

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

No. 81-1687

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October Term, 1982

August 28, 1982

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

AMICUS CURIAE BRIEF ON BEHALF OF TDK ELECTRONICS CO., LTD.

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INTEREST OF AMICUS CURIAE

Whether or not home use recording constitutes copyright infringement directly affects this *amicus curiae*. TDK is the world's largest manufacturer of audio and video tapes and produces ferrite and other electronic components used in VTRs. In 1981, U.S. sales of TDK video and audio tapes amounted to approximately \$ 160 million.

TDK, through its U.S. subsidiaries, directly employs more than 750 persons in the United States. Currently over 80% of the TDK video and audio tapes sold in the United States are manufactured in the United States. Audio tapes are produced at TDK's plant in California and video tapes in Georgia. TDK has invested well over \$ 50 million to build and equip those two plants. As the plants' production capacity expands, those domestic production percentages are projected to increase.

TDK is submitting a separate brief because the arguments made in this brief have been neither specifically presented by the parties nor examined by the lower courts.

The brief *amicus curiae* is submitted by TDK Electronics Co., Ltd. ("TDK"), a Japanese corporation. n1 Consents have been obtained from all the parties, copies of which have been filed with the Clerk of this Court.

n1 TDK operates in the United States through its wholly-owned subsidiary, TDK U.S.A. Corporation (a New York corporation), which in turn owns TDK Electronics Corporation (a New York corporation), TDK Corporation of America (a California corporation), TDK Magnetics Corporation (a California corporation) and Saki Magnetics, Inc. (a California corporation).

Petitioners Sony Corporation et al. seek the reversal of the judgment and opinion of the United States Court of Appeals for the Ninth Circuit and the adoption of the District

Court's judgment and opinion. n2 TDK supports their Petition. n3

n2 The Court of Appeals' judgment and opinion below are reported at *659 F.2d 963 (9th Cir. 1981)*, and appended to Petitioners' Petition for Writ of Certiorari as Appendix A (cited herein as "Pet. App. 1 et seq."). The judgment and opinion of the District Court below are reported at *480 F. Supp. 429 (C.D. Cal. 1979)* and appended to Petitioners' Petition for Writ of Certiorari as Appendix B (cited herein as "Pet. App. 31 et seq.>").

n3 Petitioners' Petition will be cited herein as "Petition."

SUMMARY OF ARGUMENT

Home use recording n4 is fair use for the following reasons.

n4 As used herein, "home use recording" means video recording of free off-the-air TV programs for private, non-commercial viewing, *viz.*, "time-shifting."

(1) Both the Court of Appeals and the District Court below erred in their respective modes of analysis of the Copyright Revision Act of 1976 (the "1976 Act"). Specifically, each court analyzed as separate and distinct the two questions of (a) whether courts may look to legislative history to interpret Section 106 of the 1976 Act and (b) whether home use recording satisfied the four factors mentioned in Section 107 of the 1976 Act.

The correct mode of analyzing the 1976 Act is to examine whether it is proper to resort to legislative history in order to define the "fair use" exception contained in Section 107 of the 1976 Act. We conclude it is. The "clear language" of Section 106 may erect a wall blocking a view to its legislative history, but Section 107 opens a window in that wall.

(2) Legislative history of Section 107 clearly evinces that home use recording is to be deemed fair use. The legitimate rights of copyright holders were outweighed by the dual concerns of privacy of the general citizenry and impossibility of enforcement. The equities having already been balanced in the legislative process, judicial application of the four factors enumerated in Section 107 to home use recording is obviated.

(3) Both the Court of Appeals and the District Court below erred in their application of the four factors enumerated in Section 107. Both lower courts are under the impression that the four factors are cumulative tests for fair use determination. Not only are the four factors merely illustrative, but they were misapplied with respect to home use recording. Proper application results in a finding that home use recording is fair use.

ARGUMENT HOME USE RECORDING IS FAIR USE.

1. In Determining Fair Use under Section 107, Courts Must be Guided by Legislative History.

Section 106 of the 1976 Act grants the "bundle of rights" exclusively to the owner of the copyright. Noting that "The statutory framework [of the 1976 Act] is unambiguous; the grant of exclusive rights is only limited by statutory exceptions" (Pet. App. 6), the Court of Appeals refused to look to legislative history of Section 106. However, the "fair use" exception embodied in Section 107 is sufficiently (and intentionally) ambiguous and and flexible to benefit from the illumination of legislative history. n5

n5 See generally *Note, Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court*, 95 *Harv. L. Rev.* 892 (1982).

The judicial doctrine of fair use (statutorily recognized) is an omnibus "safety valve" against certain unintended (i.e., unfair) consequences of an absolute copyright monopoly. Lurking in the corners of the doctrine of fair use is a legislative (and judicial) recognition that a literal enforcement of statutory provisions for copyright protection in certain circumstances may collide with superior interests worthy of protection. n6

n6 The District Court below recognized that when Congress passed the 1976 Act, it was sensitive to the problems of trespassing on the individual's right of privacy:

Congress can constitutionally legislate against some activity which may occur in the home, but doing so necessarily requires caution... [I]n balance, Congress did not find that protection of copyright holders' rights over reproduction of their works was worth the privacy and enforcement problems which restraint of home use recording would create. [Pet. App. 65.]

See also *Stanley v. Georgia*, 394 U.S. 557 (1969); *Rowan v. United States Post Office Dep't*, 397 U.S. 728 (1970).

The codification of the common law of fair use was not intended to freeze its definition or application. The House Report n7 accompanying the bill for the 1976 Act declared:

n7 H.R. Rep. No. 1476, 94th Cong. 2d Sess. 66 (1976), reprinted in [1976] U.S. Cong. & Admin. News 5659 (cited herein as the "1976 House Report"). The corresponding Senate Report is S. Rep. No. 473, 94th Cong., 1st Sess. 62 (1975).

"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...

"Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way." (Quoted and cited in Pet. App. 67.)
The Court of Appeals itself noted that:

"The history states that the legislation endorses the purposes and general scope of the *judicial doctrine* of fair use, but there is no disposition to freeze the doctrine in the statute." (Pet. App. 14; emphasis in the original.)

Recognizing the fair use exception as a judicially developed "equitable rule of reason" (quoted and cited in Pet. App. 86), Congress consciously refrained from statutorily defining the exact contours of the doctrine and left it up to the courts to apply it flexibly on a case-by-case basis:

"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." (Quoted and cited in Pet. App. 67.)
The Court of Appeals recognized the impossibility of exact formulation:

"[I]t is there [in the legislative history of Section 107] emphasized that the endless variety of situations and combinations of circumstances that can arise in particular cases precludes the formulation of exact rules." (Pet. App. 14.)

Accordingly, the fair use doctrine must be applied flexibly, not rigidly, in light of Congressional intentions which are chronicled in legislative history.

2. Legislative History Shows that Home Use Recording is Fair Use.

Examination of the legislative history of Section 107 reveals home use recording is to be fair use since (a) no legitimate interests of the copyright holder would be unfairly compromised and (b) enforcement of copyright infringement would raise the specter of invasion of the constitutional right of privacy, as well as of practical impossibility. So long as the off-the-air recording (whether audio or video) is for non-commercial, private home use, it is to be exempted as fair use. No further inquiry is necessary.

Mere days before Congress passed the 1971 Amendment, n8 Representative Kastenmeier of Wisconsin, Chairman of the Subcommittee responsible for the amendment, n9 engaged in the following exchange with Representative Kazen of Texas regarding non-commercial home recording:

n8 The Sound Recording Act of 1971. For discussion on the relevance of the legislative history of the 1971 Amendment to the 1976 Act, see Petition 14-16 and Pet. App. 56-68.

n9 In addition to his role of Chairman of the House Subcommittee responsible for the 1971 Amendment, Representative Kastenmeier was also the sponsor of the general copyright revision legislation and a member of the Conference Committee that finally brought about the 1976 Act.

"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 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'm glad the gentleman raises the point.

"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." (Quoted and cited in Pet. App. 64; emphasis added.)

The portion of the House Report referred to by Mr. Kastenmeier 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 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." (Quoted and cited in Pet. App. 60-61; emphasis added.)

In June 1971, Ms. Barbara Ringer (Assistant Register of Copyrights who later that year became Register of Copyrights) discussed off-the-air recording with Representative Edward Beister of Pennsylvania before Subcommittee No. 3 of the House Committee on the Judiciary:

"MR. BEISTER...

"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.

"... [T]his 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 video cassettes 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." (Quoted and cited in Pet. App. 62-63.)
Further, in contrasting public distribution of bootleg films for private home use recording, Ms. Ringer observed:

"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.

"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, much of it deriving from the 1[6]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 video cassette 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." (Quoted and cited in Pet. App. 63.)

The foregoing manifests the undisputed view in the Congress that home use recording is to be considered fair use. Accordingly, it is not necessary for the courts to analyze home use recording against the four factors listed in Section 107.

3. Considered under the Four Factors, Home Use Recording is Fair Use.

While Congress refused to define statutorily the fair use doctrine, it did nonetheless offer four factors to consider in determining fair use. Both lower courts are under the misguided impression that the four factors are cumulative tests of fair use determination.
n10 This is not so.

n10 Though the District Court states that the four "factors are neither exclusive nor required[, t]he factors are illustrative, not definitive" (Pet. App. 70), it nonetheless appears to be somehow compelled to clear each of the tests.

The four factors were offered merely to be illustrative rather than determinative or cumulative.

"Although the courts have considered and ruled upon the fair use doctrine over and over again, no real definition of the concept has ever emerged. Indeed, since the doctrine 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. On the other hand, the courts have evolved a set of criteria which, though *in no case definitive or determinative*, provide some gauge for balancing the equities. These criteria have been stated in various ways, but essentially they can all be reduced to the four standards which have been adopted in section 107." (1976 House Report 65; emphasis added.)

Distracted by the enumerated four factors, both the Court of Appeals and the District Court have failed to see the forest for the trees. The essence of fair use is *fairness* -- "the doctrine is an equitable rule of reason" (*id.*) and the four factors merely "provide some gauge for balancing the equities" (*id.*).

Even if the four factors listed in Section 107 were to be applied as "determinative tests", home use recording would be found to be fair use. Of the four factors the first and last factors are particularly relevant here.

The purpose and character of the use is video recording of free off-the-air TV programs for private viewing at a later time. Thus the use at issue here is exactly that intended by the copyright holder, namely, to permit television viewers to watch the TV program without charge. n11 Time shift copying changes nothing. It is no more significant than the act of putting aside a book for later reading. This use is clearly not commercial; it is not even "for non-profit educational purposes" in that such purposes imply performances for the benefit of others. Here the viewer is recording the program for his own benefit or for that of his immediate family.

n11 Query what Respondents' position would be with respect to the person who charges admission to see free off-the-air television programs at the time of telecast (without taping). For example, a bar may charge extra admission to customers to sit and watch the World Series.

Nor can the viewer avoid exposure to the interspersed advertising material (from which the copyright holder indirectly derives revenue) any more easily by home use copying than he can by turning off the commercials during direct viewing of a program.

The Court of Appeals appears to find it fatal to fair use that the purpose and character of the use is "copying of entertainment works for convenience" (Pet. App. 19). Whether the work itself or the purpose of copying is educationally meritorious or mere entertainment is irrelevant. The Copyright Act does not pass judgment -- if it did, Walt Disney's Donald Duck might not be copyrightable. The Constitution empowered Congress to enact copyright laws "to promote the progress of science and useful arts." If the work is worthy of copyright, its copying cannot be denigrated because of its contents for fair use purposes. n12

n12 For a more legalistic approach to this issue, see Petition 25-26.

Clearly if the use is commercial, it would not constitute fair use, but this case is limited to non-commercial uses. The 1976 House Report explains:

"The Committee has amended the first of the criteria to be considered -- 'the purpose and character of the use' -- to state explicitly that this factor includes a consideration of 'whether such use is of a commercial nature or is for non-profit educational purposes.' This amendment is not intended to be interpreted as any sort of not-for-profit limitation on educational uses of copyrighted works. It is an express recognition that, as under present law, the commercial or non-profit character of an activity, while not conclusive with respect to fair use, can and should be weighed along with other factors in fair use decisions." (1976 House Report 66.)

The non-commercial purpose, while not conclusive under this test, is persuasive (if not presumptive) n13 in finding fair use.

n13 See Part 2 of this Argument, *supra* at 6-9.

For home use recording, the second and third factors are neutral -- the nature of the

copyrighted works of U/D is audiovisual television programs substantially all of which (including commercials) are recorded.

In this case, the fourth factor n14 would be positive, rather than negative, in finding fair use. Home use recording does not adversely affect the potential market for or the value of U/D's copyrighted works. In fact, it only enhances their potential market and value.

n14 *See* 3 Nimmer on Copyright § 13.05[A](4) (1981) for the application of the fourth factor.

There are basically three separate markets for U/D's copyrighted works. The first market consists of television stations; the second, home users of pre-recorded video cassettes; and the third, movie theatres for public showing. Since the potentiality and the value of the copyright work in the television station market are determined essentially by ratings, which in turn depend on the number of viewers (including the number of home use recordings), home use recordings will have a positive effect for the copyright holder. n15

n15 *See* NBC's study on the effect of VTR copying on commercial TV broadcasting, cited in Petition 7-8.

It is conceivable that the potentiality and the value of the copyrighted work might be reduced in the other two markets by time-shifting. n16 For example, a person who missed seeing a TV program at the time of its telecast might buy it as a pre-recorded video cassette or go to the movie theatre to see it (assuming such alternatives were available). However, the very fact of U/D's sale of its copyrighted works to TV stations for free off-the-air broadcast may adversely affect the other two markets. Obviously, U/D has considered this potential negative effect but has determined that the potential positive effect on the TV station market offsets the potential losses on the other two markets. Time shifting would merely magnify the existing imbalance of the effects on the various markets without reversing the tip of the scales.

n16 Multiple recording or librarying practices are not considered here.

Since the net cumulative effect of home use recording on the three markets is positive, U/D cannot claim to have been injured by home use recording. In fact U/D concedes that it has not suffered any monetary damages, and both the Court of Appeals and District Court so found. The Court of Appeals erred in assuming potential harm. n17

n17 Pet. App. 25.

In analyzing the effect of reproduction, it is essential to distinguish a "hard copy" such as a book from a "soft copy" such as a TV program. The copyright holder of a hard copy publication can control the number of copies in existence. But the copyright holder of a soft copy publication relinquishes his right to control the number of copies. The substantial copying of a "hard copy" almost invariably has a negative effect on the potentiality and value of the copyrighted work. The copying of an entire book, even for private use, may reduce by one the number of books sold. The same would be true for pre-recorded video cassettes. However, that is not the case when the copyright work is published in a "soft" ephemeral fashion. n18 A soft copy is published through electrical waves in the air. Once released to the air, it is gone. The number of soft copies is

potentially infinite, determined by the sole discretion of the viewers. Similarly, once a book is sold, the copyright owner cannot control who reads it, when and how many times it is read. By time shifting, the number of receivers of the electric waves are increased, not reduced.

n18 To this extent, the fair use analyses by the Court of Appeals and the District Court of *Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by an equally divided court*, 420 U.S. 376 (1975), are misdirected.

It is fair to permit copying where there is no actual or even potential harm to the copyright holder, and it is unfair to prohibit or exact a fee when the copyright holder benefits from the copying. The Court below erred in failing to examine the overall fairness of use involved here. Application of the doctrine of fair use cannot avoid the question of what is fair under all the facts and circumstances.

Both the Senate and House Committee Report on the 1976 Act point out that "there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change" (Pet. App. 67). The VTR is a typical half way technology. The time cannot be far off when the home viewer will be able to time-shift his favorite programs by storing them temporarily in his home computer or by calling them up via cable or satellite from a central computer -- with or without commercials. This interim technology is a bit clumsy, but it appears to harm no one. In due course, it may be necessary for the Congress to address the question of applying the copyright law to some of these new situations. In the meantime, this case seems an appropriate one for the application of the fair use doctrine in the exercise of judicial prudence.

CONCLUSION

For the reasons stated above, we respectfully pray the Court to reverse the opinion and judgment of the Court of Appeals, to clarify the doctrine of fair use (long characterized as "the most troublesome in the whole law of copyright" n19) and to apply the doctrine to this case.

n19 *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir. 1939), (*per curiam*, presided over by L. Hand, J.).

Respectfully submitted,

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August 28, 1982

Service of the within and receipt of a copy thereof is hereby admitted this day of August, A.D. 1982.