

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

OCTOBER TERM, 1981

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

Brief of Amici Curiae Writers Guild of America, West, Inc.; Writers Guild of America, East, Inc.; Screen Actors Guild, Inc.; and Directors Guild of America, Inc., in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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TABLE OF AUTHORITIES

Cases

American Mutoscope & Biograph Co. v. Edison Mfg. Co., 137 F. 262 (C.C.D.N.J. 1905)

Edison v. Lubin, 122 F. 240 (3rd Cir. 1903)

Leon v. Pacific Tel. & Tel. Co., 91 F.2d 484 (9th Cir. 1937)

Meeropol v. Nizer, 560 F.2d 1061 (2d Cir. 1977), cert. den. 434 U.S. 1013

Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977)

Miscellaneous

Senate Report, Rep. No. 94-473, 94th Cong. 1st Sess., p. 65 (1965)

Statutes

Act of August 24, 2912, ch. 356, 37 Stat. 488, formerly 17 U.S.C. § 5(l) and (m)

Copyright Act of 1976, Sec. 106

Copyright Act of 1976, Secs. 107-118

United States Code, Title 17, Sec. 101

United States Code, Title 17, Secs. 106-118

United States Code, Title 17, Sec. 107

United States Code, Title 17, Sec. 201

Interest of Amici Curiae.

The above named amici, by their attorneys, respectfully file this Brief of Amici Curiae in opposition to the Petition for Writ of Certiorari of Sony Corporation of America ("Sony"). *

* Consent of the parties has been granted. Copies thereof are on file with the Court.

Amici are the collective bargaining representatives of thousands of individuals who create or contribute to the production of motion pictures and television films. Amici are collectively referred to hereafter as the "talent Guilds." The members of each amicus will be significantly affected by this case. More specifically:

THE WRITERS GUILD OF AMERICA, WEST, INC. and WRITERS GUILD OF AMERICA, EAST, INC., (both hereafter simply "WRITERS GUILD") are the collective bargaining representatives for all writers who are employed to write motion pictures and the entertainment portion of television programs. WRITERS GUILD members also sell literary materials for use in motion pictures and television. These writers are the creators of the dramatic shows, series, documentaries, motion pictures, and other programs which dominate television.

THE SCREEN ACTORS GUILD ("SAG") is the collective bargaining representative for all actors who are employed in motion pictures or films for television. SAG has over 50,000 members. These actors appear in the dramatic shows, series, motion pictures, and other programs which dominate television.

THE DIRECTORS GUILD OF AMERICA, INC. ("DGA") is the collective bargaining representative for directors, unit production managers, assistant directors, associate directors and stage managers who are employed in the production of motion pictures and television programs. Motion pictures and television programs cannot be produced without them. DGA has approximately 6,000 members.

Each of the talent guilds has industry-wide agreements with the three major television networks, with all the major motion picture and television producers, and with hundreds of other employers of writers, actors and directors in the motion picture and television industry.

Among the principal concerns of the talent guilds are to insure a fair return to creators of and performers in motion pictures and television and to protect economic benefits which have been achieved through collective bargaining in the unique industry which film entertainment is. The productive career of many employees in that industry is transient and fleeting. Actors flicker on the screen and many are gone from the network shows in a few seasons; the careers of directors experienced in particular genres are built on the shifting sands of trends and ratings; the literary creations of writers are devoured in the annual upheavals of network programming and public taste.

Through collective bargaining, the talent Guilds have provided for compensation to their members for reruns of television films which they have written, directed, or performed in and for additional compensation for the exhibition over television of motion pictures originally produced for theatrical exhibition. Such compensation is generally known as "residuals" and is the means for assuring reward for artistic accomplishment and achievement which is permanently captured in film and can be exploited in the future by the owner of the copyright. The product of the artist, like the words of a novelist, endures beyond publication and a single performance, and residuals constitute his reward for the subsequent exploitation of the film. Residuals have been at the heart of the collective bargaining agreements of the WRITERS GUILD, SAG and DGA since the 1950's, and residuals now constitute, for writers, actors and directors a major source of livelihood.

The talent Guilds believe that the protection of their members' residual payments, and the continued existence of the entertainment industry, are inextricably tied to the protection of the ownership and copyright of motion pictures and television films. Protection of copyright in motion pictures and television films is essential to continued creativity in our society. The Guilds believe that their experience and knowledge in these fields will provide the Court with a distinctive viewpoint on the protection which should be afforded to films which are broadcast over television and which are consequently the subject for wholesale, free-ride reproduction by the petitioners' devices. The point of view of the talent Guilds is the point of view of the creative community. It is for the preservation of copyright protection.

Summary of Argument.

Motion pictures and television films are protected by copyright. The Copyright Act permits discrete exceptions to the exclusive rights of the copyright owner, none of those exceptions includes, the right of third parties to indiscriminately and completely copy entire copyrighted works by videotaping of the works from telecasts made under restricted licenses. Creative talent in the film entertainment industry has relied upon the protection afforded the owners of the copyright by the Copyright Act and by the decisions of this Court. The rewards and compensation of creative talent, and that of numerous other groups and creators, and the survival of the industry itself, rest on the continuation of that protection. Copyright protection insures the diversity of entertainment and intellectual ferment which is indispensable to this society and has long been enforced by this Court.

TEXT: I.

MOTION PICTURES AND FILMS ARE PROTECTED BY THE COPYRIGHT ACT.

Motion pictures have been protected by the copyright statutes since the inception

of the motion picture industry. The courts found such protection even prior to the Copyright Act of 1903. *Edison v. Lubin*, 122 F. 240, 242 (3rd Cir. 1903) *American Mutoscope & Biograph Co. v. Edison Mfg. Co.*, 137 F. 262, 266 (C.C.D.N.J. 1905).

The 1912 Townsend Amendment to the Copyright Act of 1909 made the protection expressly a matter of statute. n1

n1 Act of August 24, 1912, ch. 356, 37 Stat. 488, formerly 17 U.S.C. § 5 (l) and (m).

The 1976 Copyright Act provides copyright protection to motion pictures under a comprehensive and explicit statutory system. See, e.g., 17 U.S.C. §§ 101, 106-118, 201.

II.

THE UNAUTHORIZED AND COMPLETE COPYING OF A COPYRIGHTED WORK, ESPECIALLY IN A FORM WHICH IS DESIGNED FOR REBROADCASTING OF THE WORK, IS AN INFRINGEMENT OF THE COPYRIGHT.

Section 106 of the Copyright Act gives the owner of the copyright the exclusive right to reproduce the work, and the exclusive rights to publicly perform and display it. In the case now sought to be reviewed, defendants-petitioners have mounted a frontal attack on these historical rights. The Copyright Act contains no exceptions to the owner's rights which would permit the wholesale copying which the Court of Appeal here has properly held to be a copyright infringement. The exceptions to the owner's rights are limited and are precisely spelled out in Sections 107 to 118 of the Act. None of these exceptions permits videotaping of motion pictures and television programs by Betamax or similar devices, whether in the home or elsewhere.

Petitioners attempt to ride on the shoulders of the fair use exception. 17 U.S.C. 107. But the fair use doctrine is simply not applicable; it has never been extended to the complete and wholesale copying of a work, especially copying in a form which permits subsequent performance and display of the work. See *Leon v. Pacific Tel. & Tel. Co.*, 91 F.2d 484, 486 (9th Cir. 1937) ("Counsel have not disclosed a single authority, nor have we been able to find one, which lends any support to the proposition that wholesale copying and publication of copyrighted material can ever be fair use."); and discussion in *Meeropol v. Nizer*, 560 F.2d 1061, 1068-71 (2d Cir. 1977), cert. den. 434 U.S. 1013. Defendants are not free "to film and broadcast a copyrighted dramatic work without liability to the copyright owner." *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 575 (1977).

None of the requirements of the fair use doctrine as established by 17 U.S.C. 107 can be met by this case. The purpose of reproduction for subsequent home or other use of dramatic or comedic motion pictures or television programs is wholly different from the purposes permitted and nurtured by the statute. Those purposes the statute carefully delineates to be "purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research," not entertainment. The four factors enumerated in the statute to be considered by the court also all have a cutting edge against permitting the complete copying of motion pictures and television programs. n2

n2 17 U.S.C. 107 reads in full as follows:

"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."

Amici understand that the parties, have briefed the scope of these factors and amici therefore do not elaborate on them in this brief.

III.

PUBLIC WELFARE IS ADVANCED BY COPYRIGHT PROTECTION.

Constitutional and legislative purposes combine to require copyright protection in this case. In *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 576-577 (1977), this Court stated:

Of course, Ohio's decision to protect petitioner's right of publicity here rests on more than a desire to compensate the performer for the time and effort invested in his act; for the protection provides an economic incentive for him to make the investment required to produce a performance of interest to the public. This same consideration underlies the patent and copyright laws long enforced by this Court. As the Court stated in *Mazer v. Stein*, 347 US 201, 219, 98 L.Ed. 630, 74 S. Ct. 460 (1954):

'The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in Science and useful Arts.' Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered.'

These laws perhaps regard the 'reward to the owner [as] a secondary consideration,' *United States v. Paramount Pictures*, 334 US 131, 158, 92 L Ed 1260, 68 S Ct 915 (1948), but they were 'intended definitely to grant valuable, enforceable rights' in order to afford greater encouragement to the production of works of benefit to the public. *Washingtonian Publishing Co. v. Pearson*, 306 US 30, 36, 83 L Ed 470, 59 S Ct 397 (1939). The Constitution does not prevent Ohio from making a similar choice here in deciding to protect the entertainer's incentive in order to encourage the production of this type of work. [citations]

The drafters of the Copyright Act of 1976 stated a similar principle to be applied to "isolated... infringements". In S.R. Rep. No. 94-473, 94th Cong. 1st Sess., at p. 65 (1965), the Senate Committee stated:

"Isolated instances of minor infringements, when multiplied many times, become in the aggregate a major inroad on copyright which must be prevented."

Mass infringement by Betamax copying of motion pictures and television programs threatens the industry and all creative personnel in it. The actors, the directors, the writers of such films as "On Golden Pond," "Raiders of the Lost Ark," and "Arthur", to mention but three diverse current films, are entitled to remuneration for their creative efforts. Their contracts with the producer-owners of the copyrights in those films secure such remuneration. Their remuneration is based upon the owner's exploitation of the copyright; indeed, by virtue of the talent guilds' collective bargaining agreements, the creative talent employed by the producer shares in the licensing fees derived from subsequent television exhibition of the copyrighted films. Such provisions have been included in each of the talent guilds' collective bargaining agreements for approximately 30 years. More recently talent is entitled to percentage of receipts from the sale of discs and cassettes of the films. n3 These provisions of the collective bargaining agreements rest upon the continuation of copyright protection of the films.

n3 Writers Guild of America -- AMPTP Agreements of 1977 and 1981, Articles 13, 15, 51.

Directors Guild of America -- AMPTP Agreements of 1978 and 1981, Articles 18 and 20.

Screen Actors Guild 1977 and 1980 Basic and Television Agreement (Part V, Sec. 3B, 1980).

In the case of writers who have contributed to the literary material for a motion picture or television film, only those writers who received credit on the screen (a matter also regulated by the collective bargaining agreement) receive residuals. Similarly, only the director who receives credit for directing the motion picture or television film receives residuals and, of course, only actors who have appeared in the motion picture or television film share in residuals based thereon.

Motion picture and television films record and preserve the artistic creations of writers, directors and actors, not merely the physical productions of the motion picture and television producers. Copyright protection enables all of the talent which combine in the creation and making of motion pictures and television films to receive a just reward for their creativity. The provisions of the collective bargaining agreements are direct reflections of the societal judgment that "encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.'" Zacchini, supra, 433 U.S. at 576.

Conclusion.

The doctrine of fair use is not a free ticket to wholesale copying and reshowing of complete motion pictures. The inability of our society to police millions of establishments and homes supports the conclusion that compensation for mass copyright infringement is appropriately to be imposed on the manufacturers and retailers of infringing devices. A proper regard for the rights of creators and copyright owners requires no less. The Petition for Certiorari should be denied and the case permitted to be properly determined by the trial court.

Respectfully submitted,

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