

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

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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 Support of Respondents.

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TABLE OF AUTHORITIES CITED

Cases

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

Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc., 600 F.2d 1184 (5th Cir. 1979)

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

Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968)

Goldstein v. California, 412 U.S. 546 (1973)

Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470

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

Mazer v. Stein, 347 U.S. 201 (1954)

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

Red Lion Broadcasting Co. v. FCC, 395 U.S. 367

Robert Stigwood Group, Ltd. v. O'Reilly, 346 F.Supp. 276 (Conn. 1972)

Roy Export Co. v. CBS, 672 F.2d 1095 (2nd Cir. 1982), cert. den. Oct. 4, 1982)

Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp., 562 F.2d 1157 (9th Cir. 1977)

Teleprompter Corp. v. Columbia Broadcasting System, Inc., 415 U.S. 394 (1974)

Triangle Publications v. Knight-Ridder, 620 F.2d 1171 (5th Cir. 1980)

Twentieth Century Music Corp. v. Aiken, 422 U.S. 151 (1975)

United States v. Bodin, 375 F.Supp. 1265 (W.D.Okla. 1974)

Wainright Securities, Inc. v. Wall Street Transcript Corp., 558 F.2d 91 (2nd Cir. 1977), cert. den. 434 U.S. 1014 (1978)

Walt Disney Productions v. Air Pirates, 345 F.Supp. 108 (N.D. Cal. 1972)

Walt Disney Productions v. Air Pirates, 581 F.2d 751 (9th Cir. 1978), cert. den. 439 U.S. 1132 (1979)

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

Zemel v. Rusk, 381 U.S. 1 (1965)

Constitution

United States Constitution, First Amendment

United States Constitution, Art. I, Sec. 8, Clause 8

Miscellaneous

Act of August 24, 1912, Ch. 356, 37 Stat. 488 (Formerly 17 U.S.C. Sec. 5(d) and (m))

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

Statute

United States Code, Title 17, Sec. 107

Treatise

Nimmer, Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?, 17 UCLA Law., Rev., p. 1180 (1980)

Interest of Amici Curiae.

The above named amici, by their attorneys, respectfully file this Brief of Amici Curiae in support of respondents. *

* Consent of the parties has been granted and is 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 "WGA") are the collective bargaining representatives for all writers who are employed to write motion pictures and the entertainment portion of television programs. WGA members also sell literary materials for use in motion pictures and television. WGA has over 6,000 members. 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 of entertainment film and television. 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, and on the premise that the finished product, the film, is protected by copyright, 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 and rerun over television of motion pictures originally produced for theatrical exhibition. Such compensation is generally known as "residuals." Residuals are, in effect, deferred wages, and are 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 in the film 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 WGA, 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. The broadest protection of copyright in motion pictures and television films is essential to continued creativity and to the dissemination of entertainment in our society. Protection should be afforded to films which are broadcast over television; they should not be subject to 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.

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 copy entire copyrighted works by videotaping of the complete works from telecasts made under restricted licenses.

Free speech comes, both philosophically and in time, before public access. Free speech is justified and protected by the widest dissemination of speech, but the public's right to know and the public's right to access are products of the right of free speech, not vice-versa. It undermines the First Amendment and the Copyright Act and places the cart before the horse to argue that the public's right of access compels a surrender or narrowing of the author's copyright.

The Court has approved the protection of an artist's entire performance and work on broad public policy basis. The Copyright Statute is the legislature's express approval of that policy with respect to motion pictures and films.

Creative talent in the film entertainment industry has relied upon the protection afforded to 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.

ARGUMENT.

I.

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.

A. The Purpose of the Copyright Clause.

Petitioners and their amici make much of the claim that copyright must ultimately benefit the public. Clause 8 of Art. 1. Sec. 8 of the Constitution reads:

"To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

What petitioners gloss over is the underlying philosophical premise of Clause 8.

The copyright clause is a recognition that, as in other areas of social endeavor, protection of private property is the best spur to social progress and well-being. n1 An author is rewarded for his labor by the grant of copyright protection, just as the manufacturer of an automobile is rewarded by the enforcement of other property laws. The author and the copyright owner are given this grant because the public will benefit from the creative activities of authors; that is, the copyright monopoly is a necessary ingredient for the creation of literary and artistic works. *Mazer v. Stein*, 347 U.S. 201, 219 (1954). Consequently, although the public interest is paramount, the definition of the author's rights is made by the copyright statute, and not vice versa as petitioners would contend. Stated otherwise; the assertion of the authors rights under the copyright statutes is not in derogation of the public interest; it is a necessary precondition to the public interest and benefit. Limitations on the authors' rights are determined by the exceptions written into the copyright statute and the fair use doctrine if that doctrine comes into play, not by the First Amendment. Petitioners would bypass the sine qua non of progress and permit exploitation of "writings and discoveries" without recognizing the exclusive rights of the authors and inventors.

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

B. Complete and Wholesale Copying of an Entire Work Is Not Protected by the Fair Use Doctrine.

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 does not extend 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 rebroadcast or 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.

C. The Trial Court's Findings of No Current Demonstrable Damage Do Not Prevent Relief.

Petitioners contend that no economic harm has been shown by respondents and that consequently the defense of fair use must be upheld. (Petition, pp. 30-31) This argument, like petitioners' First Amendment argument (see II, *infra*) reverses the order of proper analysis. The remarks of David Ladd, United States Register of Copyrights, to the American Bar Association, Section of Patent, Trademark and Copyright Law, August 10, 1982, directly answers petitioners' contentions. We reproduce Mr. Ladd's remarks as an Appendix here. As Mr. Ladd shows, "The bracing sweep of Section 106 rights is there precisely because Congress sought to avoid unanticipated, future, erosions of authors' rights as had occurred under the 1909 Act." See 1965 Report of the Register, as extracted in Mr. Ladd's speech. As he states, "To posit, in any sense, a finding of 'fair use' on the absence of demonstrable present damages is to do nothing less than deprive copyright of any future life."

II.

NO FIRST AMENDMENT RIGHTS OF PETITIONERS OR OF THE PUBLIC ARE RESTRICTED BY AFFORDING RESPONDENTS COPYRIGHT PROTECTION OF THEIR FILMS AS HERE SOUGHT.

A. The Public's "Right to Receive" Is Not in Conflict With Copyright Protection.

The First Amendment is not implicated or threatened in the slightest by upholding

the rights of the copyright owners, and the semantic decoration of the issue by petitioners and their amici should not mislead the Court. n3

n3 Petitioners emphasize "time shifting" (e.g., Brief for Petitioners, pp. 4-6; Brief of Amicus Curiae Sanyo Electric, Inc., pp. 2 and II); "delayed viewing or time shifting" (Brief of Amicus Curiae Pfizer, Inc., pp. 7, 12, 16; Brief of Amici Curiae Minnesota Mining & Mfg. Co., et al., pp. 9, 15, 20-21); "the public's right to receive free off-the-air TV" (Brief for Petitioners. p. 24); the public's "right to receive information and ideas" (Brief of Amici Curiae Minn. Mining & Mfg. Co., et al., p. II); "the right to receive speech" (Brief of Amici Curiae Virginia Citizens Consumers Council, Inc., et al., p. 5) and "the public's right of access to copyrighted materials" (Brief of Amicus Curiae American Library Assn., p. 10). This improperly camouflages the basic question in this case with the mantle of the First Amendment.

The argument is made that there is a paramount "right to receive" which is the determinative weight in deciding whether VCR recording is a fair use. The argument, however, stands the First Amendment and prior precedent on its head.

The public's right to receive is a *raison d'etre* for the right of free speech and for the expansion of diversity in speech, but the cases cited by petitioners and amici do not stand for an absolute right to receive information or entertainment which is independent of or superior to the right of expression. An author cannot be compelled to write, nor an orator to orate, because of the public's right to receive their work or oratory. Rather, it is the author's freedom of speech and his access to the means of communication which are the motor of the First Amendment.

Thus, petitioners' and their amici's use of this Court's rationale in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, especially at 390, is misplaced. The issue in *Red Lion* was the FCC's fairness rule. The fairness doctrine, which promotes diversity of expression and access to the airwaves, is justified by the needs of viewers and listeners and by the public imperative not to permit monopoly of the airwaves. The critical passage in *Red Lion* reads as follows:

"... No one has a First Amendment right to a license or to monopolize a radio frequency; to deny a station license because 'the public interest' requires it 'is not a denial of free speech.'..."

... There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves.

... This is not to say that the First Amendment is irrelevant to public broadcasting. On the contrary, it has a major role to play as the Congress itself recognized in § 326, which forbids FCC interference with 'the right of free speech by means of radio communication.' Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium. But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of

the viewers and listeners, not the right of the broadcasters, which is paramount. [citations omitted] It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee. [citations omitted]" (395 U.S. 389-390).

Similarly, a trilogy of cases heavily relied upon by petitioners and their amici rest entirely on a different bottom from this case.

Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968);

Teleprompter Corp. v. Columbia Broadcasting System, Inc., 415 U.S. 394 (1974);

Twentieth Century Music Corp. v. Aiken, 422 U.S. 151 (1975).

In each of those cases the audiences receiving the original broadcasts were simultaneously expanded to include additional viewers or listeners; the audience which was enlarged (cable TV, CATV, public place reception) saw or heard the broadcast simultaneously with the audience for whom enlargement was not required. The cases are simply illustrations of the fact that the networks and the broadcasting stations have no control over who listens to or sees their programs when the programs are broadcast. Respondents here similarly have no control, and do not seek it. What is asserted here is the protection of the copyright statutes that the program shall not be copied and replayed thereafter at the whim and discretion of the copier and without compensation to the copyright owner. The issue presented here was not involved in the slightest in Fortnightly, Teleprompter, or Aiken.

Petitioners' and their amici's cases cited in support of the unquestioned right of the public to receive speech are not copyright cases. The right of the public to receive diverse speech is a reason for societal pressure for the most complete freedom of speech; it is not a defense to a violation of copyright. The public is being restrained from the act of copyright infringement. The public's First Amendment rights are not being infringed. Compare *Zemel v. Rusk*, 381 U.S. 1, 16-17 (1965):

"We must agree that the Secretary's refusal to validate passports for Cuba renders less than wholly free the flow of information concerning that country. While we further agree that this is a factor to be considered in determining whether appellant has been denied due process of law, we cannot accept the contention of appellant that it is a First Amendment right which is involved. For to the extent that the Secretary's refusal to validate passports for Cuba acts as an inhibition (and it would be unrealistic to assume that it does not), it is an inhibition of action. There are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow. For example, the prohibition of unauthorized entry into the White House diminishes the citizen's opportunities to gather information he might find relevant to his opinion of the way the country is being run, but that does not make entry into the White House a First Amendment right. The right to speak and publish does not carry with it the unrestrained right to gather information." (381 U.S. at 16-17). n4

n4 Emphasis has been added to quotations, and footnote references have been omitted, unless otherwise indicated.

B. The Distinction Which Is the Premise of the Copyright Law, Namely, the

Distinction Between Ideas and Expressions, Avoids Any Infringement of First Amendment Rights.

The most recent discussions by Courts of Appeals of the alleged copyright-First Amendment dichotomy are contained in *Triangle Publications v. Knight-Ridder*, 626 F.2d 1171 (5th Cir. 1980), (see especially concurring and dissenting opinion by Judge Brown); and *Roy Export Co. v. CBS*, 672 F.2d 1095 (2nd Cir. 1982), (cert. den. Oct. 4, 1982). Judge Newman summarized the prior cases and the rule in the Second Circuit as follows:

"No Circuit that has considered the question, however, has ever held that the First Amendment provides a privilege in the copyright field distinct from the accommodation embodied in the 'fair use' doctrine. [Citations] n5 In this Circuit, while we have acknowledged in passing the conceivable occurrence of some 'rare,' 'almost unique' circumstance, such as those surrounding the Zapruder film, in which 'it is at least arguable that the informational value of [the] film cannot be separated from the photographer's expression,... thereby indicating that both should be in the public domain,' *Iowa State University Research Foundation v. American Broadcasting Cos.*, 621 F.2d 57, 61 n.6 (2d Cir. 1980), we have also stated the general rule that '[c]onflicts between interests protected by the first amendment and the copyright laws thus far have been resolved by application of the fair use doctrine,' *Wainright Securities, Inc. v. Wall Street Transcript Corp.*, supra, 558 F.2d at 95." (672 F.2d at 1099)

n5 The cases cited by Judge Newman are: *Dallas Cowboys Chcerleaders, Inc. v. Scoreboard Posters, Inc.*, 600 F.2d 1184, 1188 (5th Cir. 1979); *Walt Disney Productions v. Air Pirates*, 581 F.2d 751, 758-59 (9th Cir. 1978), cert. den. 439 U.S. 1132 (1979); *Wainright Securities, Inc. v. Wall Street Transcript Corp.*, 558 F.2d 91, 95 (2nd Cir. 1977), cert. den. 434 U.S. 1014 (1978).

Judge Brown in *Triangle Publications v. Knight-Ridder*, 626 F.2d 1171 (5th Cir. 1980) concludes that the First Amendment does not come into play because the "idea-expression dichotomy" which underpins all copyright itself provides a workable balance between copyright protection and free speech interests. He relies upon the formulation by the Ninth Circuit and Professor Nimmer. At 1179 of 626 F.2d he states:

This "idea-expression dichotomy" is carried forward in the 1976 Copyright Act. Thus § 102(b) makes clear that copyright protection does not extend to the idea itself. This notion is further articulated in the legislative history. For example, the House Report states: "Wide departures or variations from the copyrighted work would still be an infringement as long as the author's 'expression' rather than merely the author's 'ideas' are taken." House Report, at 61; U.S. Code Cong. & Admin. News, at 5675. The "idea-expression dichotomy" generally provides a workable balance between copyright and free speech interests. As the Ninth Circuit has stated:

[T]he idea-expression dichotomy... serves to accommodate the competing interests of copyright and the first amendment. The "marketplace of ideas" is not limited by copyright because copyright is limited to protection of expression. As one commentator has stated: "[T]he idea-expression line represents an acceptable

definitional balance as between copyright and free speech interests. In some degree it encroaches upon freedom of speech in that it abridges the right to reproduce the 'expression' of others, but this is justified by the greater public good in the copyright encouragement of creative works. In some degree it encroaches upon the author's right to control his work in that it renders his 'ideas' per se unprotectible, but this is justified by the greater public need for free access to ideas as part of the democratic dialogue." Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 U.C.L.A.L.Rev. 1180, 1192-93 (1970). Cf. *Lee v. Runge*, 404 U.S. 887, 892-93, 92 S.Ct. 197 [200], 30 L.Ed.2d 169 (1971) (Douglas, J., dissenting).

Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp., 562 F.2d 1157, 1170 (9th Cir. 1977).

As Judge Brown points out in his footnote (2), relying on footnote (13) of this Court's opinion in *Zacchini* (433 U.S. at 577-78), "the Supreme Court has given at least its general approval to the 'idea-expression dichotomy' principle."

The result below places no restraint on the public's right to receive television broadcasts. That right remains the same as it was before the advent of VCR. To restrain the public from copying the entire program and replaying it at the public's convenience or commercially does not restrict the public's right to receive any broadcast, and clearly no restraint whatsoever is placed "on the use of an idea or concept." *United States v. Bodin*, 375 F.Supp. 1265, 1267 (W.D. Okla. 1974); *Walt Disney Productions v. Air Pirates*, 345 F.Supp. 108, 115 (N.D. Cal. 1972); *Robert Stigwood Group, Ltd. v. O'Reilley*, 346 F.Supp. 276 (Conn. 1972); Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA Law. Rev. 1180 (1980).

In footnote 13 in *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 577, the Court quoted from *Kewance Oil Co. v. Bicron Corp.*, 416 U.S. 470, 479, language which makes it clear that it is the copyright statute and not the First Amendment which governs this case:

"Just as the States may exercise regulatory power over writings so may the States regulate with respect to discoveries. States may hold diverse viewpoints in protecting intellectual property relating to invention as they do in protecting the intellectual property relating to the subject matter of copyright. The only limitation on the states is that in regulating the area of patents and copyrights they do not conflict with the operation of the laws in this area passed by Congress..."

III. PROTECTION OF AN ENTIRE PERFORMANCE OR WORK RESTS ON PRINCIPLES EVEN MORE BASIC THAN THOSE CONTAINED IN THE COPYRIGHT STATUTES.

What VCRs record, and what they reproduce and replay for exhibition, are the entire works, the entire expression, the entire product of literary, acting, directing and production creativity. Not ideas alone, but the whole expression, the complete work, is appropriated and reproduced for display at the whim of anyone with a VCR. The copyright statute and even more basic policy prohibit such entire and wholesale reproduction and replay.

Goldstein v. California, 412 U.S. 546 (1973), and *Zacchini v. Scripps-Howard*

Broadcasting Co., 433 U.S. 562 (1977), addressed the question in a different setting.

At the time of Goldstein, the copyright law provided no protection to the artist and producer of musical recordings; a recording by Pavorotti, for example, could be reproduced at will by anyone. The State of California moved into the vacuum; California made it a crime to copy without permission the records or tapes of another with the intent to sell the duplicated recordings so made. This Court upheld the statute as not in violation of the copyright act as it then existed or of the supremacy clause of the Constitution. The Chief Justice stated for the majority:

"But there is no fixed, immutable line to tell us which 'human productions' are private property and which are so general as to become 'free as the air.' In earlier times, a performing artist's work was largely restricted to the stage; once performed, it remained 'recorded' only in the memory of those who had seen or heard it. Today, we can record that performance in precise detail and reproduce it again and again with utmost fidelity. The California statutory scheme evidences a legislative policy to prohibit 'tape piracy' and 'record piracy,' conduct that may adversely affect the continued production of new recordings, a large industry in California. Accordingly, the State has, by statute, given to recordings the attributes of property. No restraint has been placed on the use of an idea or concept; rather, petitioners and other individuals remain free to record the same compositions in precisely the same manner and with the same personnel as appeared on the original recording." (412 U.S. at 570-571).

Similarly, the copyright statute evidences a legislative policy to prohibit copying and recording that may adversely affect the continued production of a large industry and activity, namely, the production and distribution of films for motion pictures and television. The owner of the copyright is given the exclusive right to reproduce the film and the numerous other rights afforded by the copyright statute. This is done to advance the greater public good by encouragement of creative works through copyright protection. There is no limitation on the public's free access to or use of ideas or concepts.

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 U.S. 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 U.S. 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 U.S. 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]" (Emphasis added).

The drafters of the Copyright Act of 1976 stated a similar principle to be applied to multitudinous "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 "E.T.," 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 a percentage of receipts from the sale of discs and cassettes of the films. n6 These provisions of the collective bargaining agreements rest upon the continuation of copyright protection of the films.

n6 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 public good is the long range consequence of the direct and immediate means used by the Copyright Act, namely the protection of the potential for reward for creative production.

The primacy of the First Amendment in fact mandates that the Copyright Act be enforced. It is through the Copyright Act that expression of reasoned and elaborate opinion is promoted. The ideas of political philosophers and of all writers are free to be taken and discussed as the public wishes. Their books, however, and their films, cannot be reproduced in their entirety and by the millions without violation of the Copyright Act. Suppose Locke and Hobbs, published and copyrighted "Of Civil Government" and "Leviathan" today. Their ideas could be fully appropriated; but could the books themselves be entirely and freely reproduced without their consent? If Shakespeare wrote "Romeo and Juliet" for the television screen today, and the film was produced at great expense and copyrighted, could millions reproduce it and replay it at their whim?

The doctrine of fair use is not a free ticket to wholesale copying and reshewing 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 received from the manufacturers and retailers of infringing devices.

A proper regard for the rights of creators and copyright owners requires no less. The opinion of the Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX.

Remarks of David Ladd.

United States Register of Copyrights to the American Bar Association Section of Patent, Trademark and Copyright Law.

San Francisco, California -- August 10, 1982.

ECONOMIC HARM: A TROJAN HORSE IN COPYRIGHT.
For Release August 10, 1982, 3:00 p.m. EST

Today I'd like to talk about a dangerous concept now emerging as a philosophical basis for copyright protection. This concept -- "economic harm" -- may alter and could destroy the role of copyright as a principal mechanism for fostering intellectual activity. Historically, there have been various justifications for copyright protection in Anglo-American and other legal systems. Even the most pedestrian explanation, however, cites copyright as an essential incentive to further creation.

The notion that "economic harm" should serve as a basis for copyright is bizarre: its application demands that creators demonstrate economic losses in order to justify copyright. A corollary of this view is that absent a showing of "harm" which is causally related to a particular activity, the activity should not be made subject to proprietary controls under copyright. It's not a hard-and-fast rule yet, but it keeps raising its head.

The Betamax litigation and the various Congressional hearings on off-air taping legislation, and the public debate which have attended them, compel us to focus on the meaning of "harm" in copyright. It is important to identify it, assess its significance, and grasp its danger.

Harm is not a separate element of the tort of copyright infringement; to establish a copyright infringement case, one need prove only ownership and copying. (That is often hard enough since proof of copying is frequently inferential.) Nonetheless, "harm," particularly palpable monetary damage, has wrongfully intruded itself into the calculus of liability.

In the Williams and Wilkins case, the first reason given by the Court of Claims majority in finding non-infringement was: "Plaintiff has not in our view shown and there is inadequate reason to believe, that it is being or will be harmed substantially by these specific practices...." The Betamax trial court's reliance upon this "logic" produced a similarly narrow view of "harm" and imposed upon the plaintiff a burden which drew specific criticism from the Court of Appeals when it reversed the judgment.

A handful of cases do not a body of jurisprudence make; but in photocopying, home taping, and educational uses, we see repeated patterns of argument, of framing issues for resolution. In these areas, the battle lines on present and prospective liability have been drawn, in courts and Congress, around the fourth statutory criterion of fair use: "The effect of the use upon the potential market for or value of the copyrighted work."

Two concepts are embodied in this test of fair use: effect upon "the value" of the copyrighted work and effect upon "potential markets." To be applied in a manner consistent with the fundamental purposes of § 106, these two concepts must neither be confused nor merged into a kind of general economic impact analysis. That is not what the law calls for.

While the "value" of a copyrighted work obviously could include future uses, I believe the specific reference to "potential" underscores the need to secure future markets from pre-emption, and leaves their exploitation to the designs of the copyright owner. The import is that potential markets may be as valuable as those

presently exploited. Too narrow a view of adverse market impact may simply have the effect of destroying anticipated markets. Consequently, the concept of "potential market" in "fair use" should be as broad as the exclusive rights in § 106 allow.

There are understandable tactical reasons for a defendant to try to saddle a plaintiff with a vague and frustrating "burden" to demonstrate actual or potential harm in an infringement case. If, as in *Williams and Wilkins*, the burden goes to establishing a cause of action, the results can be devastating. When the context is the defense of "fair use," then the results can be equally crippling if mere invocation of the defense requires the plaintiff to demonstrate harm.

What interests me about economic harm and the rationale of copyright, however, transcends the confines of a judicial controversy. Economic harm also has been an important element in the Congressional off-air taping debate. It will likely be employed in the context of other technological uses of copyrighted works as well. The legislature, of course, may legitimately consider factors -- such as harm -- in a manner different from a court. But in either forum any consideration of harm should be based upon certain and definite standards.

There is no satisfactory consensus about the meaning of harm. If the concept is to be treated seriously, the following issues must be confronted:

1. What is meant by harm?
2. What kind of harm justifies payment for use of copyrighted works?
3. And who should bear the burden of proof -- in the courts or the legislature -- the creators who hold broad exclusive rights in their works or those who wish to use them without payment or permission?

Congressional examination of the home taping question has generated a consultants' bonanza in which both sides are trying to establish by survey the presence or absence of harm: how much "librarying" goes on, whether time-shifting devalues broadcast advertising time, or whether there is an "unhealthy" relationship between taping and the emerging cassette rental and sale markets.

If those who are opposed to copyright liability for off-air taping are clamoring for some evidence of "harm" as a prerequisite for legislative relief, it is necessary to ask: "what do you mean by harm?" The answer is not clear. Not even the various possible answers are clear.

Everyone would agree that bankruptcy and massive business failures in copyright industries represent "harm" (at least to the victims). There are, of course, other kinds of harm one can point to: one is a disappointment in earnings from one's present market base. Again, proving a causal relationship between current losses or failures to gain in profitability and a particular activity like home taping is very difficult. General economic conditions, changes in the broadcast market itself -- these are much more obvious contributors to making motion picture and television production less profitable.

Another sort of harm is a bit more difficult to categorize: a deterioration of position in regard to future markets, whether those markets are presently anticipated or not. Infact, the thrust of industry arguments in favor of some remuneration and control of

home taping has been largely directed toward the future.

This "harm" is quite different from "damages," and it properly reflects both the structure of the Copyright Act of 1976 and the wise way to set policy for the future. Unauthorized off-air taping prejudices the integrity of other emerging markets; it risks limiting the number of outlets from which substantial investments must be recouped.

Section 106 of the 1976 Copyright Act affords copyright owners extremely broad rights, limited only by express exemptions, including "fair use." The bracing sweep of Section 106 rights is there precisely because Congress sought to avoid unanticipated, future, erosions of authors' rights, as had occurred under the 1909 Act. This objective was eloquently explained in the 1965 Report of the Register:

A real danger to be guarded against is that of confining the scope of an author's rights on the basis of the present technology so that, as the years go by, his copyright loses much of its value because of unforeseen technical advances.

For these reasons, we believe that the author's rights should be stated in the statute in broad terms, and that the specific limitations should not go any further than is shown to be necessary in the public interest. In our opinion, it is generally true, as the authors and other copyright owners argue, that if an exclusive right exists under the statute a reasonable bargain for its use will be reached; copyright owners do not seek to price themselves out of a market.

In a judicial context, the concept of "potential market" under use must always be as extensive as the potential markets which broad exclusive rights were intended to secure. To posit, in any sense, a finding of "fair use" on the absence of demonstrable present damages is to do nothing less than deprive copyright of any future life. For the life of the author plus 50 years, an empty right would be provided. And, in Congress as well, the search for "harm" should consider the decision now embodied in the copyright law: that strong exclusive rights provide the flexibility and protection needed for copyright interests to function in the future.

Underlying the "economic harm" theory of copyright is a more sinister point-of-view: the idea that copyright is mere privilege. That, in the English-American tradition, may have been its origin -- copyright and patents as largesse of royal favor. But that is not the function of copyright: It is an instrument of right, around which not only the creation, but the production and distribution of creative works are offered, for acceptance or rejection, by the public. And the right therefore fosters not only creation, but realization, enjoyment, and enrichment. It safeguards the interests not only of authors, but entrepreneurs, investors, artists, and shopkeepers -- and ultimately the consumer. Moreover, it increasingly undergirds American preeminence in information and entertainment, and the vitality and viability of the society.

The strains on copyright are great. For the most part, they originate in rapid change in technology and in the order of markets. But the strains are doctrinal and ideological also; and in the preservation of the honored institution of copyright, already tested and vindicated by time, we must be resolute in turning back false doctrine and specious policy.