended to create -- a home audio recording exemption under the 1971 Amendment. First, the language of the 1971 Amendment was clear and unequivocal on its face, n7 so that resort to the 1971 House Report to divine a contrary intention is entirely unnecessary. See *United States v. Oregon*, 366 U.S. 643, 648, rehearing denied, 368 U.S. 870 (1961); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 201, rehearing denied, 425 U.S. 986 (1976).

n7 Section 1(a) of the 1971 Amendment gave the owner of copyright in a sound recording the exclusive right "[t]o reproduce... reproductions of the copyrighted work if it be a sound recording." P.L. No. 92-140, § 1(a), 85 Stat. 391 (1971).

Second, the quoted passage was never joined in by the Senate; at most, it represented the intent of only one chamber of Congress. There is no justification, in the absence of an exemption in the Amendment itself, for inferring that the 1971 House Report reflected the intent of Congress as a whole. n8

n8 Without citation of authority, the petitioners advance the novel proposition that "[s]ince the exclusive rights are a matter of joint intendment by both the Senate and the House, the lack of intendment by either legislative body as to any particular right is relevant." Petitioners' Brief at 36 n.41 (emphasis in the original). This argument, if allowed to prevail, would permit one chamber of Congress to rewrite a statute which may be enacted only by both chambers. No such doctrine is known to our constitutional law.

Third, the quoted passage did not purport to create a special exemption for sound recordings. This is clear from the first and last sentences of the quoted passage. The first sentence indicates that the new rights in sound recordings were to be no "broader" than the rights in other works under existing law. Similarly, the last sentence emphasizes that "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 twenty years" (emphasis added). Since there existed in 1971 no special exemption for musical works, it follows that the House Judiciary Committee cannot have intended to create a special exemption for sound recordings. Such an exemption would have placed sound recordings in an entirely different position from musical works -- precisely what the Committee said it did not intend to do. n9

n9 The District Court also quoted the following colloquy on the floor of the House as further evidence that the "home recording" passage in the 1971 House Report was intended to create a special exemption for sound recordings, 480 F. Supp. at 446:

"Mr. KAZEN: Am I correct in assuming that the bill protects copyrighted material that is duplicated for commercial purposes only?

"Mr. KASTENMEIER: Yes.

"Mr. KAZEN: In other words, if your child were to record off of 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 the bill. I am glad the gentleman raises the point.

"On page 7 of the [1971 House] 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. 34,748-49 (1971) (emphasis added).

Far from evidencing any intent to create a special exemption for sound recordings, the quoted colloquy suggests only that what was considered fair use under the Copyright Act of 1909, P.L. No. 349, 35 Stat. 1075 (1909), should likewise be considered fair use under the 1971 Amendment. This expression of opinion does not amount to an absolute home recording exemption, and it cannot predetermine the fair use issue now before the Court, as the petitioners erroneously contend. Petitioners' Brief at 37, 39. Even if the Congressman believed in 1971 that home recording of copyrighted works constituted fair use under the 1909 Act, it is well settled, and this Court has often held, that the opinion of one Congress as to the interpretation of a statute passed by a previous Congress has "very little, if any, significance." *Rainwater v. United States*, 356 U.S. 590, 593 (1958). See also *United States v. United Mine Workers of America*, 330 U.S. 258, 282 (1947); *United States v. Price*, 361 U.S. 304, 313 (1960). The colloquy has even less significance where, as here, the quoted statement was never joined in by the Senate, and where there is no reason to infer that it reflected the view of Congress as a whole. In any event, the 1971 Amendment was repealed in its entirety by the Copyright Act of 1976, and it is the 1976 Act -- not the legislative history of the 1971 Amendment -- that governs the fair use issue in this case.

The District Court cited a number of additional sources which it claimed were relevant to legislative intent in 1971, including hearing testimony before Subcommittee No. 3 of the House Judiciary Committee, and a 1961 report of the Register of Copyrights. 480 F. Supp. at 445-46. As the Ninth Circuit forcefully observed, the quoted statements "hardly represent -- when considered in the context in which they were made and in the context of the 20-year copyright revision process -- a firm expression of Congressional intent to carve out a major exception to the copyright scheme." 659 F.2d at 968.

Thus, the District Court quoted the following exchange between Representative Biester and the then Assistant Register of Copyrights Barbara Ringer during hearings on the 1971 Amendment before Subcommittee No. 3 of the House Judiciary Committee:

"Mr. BIESTER: I do not know that I can add very much to the questions which you have been asked so far.

"I can tell you I must have a small pirate in my own home.

"My son has a cassette tape recorder, and as a particular record becomes a hit, he will retrieve it onto his little set.

"Now, he may retrieve in addition something else onto his recording, but nonetheless, he does retrieve the basic sound, and this legislation, of course, would not point to his activities, would it?

"Miss RINGER: I think the answer is clearly, 'No, it would not.'

"I have spoken at a couple of seminars on videocassettes lately, and this question

is usually asked: 'What about the home recorders?'

"The answer I have given and will give again is that this is something you cannot control.

"You simply cannot control it." Prohibiting Piracy of Sound Recordings: Hearings on S. 646 and H.R. 6927 before Subcommittee No. 3 of the House Judiciary Committee, 92d Cong., 1st Sess. 22 (June 9 and 10, 1971) (hereinafter "1971 Hearings").

This exchange did not disclose any legislative intent to create a home audio recording exemption. Ms. Ringer noted the difficulty of enforcement ("you simply cannot control it"), but she did not state that this difficulty justified an exemption from liability. She also emphasized that the pending legislation was not addressed to (did not "point to") noncommercial taping activities. In fact, as is made clear elsewhere in the 1971 House and Senate reports, the 1971 Amendment was a short-term, stop-gap measure designed to deal with the "immediate and urgent" problem of commercial record piracy. See 1971 House Report, *supra*, at 4; see also S. Rep. No. 92-72, 92d Cong., 1st Sess. 3-4 (1971).

Ms. Ringer went on to give her own view of home recording in prescient language which was not quoted by the District Court:

"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. But I do not see anybody 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." 1971 Hearings, *supra*, at 22-23.

Thus, Ms. Ringer foresaw the home taping "crunch" that is now before this Court. However, she did not lend her support to an exemption from liability; indeed, she would scarcely have foreseen a home taping "crunch" in the future if she had thought that Congress meant to exempt home taping from liability in 1971.

The District Court quoted one more exchange between Representative Biester and Ms. Ringer on the home taping issue:

"Mr. BIESTER: [W]ith respect to videocassettes, 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?

"Ms. RINGER: The answer is very definitely, 'yes.'

"For years the motion picture industry has been faced with bootleg problems, much of it derived from the 16 mm. prints that were distributed to the Armed Forces and got out of control. The film industry has had a very active policing activity for years.

"I think that this problem is going to undergo a quantum increase when videocassette recorders are freely available. But I would say that there is a big

difference, and I think it is something that you might consider. In that area, they have got copyright protection, and in this area, who knows? It is certainly not protectable under the Federal statute. " 1971 Hearings, *supra*, at 23 (emphasis added).

The District Court and two amici supporting the petitioners erroneously construed the language in italics to mean that home audio recording was not subject to copyright infringement liability under the 1971 Amendment. In fact, as Professor Nimmer has pointed out, Ms. Ringer was speaking prior to enactment of the bill, and it is obvious that she was merely contrasting the legal status of videocassettes (which were protectable under the federal copyright statute then in effect) and sound recordings (which were not of course protectable under federal law until passage of the 1971 Amendment). See Nimmer Memorandum, *supra*, at 11.

The District Court and the petitioners also referred to the following statement from a 1961 Report of the Register of Copyrights as evidence of legislative intent:

"New technical devices will probably make it practical in the future to reproduce televised motion pictures in the home. We do not believe the private use of such a reproduction can or should be precluded by copyright." Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, House Judiciary Committee Print, 87th Cong., 1st Sess. 30 (1961). Any reliance on this quotation as evidence of legislative intent with respect to home recording is entirely misplaced. As is made clear by the preceding paragraph of the Report, n10 the statement was made in response to an argument that private performances of motion pictures should under certain circumstances constitute an infringement of copyright. It was not directed to the issue of private recording. The Register's recommendation that private performances should not be considered infringing was in fact adopted in section 106(4) of the current law, which gives the copyright owner control only over public performances. There is no such limitation in section 106(1) on the right of reproduction.

n10 The preceding paragraph of the Register's 1961 Report, not quoted by the District Court, is as follows:

"Motion picture producers and distributors have urged that the performance right in motion pictures should extend to what are clearly private performances, including performances given in private homes. They point to *Patterson v. Century Productions*, and its concept that exhibition is a form of copying, to support their position. Motion picture films are commonly leased for exhibition at specified places and dates. Most leases are for commercial exhibitions, but many films are also leased for home use. It is argued that in either case private exhibitions beyond the terms of the lease should constitute an infringement of copyright." *Id.* at 29 (emphasis added).

Finally, the petitioners and several amici supporting them make much of the following statement of Mr. Stanley M. Gortikov, then the President of Capitol Records, as further evidence of legislative intent in 1971, Petitioners' Brief at 36 n.40:

"[T]he pirate also argues that granting a copyright may raise questions about the

individual who in his home may duplicate a commercial performance on home-recording equipment. We in the industry certainly have known that such amateur practices go on in the home, and we realistically recognize that no such enforcement is possible, and certainly none is intended." 1971 Hearings, *supra*, at 26. Mr. Gortikov's statement did not credit the existence of a home recording exemption. On the contrary, his statement, like Ms. Ringer's exchange with Representative Biester, was directed only to the difficulty of enforcement, not to the scope of liability. In any event, it can scarcely be contended that Mr. Gortikov's view of the 1971 Amendment amounted to a binding expression of legislative intent.

None of the statements quoted above justifies the inference that Congress intended to create a home audio recording exemption under the 1971 Amendment. As the Ninth Circuit correctly noted, even the statements of Representative Kastenmeier and Ms. Ringer "do not clearly establish an intent to exempt unauthorized reproductions apart from the fair use doctrine." 659 F.2d at 968 n.8 (emphasis in the original). Not even the petitioners -- and not one of the amici supporting them -- claim that the miscellany of legislative materials cited by the District Court amounts to an absolute home recording exemption.

B. There Is No Home Audio Recording Exemption Under the Copyright Act of 1976

Even assuming *arguendo* that Congress intended to create a home audio recording exemption when it enacted the Sound Recording Amendment of 1971, there is no evidence to support the District Court's conclusion that an exemption was somehow incorporated *sub silentio* into the Copyright Act of 1976. Indeed, all the evidence -- including the language, structure and legislative history of the 1976 Act, as well as basic principles of statutory interpretation -- point to the opposite conclusion.

In the first place, the language of the 1976 Act is clear and unambiguous. The copyright owner's exclusive right to reproduce is set forth in broad terms in section 106(1),ⁿ¹¹ subject only to the specific limitations contained in sections 107 through 118. There is no home recording exemption in any of those sections. Thus, to infer an implied home audio recording exemption in addition to the express limitations contained in sections 107 through 118 is to ignore what the Ninth Circuit justly called "elementary principles of statutory construction."ⁿ¹² 659 F.2d at 966. The creation of express limitations in sections 107 through 118 of the 1976 Act must be presumed to negate the existence of any implied exemption.ⁿ¹³

ⁿ¹¹ Section 106(1) provides, in pertinent part, that "the owner of copyright under this title has the exclusive rights... to reproduce the copyrighted work in copies or phonorecords." 17 U.S.C. § 106(1). The 1976 House Report makes it clear that Section 106(1) is infringed when "the actual sounds that go to make up a sound recording are reproduced in phonorecords by... recapturing off the air...." 1976 House Report, *supra*, at 106.

ⁿ¹² The applicable rule of statutory construction was recently reaffirmed by this Court in *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 188 (1978), where it was held that:

"In passing the Endangered Species Act of 1973, Congress was also aware of certain instances in which exceptions to the statute's broad sweep would be necessary. Thus, [the statute in certain cited sections] creates a number of limited

'hardship exemptions,' none of which would even remotely apply to the [present case]... Under the maxim *expressio unius est exclusio alterius*, we must presume that these were the only 'hardship cases' Congress intended to exempt."

n13 The petitioners, in an apparent attempt to circumvent the applicable rule of construction, argue that home recording is fair use, and is therefore included in section 107. Petitioners' Brief at 33. This misconceived argument has been discussed in Section I, *supra*.

The structure of the 1976 Act also refutes the District Court's inference of an implied home audio recording exemption. As the current Register of Copyrights has observed, the statute was deliberately constructed to anticipate new technological uses such as home taping:

"Congress chose not to provide a blanket exemption for home videotaping...

"The basic philosophy of the 1976 Copyright Act was influenced by the perceived tendency of prior copyright laws to become outdated upon the development of new technological means for exploiting works of authorship...

"The design for achieving a statute capable of taking into account future innovations was the very architecture of the statute. In that design, section 106 sets forth in broad terms the copyright owner's exclusive rights of reproduction, adaptation, publication, performance, and display. Following this broad provision are specific provisions establishing various limitations, qualifications or exemptions. Thus, under the theory of the 1976 Act, unless a use of a work is specifically exempted from copyright liability, its use falls within the exclusive rights of the copyright owner." Statement of David Ladd, Register of Copyrights and Assistant Librarian of Congress for Copyright Services, 17-19 (Apr. 21, 1982) to be reprinted in Hearings on S. 1758 Before the Senate Committee on the Judiciary, 97th Cong., 2d Sess. (1982) (Statement of David Ladd) (emphasis added). The Ninth Circuit properly called attention to this "unambiguous" statutory framework, and rightly admonished the trial court that "we should not, absent a clear direction from Congress, disrupt this framework by carving out exceptions to the broad grant of rights apart from those in the statute itself." 659 F.2d at 966. Thus, the inference of an implied home audio recording exemption violates not only the language of the statute but also its very architecture, and thereby turns congressional intent on its head.

Moreover, the legislative history of the 1976 Act -- even if it were considered relevant -- contains absolutely no reference to a home audio recording exemption. With three separate opportunities to express a view on home recording -- the 1975 Senate Report, *supra*, the 1976 House Report, *supra*, and a 1976 Conference Report, H.R. Rep. No. 94-1733, 94th Cong., 2d Sess. (1976) -- the responsible committees of Congress said nothing on the subject to contradict the plain meaning of the current statute. n14 The District Court acknowledged this omission, but interpreted it as evidence of an unaltered legislative intent to exempt home audio recording from infringement liability under the 1976 Act. 480 F. Supp. at 444-45. Even assuming such intent under the prior law, the trial court's reasoning ignores the settled rule, reiterated by the Ninth Circuit, that "silence cannot be reviewed as an expression of legislative intent." 659 F.2d at 968, citing *Turpin v. Mailet*, 579 F.2d 152 (2d Cir.), vacated, 439 U.S. 974 (1978), on remand, 591 F.2d 426 (2d Cir. 1979). Accord,

Scripps-Howard Radio, Inc. v. F.C.C., 316 U.S. 4, 11 (1942); *Girouard v. United States*, 328 U.S. 61, 69 (1946). Furthermore, it overlooks three telling facts, also noted by the Ninth Circuit, which clearly manifest an altered intention under the 1976 Act. 659 F.2d at 967 n.5, quoting 3 M. Nimmer, *Nimmer on Copyright*, § 13.05[F][5] n.159 (1981).

n14 The petitioners argue that the 1971 House Report was an "integral part" of the legislative history of the 1976 Act, citing letters from the Librarian of Congress to the House and Senate Judiciary Committees in 1971, and a portion of the 1971 House Report. Petitioners' Brief at 37-38. The Brief of amici McCann-Erickson, Inc. et al., at 11, also cites a portion of the 1971 Hearings for the same proposition. In fact, what these sources all refer to is the contemplated merger of the statutory provisions of the 1971 Amendment into the general revision bill. They do not answer the question at issue here, namely, whether the legislative history of the 1971 Amendment -- including the references to home recording -- were incorporated sub silentio into the legislative history of the current law. Similarly, Copyright Office Circular R-99, also cited by the petitioners, Petitioners' Brief at 38 n.45, states only that "[t]he new law retains the provisions added [by the 1971 Amendment];" it does not refer to the legislative history.

First, certain portions from the 1971 House Report were incorporated verbatim in the 1976 House Report, n15 while the passage on home recording was omitted in its entirety. Thus, the omission cannot be attributed to an assumption by the House Judiciary Committee that it was unnecessary to restate its legislative intent in 1976. Neither the District Court nor the petitioners explain why the House Committee saw fit to omit the passage that forms the cornerstone of their argument with respect to legislative intent. n16

n15 Compare, e.g., H.R. Rep. No. 92-487, 92d Cong., 1st Sess. 5 (1971) (bottom paragraph), reprinted in [1971] U.S. Code Cong. & Ad. News 1566, 1570 with H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 56 (1976) (second full paragraph), reprinted in [1976] U.S. Code Cong. & Ad. News 5659, 5669.

n16 The best explanation the petitioners can offer is that the 1975-1976 reports did not mention home recording because that subject had already been "settled" in 1971. Petitioners' Brief at 38. What this "explanation" fails to explain is why the 1976 House Report did restate other portions of the 1971 House Report concerning subjects which might also be considered to have been "settled" in 1971. See n.15, *supra*.

Second, the 1971 Amendment and its legislative history applied only to sound recordings, and did not (indeed could not) affect the scope of rights in musical or other works embodied in such recordings. n17 Thus, when Congress legislated in 1976 with respect to all copyrighted works, it could not have incorporated an intent to exempt home recording of musical works without expressly referring to them.

n17 It should be noted that recorded music may, and usually does, include at least two copyrights: a copyright in the sound recording and a copyright in the underlying

musical work. See generally Diamond, "Sound Recordings and Phonorecords: History and Current Law" U. Ill. L.F. 337, 339-45 (1979). For a comprehensive discussion of home recording of musical works, see Baumgarten, "Private Audio Recording of Copyrighted Music" (Apr. 21, 1982), to be reprinted in Hearings on S. 1758 Before the Senate Committee on the Judiciary, 97th Cong., 2d Sess. (1982) (Statement of Jon A. Baumgarten).

Third, there is language in the 1976 legislative history that is totally incompatible with any implied home audio recording exemption. For example, the 1976 House Report, *supra*, at 66, echoing similar language in the 1975 Senate Report, warned that "it is not intended to give [photocopying and taping] any special status under the fair use provision." See also 1975 Senate Report, *supra*, at 62. Moreover, the 1975 Senate Report, discussing off-the-air recording of instructional television transmissions by a school for purposes of delayed viewing by its students -- an educational activity more obviously favored by the fair use doctrine -- stated that:

"The committee does not intend to suggest however, that off-the-air recording for convenience would under any circumstances, be considered 'fair use.'" 1975 Senate Report, *supra*, at 66.

Thus, the language, structure and legislative history of the current statute all confirm that Congress did not intend to exclude home audio recording from the scope of the copyright owner's exclusive right of reproduction under section 106(1) of the 1976 Act. We concur with Professor Nimmer's view that "[e]ven if... it be assumed that an audio home recording exemption were somehow contained in the 1971 Amendment, it must be concluded that any such exemption was not carried over into the general revision of copyright law as embodied in the Copyright Act of 1976." Nimmer Memorandum, *supra*, at 12. n18

n18 This conclusion coincides with the view previously expressed by Professor Nimmer in his treatise. See 2 M. Nimmer, *Nimmer on Copyright* § 8.05[C] (1981).

C. It Follows that There Is No Exemption for Home Video Recording Under Current Law

The District Court concluded that home video recording is exempt from copyright infringement liability by analogy with home audio recording; it did not suggest any independent basis for a home video recording exemption under current law. 480 F. Supp. at 446. Since there is no exemption for home audio recording under current law, it follows that no such exemption is applicable -- by analogy or otherwise -- to home video recording. The Ninth Circuit so held, 659 F.2d at 969, and its conclusion is unassailable. Nor is it necessary to distinguish audiovisual works from sound recordings in arriving at this conclusion. n19 As the preceding analysis demonstrates, both home audio recording and home video recording are fully subject to copyright infringement liability under current law in the absence of a valid defense. There is no home recording exemption of any kind under the Copyright Act of 1976.

n19 Only one of the amicus briefs in support of the petitioners asserts that the trial

court's home audio recording exemption was "acknowledged" by the Ninth Circuit. Brief of amici General Electric Company, et al., at 9. On the contrary, while the Ninth Circuit was careful to distinguish sound recordings from audiovisual works, and expressly limited its holding to the latter, 659 F.2d at 966-69, its interpretation of the "unambiguous" statutory framework of the 1976 Act is fully applicable to home recording of sound recordings.

CONCLUSION

For the foregoing reasons, the Court should reject the petitioners' contention that the legislative history of the Sound Recording Amendment of 1971 predetermines the fair use issue. Furthermore, the Court should affirm that portion of the Ninth Circuit's opinion holding that there is no home video recording exemption under current law.

Respectfully submitted,

JAMES F. FITZPATRICK *, CARY H. SHERMAN, HAMISH R. SANDISON, ARNOLD & PORTER, 1200 New Hampshire Ave., N.W., Washington, D.C. 20036, (202) 872-6700, Attorneys for Amicus Curiae Recording Industry Association of America, Inc.

* Counsel of Record

Of Counsel: ERNEST S. MEYERS, MEYERS, TERSIGNI, KAUFMAN, DEBROT, FELDMAN & GRAY, 630 Third Ave., New York, N.Y. 10017, (212) 953-9000

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