

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

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BRIEF OF VIARE PUBLISHING, AMICUS CURIAE, IN SUPPORT OF SONY CORPORATION OF AMERICA, ET AL., PETITIONERS

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I. INTEREST OF VIARE PUBLISHING AMICUS CURIAE

Viare Publishing ("Viare") is the publisher of *Video Review*, a magazine sold through mail subscriptions and at newsstands. It is distributed throughout the United States. The articles and features presented by the magazine concentrate upon new developments in video equipment, viewing material and television programming. In addition to the revenue generated by the sale of copies of the magazine, Viare derives its income from the advertising placed in it by manufacturers of video equipment, tapes and accessories. New products, and equipment that enhances the utility of existing products are the subject of much of the advertising placed in the magazine. This new product advertising is a major source of the revenue that supports *Video Review*. From both an editorial and a financial perspective, continuing innovation in the home electronics industry is most important to the continuing vitality of *Video Review*.

The most important product newly developed within the past fifteen years for video use, the video tape recorder ("VTR"), is at the center of this dispute. Viare believes that it is imperative to encourage the development and distribution of new video products such as the VTR, as well as home electronic products in general. The decision in this case by the United States Court of Appeals for the Ninth Circuit, if permitted to stand, will have a directly contrary result. That decision will inhibit and thwart new technology. It must be reversed. For this reason, Viare respectfully submits this Brief, Amicus Curiae, in support of Petitioners Sony Corporation of America, *et al.* This Brief is submitted with the written consent of all parties on file with the Clerk of this Court.

Video Review is affiliated with *Consumer Electronics*, published by CES Publishing Corp. The two magazines share a common focus upon home electronic products. A Brief Amicus Curiae In Support of The Petition for Writ of Certiorari was filed by CES Publishing Corp. Several of the arguments made in that Brief are made at this time on behalf of Viare in this Brief.

II. SUMMARY OF ARGUMENT

The Court of Appeals for the Ninth Circuit held that home use of VTRs for recording, for private noncommercial purposes, programs broadcast free of charge, did not constitute a "fair use" of copyrighted materials. The Court of Appeals did not apply correctly the fair use doctrine either as that doctrine was enunciated in earlier cases or as that doctrine is set forth in Section 107 of the Copyright Revision Act of 1976, *17 U.S.C. § 107*. The Court of Appeals, contrary to the intent of the Congress, applied the fair use doctrine in a narrow manner, a manner hostile to new technology. This honorable Court should reverse the decision of the Court of Appeals and accord the fair use doctrine the flexible, equitable office for which it was created and enacted. Such a decision will encourage and promote the development of new technology.

III. ARGUMENT

A. The Holding of the Court Below That "Intrinsic Use" Cannot Constitute "Fair Use" Unjustifiably Constricts the Well-Established Scope of the Fair Use Doctrine.

I. The Decision Below Conflicts With Clear Legislative Intent Regarding the Proper Application of the Fair Use Doctrine.

a. No Single Factor of the Four Listed in Section 107 Is Sufficient to Preclude a Finding of Fair Use.

In addressing whether the use in the home of videotape recorders for the recording of publicly broadcast television programs constitutes a "fair use" of copyrighted programs within the meaning of *17 U.S.C. § 107*, the Court of Appeals for the Ninth Circuit emphasized that such recording is for the purpose of "intrinsic," rather than "productive" use. The use at issue is deemed "intrinsic," in that programs recorded by the VTR perform the same function as that provided by the original broadcasted copies: VTR copies, like the originals, enable private program viewing for the purpose of education or entertainment.

The court below, in response to the challenge of determining the correct application of the fair use doctrine in the context of this new technological frontier made possible by the VTR, stated baldly the proposition that "intrinsic use" cannot constitute "fair use": "Without a 'productive use', *i.e.*, when copyrighted material is reproduced for its intrinsic use, the... copying of the sort involved in this case precludes an application of fair use." *Universal City Studios, Inc. v. Sony Corporation of America*, 659 F. 2d 963, 971-72 (9th Cir. 1981).

The Court of Appeals' decision appears to dictate that a fair use analysis be two-staged. First, the inquiry is directed to the use of the reproduced work. Under the Court of Appeals' reasoning, finding the use to be "intrinsic" ends the analysis, because "fair use" is then deemed impossible. Only if the use is found to be not "intrinsic" would the Court of Appeals' analysis permit the inquiry to proceed to a traditional fair use analysis, employing the four illustrative criteria developed in the cases and set forth by Congress in *17 U.S.C. § 107. Universal City Studios, Inc. v. Sony Corporation of America, supra*, 659 F. 2d at 971-72. n1

n1 In *Jartech, Inc. v. Clancy*, 666 F. 2d 403 (9th Cir. 1982), decided by the United States Court of Appeals for the Ninth Circuit some three months after its decision in this case, the Ninth Circuit reiterated, with but slight modification, its conclusions that the inquiry is two-staged and that a finding of "intrinsic use" precludes a finding of fair use: "In *Sony*, this Court found that the use made by the alleged infringers was the same intrinsic use to which the copyright holders expected protection from unauthorized use. Such a finding is a strong indication of finding no fair use." *Jartech v. Clancy, supra*, 666

F.2d at 407.

The proposition that intrinsic use and fair use are mutually exclusive immediately works an unwarranted and inappropriate narrowing of the fair use doctrine. The two-stage analysis is inconsistent with the fair use doctrine. Indeed, by focusing on an aspect of the use made, the Court of Appeals has without so stating elevated above the others one of the criteria presented by Congress as illustrative. This Court should prevent any such erosion of the fair use doctrine.

In holding that intrinsic use "*precludes* an application of fair use," *Universal City Studios, Inc. v. Sony Corporation of America, supra*, 659 F. 2d at 972 (emphasis added), the Court of Appeals actually employed as a threshold test the first of the four fair use criteria listed in 17 U.S.C. § 107 -- "the purpose and character of the use...." It used this single test to dispose entirely of the question whether home VTR recording for private, noncommercial purposes constituted fair use.

Section 107 identifies four factors that are material to a determination that a particular use of copyrighted matter is a fair use. The first factor of the four directs a court conducting a fair use inquiry to consider "the purpose and character of the use, including whether such use is of a commercial nature...." The presence of a commercial use is to be weighed by the court against the conclusion that the use is fair. "Intrinsic" use is not mentioned in Section 107. However, although the statute expressly indicates that the characteristic of commercial use lessens the propriety of a finding of fair use, even the presence of the explicitly mentioned characteristic "commercial use" alone is insufficient to preclude a finding of fair use: "[T]he fact that a given use is 'of a commercial nature' does not necessarily negate a fair use determination...." 3 M. NIMMER, NIMMER ON COPYRIGHT § 13.05 (1981) (citing, e.g., *Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc.*, 626 F. 2d 1171 (5th Cir. 1980); *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F. 2d 303 (2d Cir. 1966), cert. denied, 385 U.S. 1009 (1967); *New York Times Co. v. Roxbury Data Interface, Inc.*, 434 F. Supp. 217 (D.N.J. 1977)).

In *Triangle*, the United States Court of Appeals for the Fifth Circuit rejected the reasoning of a district court decision strikingly similar to that of the Ninth Circuit here. The district court in *Triangle* had held the commercial purpose of the use under consideration to preclude a finding of fair use: "The [District] Court established what amounts to virtually a *per se* rule that commercial motive destroys the defense of fair use." *Id.* at 1175. The Court of Appeals in *Triangle* held that the preclusive nature of the rule applied by the lower court was incompatible with the intent of Section 107: "Clearly, § 107 makes commercial motive *relevant* to fair use analysis. But it is certainly *not decisive*." *Id.* at 1175 (emphasis added). The Court proceeded to analyze the question of fair use in terms of each of the criteria listed in Section 107 and concluded on that basis that the use at issue was fair, notwithstanding its commercial purpose.

Similarly, in *Meeropol v. Nizer*, 560 F. 2d 1061 (2d Cir. 1977), cert. denied, 434 U.S. 1013 (1978), the United States Court of Appeals for the Second Circuit held that a purpose of commercial gain, although relevant to the question whether the use under consideration was fair, did not *preclude* a finding of fair use. The court stressed that all of the factors listed in Section 107 "must be evaluated in concert." *Id.* at 1069.

It is thus well-established that the presence of a commercial use, which is specifically mentioned in Section 107 (1) as a factor that weighs against fair use, does not foreclose a finding of fair use. It follows *a fortiori* that the factor of intrinsic use, a subject on which the statute is silent, may not be applied to preclude a finding of fair use.

b. The Application of Arbitrary, Fixed Rules Is Antithetical to the Established Principle That Fair Use Analysis Should Be Equitable and Flexible.

The proposition applied by the court below that the sole characteristic of intrinsic use

precludes a use from being fair is itself an example of the rigid formulae that proper fair use analysis must reject: "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." *Meeropol v. Nizer, supra*, 560 F. 2d at 1068. n2

n2 The legislative history of 17 U.S.C. § 107 (1976) unambiguously states that that section embodies the judicial doctrine of fair use. "Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way." H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 66 (1976). Thus, the description of the fair use doctrine set forth in *Meeropol* pertains to the characteristics of the doctrine under the 1976 Copyright Act.

In spite of the well-established prohibition against arbitrary rules or fixed criteria, articulated in *Meeropol*, the rule applied below by the Ninth Circuit is manifestly both "arbitrary" and "fixed." The rule is arbitrary because there is no reason to suppose that intrinsic use, such as, for example, viewing a VTR recording of an educational program, is inherently less deserving of fair use protection than altered-purpose use, such as making wallpaper out of copies of pages of a telephone book.

The requirement that fair use analysis avoid the application of fixed criteria is a corollary of the notion that the fair use doctrine comprises an equitable rule of reason: "[S]ince 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." H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 65 (1976). The rule fashioned by the court below is "fixed" in that there is no suggestion in the court's language that it should be applied as a rule of reason on a case-by-case basis. Instead, the court's formulation commands that the factor of intrinsic use be deemed preclusive of fair use irrespective of variations in the application of the other enumerated criteria that invariably will occur under different factual conditions. Thus, the approach taken by the court below contravenes the well-established principle that fair use analysis should be flexible.

c. The Decision Below Should Be Reversed as It Contravenes the Intent of the Congress as Set Forth in 17 U.S.C. § 107.

The holding of the Ninth Circuit that intrinsic use is inconsistent with fair use is at odds with legislative intent. For example, the Congress which passed the 1976 Act "did not require independent use when finding home use sound recording to be fair use." *Universal City Studios, Inc. v. Sony Corp. of America*, 480 F. Supp. 427, 453 (C.D. Cal. 1979), *rev'd on other grounds*, 659 F. 2d 963 (9th Cir. 1981).

Moreover, Section 107 is intended both to embody the judicially fashioned doctrine of fair use as it existed at the time when the 1976 Act went into effect and to provide a framework for the continued evolution of the doctrine. n3 Notwithstanding the elusive definition of what the doctrine *is*, several assumptions about what it *is not* have remained constant in the cases that preceded the 1976 Copyright Act, in the legislative history of the Act, and, with the exception of the decision below, in the ensuing decisions rendered. No single factor precludes a finding of fair use; neither arbitrary nor fixed criteria inform whether a particular use is fair. The decision below is completely contrary to each of these foundational assumptions.

n3 See note 2, *supra*.

2. The Rule Applied Below Must Be Rejected Because It Restricts Public Access to Information.

As stated in Section III.A.1, *supra*, fair use analysis has been predicated consistently on the notion that no single criterion can be dispositive of the question whether a particular use is fair. The decision below, in holding the presence of a single factor to preclude a finding of fair use, disregarded the securely established prohibition against the application of narrow, arbitrary and fixed criteria in a fair use context. The impact of the Court of Appeals' error on the societal benefits provided by the fair use doctrine could be profound.

The purpose that animates the fair use doctrine is "to balance the author's right to compensation for his work, on the one hand, against the public's interest in the widest possible dissemination of ideas, on the other." Latman, "Fair Use of Copyrighted Works" 5 (Sen. Comm. on Judiciary Study No. 141960) *quoted in, Triangle, supra, 626 F. 2d at 1174*. If the decision of the court below is permitted to stand, the public's interest in obtaining the widest possible access to ideas will be severely impaired in honor of a rule that is not required for the protection of authors.

Implicit in the principle that no single factor is sufficient to preclude a finding of fair use is the judgment that the author's right to compensation for his work is adequately protected by the application of the fair use factors "in concert." The preclusive rule applied below therefore constricts the previously recognized scope of the right of the public to obtain access to ideas.

The Ninth Circuit approach would reject a fair use defense where, although the use is intrinsic, all of the other factors listed in Section 107 militate strongly in favor of a finding of fair use. This approach would prevail whether or not it was actually necessary to advance a countervailing interest in protecting the needs of an author. However, the only justification for reducing public access to information is the interest in assuring for authors the rewards necessary to stimulate continuing creative incentive. That interest, as stated above, has long been fulfilled without resort to a preclusive rule by the application of all four factors in fair use analysis. Thus, the preclusive rule enunciated below, by constricting the appropriate scope of fair use, restricts public access to information. It would do precisely that in cases where a fair use defense would prevail were all four factors considered, without being necessary to fulfill any need that may arise to augment the rewards of authorship. The Ninth Circuit rule thus improperly diminishes the public's right to the dissemination of ideas.

The harmful impact of the decision below will extend far beyond the realm of home VTR users. The rule articulated below will prevent *any* intrinsic use from comprising a fair use under Section 107. Moreover, the principle that an application of the first criterion of Section 107 can preclude a finding of fair use invites subsequent decisions to the effect that an application of any one of the remaining three criteria is sufficient to foreclose a finding of fair use. Such ramifications would constrict beyond recognition the present fair use doctrine, under which the rejection of a fair use defense must be predicated upon an application of all four criteria, and could restrict public access to information to an alarming and unnecessary extent.

3. The Rule Applied Below Discriminates Against New Technology.

The withdrawal of fair use protection that could occur, if the decision below were permitted to stand, would be particularly injurious in the area of new technology. The Ninth Circuit recognized that technological advances, "place[d] a strain on the fair use doctrine." *659 F. 2d at 971*. Despite that perception the court below did not give the fair use doctrine the flexibility and breathing space to which it is entitled. To the contrary, the Ninth Circuit appeared to be willing to impede technological development through an extremely narrow definition of the fair use doctrine.

Professors Latman and Gorman have observed that with the employment of new

technology "the entire work is usually taken." A. LATMAN & R. GORMAN, COPYRIGHT FOR THE EIGHTIES, 484 (1981). As has been stated earlier, the decision of the Ninth Circuit set forth a two-stage approach to the fair use doctrine; it created and simultaneously exalted the "intrinsic" versus "productive" use dichotomy. New technology through which "the entire work is usually taken" will not fare well under that test. The test created by the Court of Appeals will thus thwart the development of new technology.

Moreover, the Ninth Circuit showed that it had no inclination to encourage future technological advances. For example, although the Court of Appeals must have recognized that developments such as the VTR represent great investments of capital on research and development, it directed that:

"the district court should not be overly concerned with the prospective harm to appellees. A defendant has no right to expect a return on investment from activities which violate the copyright laws. Once a determination has been made that an infringement is involved, the continued profitability of appellees' businesses is of secondary concern." 659 F. 2d at 976.

4. The Absence of Precedent Must Not Weight Against a Conclusion of Fair Use Where New Technological Uses Are Concerned.

A central purpose of Section 107 is to apply the same expansive approach to fair use protection of uses enabled by technological advances as applied to uses known when the statute was enacted. Permitting the absence of precedent to weigh against a conclusion of fair use in evaluating new technological uses is, therefore, antithetical to the statute's purpose and intent. This unwarranted application of absence of precedent discriminates unfairly against new technological uses and will inhibit technological development under the guise of *stare decisis*.

The principle of *stare decisis* will tend to preserve an expansive approach to fair use insofar as there is further litigation involving the many uses already developed which were considered in decisions rendered during the last one hundred and forty years. n4 However, the safeguard of *stare decisis* will afford more limited protection when addressing apparently novel questions regarding the application of the fair use doctrine in the context of new technology. Thus, uses enabled by new technological devices will be particularly vulnerable to the restrictive impact of the decision below. That particularly acute danger is likely to foreshadow a discriminatory impact upon such uses. Such a discriminatory impact would frustrate a central purpose of Section 107, the provision of an equal quantum of protection to uses enabled by technological advances. As the legislative history of Section 107 states: "[T]here is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change." H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 66 (1976).

n4 The origin of the fair use doctrine has been traced to *Folsom v. Marsh*, 9 Fed. Cas. 342, 348, No. 4,901 (C.C.D. Mass. 1841). A. LATMAN & R. GORMAN, COPYRIGHT FOR THE EIGHTIES, 460 (1981).

As if to prove this point, the Ninth Circuit weighed the purported dearth of precedent regarding the relevance of intrinsic use to the issue of fair use and the purported distinctions between available precedent and the case before it in favor of its conclusion that the intrinsic use enabled by VTRs was not fair. *E.g.*, 659 F. 2d at 970. As stated in Section III.A.3, *supra*, the Congress that enacted 17 U.S.C. § 107 (1976) intended the fair use doctrine to accommodate uses enabled by technological advances: "[F]air use is a flexible tool which Congress specifically intended to handle new technologies." Note, *The Betamax Case: Accommodating Public Access and Economic Incentive in Copyright*

Law, 31 *STAN. L. REV.* 243, 254 (1979). The unavailability of precedent considering the fairness of uses enabled by previously undeveloped technology should not be deemed relevant to the issue whether such uses are fair.

If the absence of precedent is permitted to be weighed against a fair use defense where the new technological advances enable the use under consideration, the proponents of such uses, which were by definition undeveloped when prior cases were decided, would suffer an inherent disadvantage in maintaining a fair use defense. Such a discriminatory impact is manifestly arbitrary and at odds with the intent of the drafters of Section 107 to place new technological uses on an equal footing with more traditional uses in a fair use context: "The fluidity built into [Section 107] was designed to diminish the difficulty which arises when an innovation in technology makes possible new techniques of display that could not be contemplated by legislators in the year the statute was framed." *Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc.*, 445 F. Supp. 875, 880 (S.D. Fla. 1978), *aff'd*, 626 F.2d 1171 (5th Cir. 1980).ⁿ⁵ A mode of analysis that would operate to discriminate against new technology in a fair use context could have a stifling effect upon progress in that field.

ⁿ⁵ The decision of the Court of Appeals in *Triangle* is discussed in Section III.A.1.a., *supra*.

IV. CONCLUSION

The Court of Appeals for the Ninth Circuit, in holding that the home use of VTRs for recording, for private noncommercial purposes, programs broadcast free of charge, did not constitute a fair use, seriously misapplied the fair use doctrine. The application of that doctrine made by the Court of Appeals would inhibit the development of technologically new products. It would thwart innovation. This honorable Court should prevent that loss. It should accord the fair use doctrine the flexible, equitable role for which it was intended. The decision of the Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted,
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