Docket Nos. 13-55156 (L), 13-55157, 13-55226, 13-5528

In the

United States Court of Appeals

for the

Ninth Circuit

FOX TELEVISION STATIONS, INC.,
TWENTIETH CENTURY FOX FILM CORPORATION
and FOX BROADCASTING COMPANY, INC.,

Plaintiffs-Appellees,

v.

AEREOKILLER, LLC, ALKIVIADES DAVID, FILMON.TV NETWORKS, INC.,
FILMON.TV, INC., and FILMON.COM, INC.,

Defendants-Appellants.

Appeal from a Decision of the United States District Court for the Central District of California, Case Nos. 12-cv-06921-GW-JC and 12-cv-06950-GW-JC · Honorable George H. Wu

BRIEF OF *AMICI CURIAE* INTELLECTUAL PROPERTY AND COPYRIGHT LAW PROFESSORS IN SUPPORT OF DEFENDANTS-APPELLANTS

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STATEMENT OF INTEREST

Amici curiae are law professors who teach and write about intellectual property law (including copyright law) at law schools, colleges, and universities throughout the United States. We have no personal stake in the outcome of this case; our interest is in seeing that copyright law is applied in a manner most likely to fulfill its Constitutional mandate "to promote the Progress of Science," U.S. Const., Art. I, § 8, cl. 8, taking into account both the protections afforded to, and the obligations imposed upon, copyright holders and users of copyrighted works.[1] A full list of amici is included in Appendix A.

ARGUMENT

Amici submit this brief with a single, narrow goal in mind: to remind the court that, as the Supreme Court has noted on numerous occasions, the limited grant of copyright reflects . . .

> . . . a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts. The immediate effect of our copyright law is to secure a fair return for an author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.

[1] Pursuant to Federal Rule of Appellate Procedure 29(c)(5), *amici* hereby certify that no party or party's counsel authored this brief in whole or in part; no party or party's counsel contributed money intended to fund preparation or submission of this brief; and no person other than *amici* contributed money intended to fund preparation or submission of this brief.

Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 431-2 (1984) (quoting *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975)); s*ee also*, *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 349 (1991) (the "primary objective of copyright is not to reward the labor of authors, but to 'Promote the Progress of Science and Useful Arts'") (quoting U.S. Const. Art. I, § 8, cl. 8). The "sole interest of the United States" lies not in authorial reward, but in "the general benefits derived by the public from the labor of authors," *Sony*, 464 U.S., at 429 (quoting *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932)), and when "technological change has rendered its literal terms ambiguous, the Copyright Act must be construed in light of this basic purpose." *Id.*, at 432 (quoting *Twentieth Century Music*, 422 U.S. at 156).[2]

From this foundational principle, the Court has derived a simple interpretive canon for construing ambiguities and silence in the Copyright Act in the face of "major technological innovations [that] alter the market for copyrighted materials," *id*, at 431: "[C]onsistent deference to Congress" and a "reluctance to expand the protections afforded by the copyright *without explicit legislative guidance*." *Id.* (emphasis added); *see also Metro-Goldwyn-Mayer Studios, Inc. v. Grokster*, 545

[2] See also, *id.*, at 429 ("The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved . . . motivat[ing] the creative activity of authors and inventors by the provision of a special reward, and allow[ing] the public access to the products of their genius after the limited period of exclusive control has expired").

U.S. 913, 957 (2005) (noting that "the copyright laws are not intended to discourage or to control the emergence of new technologies, including (perhaps especially) those that help disseminate information and ideas more broadly or more efficiently") (Breyer, J., concurring).

We respectfully submit that Professor (and former Register of Copyrights) Ralph Oman misstates this important interpretive canon in the *amicus* brief submitted in this action. Brief *Amicus Curiae* of Ralph Oman, Former Register of Copyrights of the United States (Case Nos. 12-cv-06921 GW(JCx) and 12-cv-06950 GW, (JCx), dated May 3, 2013) (hereafter, "Oman Brief"). Prof. Oman writes:

> If Congress wants to regularize the terms and conditions of Internet streaming, it is free to do so, *but the burden should not be placed on the creative industries to get some sort of congressional reaffirmation that the Transmit Clause applies to these Internet retransmissions*. . . . The courts should not saddle the copyright owner with having to convince Congress to act to prohibit unauthorized Internet retransmissions. *Whenever possible, when the law is ambiguous or silent on the issue at bar, the courts should let those who want to market new technologies carry the burden of persuasion that a new exception to the broad rights enacted by Congress should be established*. That is especially so if that technology poses grave dangers to the exclusive rights that Congress has given copyright owners. *Commercial exploiters of new technologies should be required to convince Congress to exempt them* expressly from copyright liability. Otherwise, the copyright owner should enjoy the normal right of authorizing that new use of their creative works. That is what Congress intended.

Oman Brief, at 16-18 (emphasis added). The sole precedent cited in support of this novel principle of statutory construction is Justice Blackmun's dissenting opinion in *Sony v. Universal City Studios, Inc*. *Id.*, at 18.[3] This is telling, for it was the majority opinion in that very case that expressly adopted the contrary position and rejected the position articulated by Justice Blackmun (and endorsed here by Prof. Oman).

The *Sony* case, like the case at bar, involved precisely the sort of revolutionary new technology (the VCR) to which Prof. Oman refers; one posing allegedly "grave dangers to the exclusive rights that Congress has given to copyright owners," Oman Brief at 17, and one that had clearly not been in Congress' contemplation when the text of the 1976 Copyright Act had been composed. In the face of statutory silence on the matter, the Court marked out a course of action that could not have been clearer: those who want to market new

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[3] *Id*., at 18. The passage quoted from Justice Blackmun's dissent by Prof Oman reads as follows:

> Like so many other problems created by the interaction of copyright law with a new technology, there can be no really satisfactory solution to the problem presented here, until Congress acts. But in the absence of a congressional solution, courts cannot avoid difficult problems by refusing to apply the law. We must take the Copyright Act as we find it and do as little damage as possible to traditional copyright principles until the Congress legislates.

Sony, 464 U.S. at 500 (1984) (Blackmun, J., dissenting).

technologies do *not*, as Prof. Oman suggests, "carry the burden of persuasion that a new exception to the broad rights enacted by Congress should be established." *Id.* On the contrary, if there is a burden of persuasion to be borne, it is the copyright owners who must bear it.

> It is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors or to inventors in order to give the public appropriate access to their work product. Because this task involves a difficult balance between the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society's competing interest in the free flow of ideas, information, and commerce on the other hand, our patent and copyright statutes have been amended repeatedly. . . . [and r]epeatedly, *as new developments have occurred in this country, it has been the Congress that has fashioned the new rules that new technology made necessary.* *Sony*, 464 U.S. at 429 – 430 (emphasis added).
>
> *The judiciary's reluctance to expand the protections afforded by the copyright without explicit legislative guidance* is a recurring theme. Sound policy, as well as history, supports *our consistent deference to Congress when major technological innovations alter the market for copyrighted materials.* Congress has the constitutional authority and the institutional ability to accommodate fully the varied permutations of competing interests that are inevitably implicated by such new technology. *Id.*, at 431 (emphasis added).
>
> *'The sign of how far Congress has chosen to go can come only from Congress.'* One may search the Copyright Act in vain for any sign that the elected representatives of the millions of people who watch television every day have made it unlawful to copy a program for later viewing at home, or have enacted a flat prohibition against the sale of machines that make such copying possible. *It may well be that Congress will take a fresh look at this new technology, just as it so often has examined other innovations in the past. But it is not our job to apply laws that have not yet been written.* *Id.*, at 456 (emphasis added) (internal citations omitted).

As the Court noted, it was merely reiterating a theme that had been sounded on numerous occasions throughout the history of copyright law's interaction with new technologies, beginning with the development of the printing press itself, *id.*, at 430 n. 12, and moving through the invention of the camera, *see Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 54 (1884) (deciding whether "photograph" was protected by copyright), the player piano, *see White-Smith Music Publ'g Co. v. Apollo Co*., 209 U.S. 1 (1908) (deciding whether mechanical piano rolls were within scope of copyright owners' exclusive reproduction right), radio, *see M. Witmark & Sons v. L. Bamberger & Co*., 291 F. 776 (D.N.J. 1923) (deciding whether radio broadcast was within scope of copyright owners' public performance right), cable television, *see Fortnightly Corp. v. United Artists Television, Inc*., 392 U.S. 390 (1968) (deciding whether cable retransmission was within scope of copyright owners' public performance right), and any number of other similar breakthrough technologies. As each new technology becomes widespread in the marketplace, copyright owners, facing judicial "reluctance to expand the protections afforded by the copyright without explicit legislative guidance [and] circumspect[ion] in construing the scope of rights created by a legislative enactment which never contemplated such a calculus of interests," *Sony*, 464 U.S. at 431, take their case to Congress, the institution charged with balancing the "competing claims upon the public interest" and possessing the "constitutional

authority and the institutional ability to accommodate fully the varied permutations of competing interests that are inevitably implicated by such new technology." *Id.*[4] The history of copyright is replete with many instances in which they were successful in persuading Congress that the balance of the public interest tips in their favor,[5] and many instances in which they were not.[6]

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[4]

> Judges have no specialized technical ability to answer questions about present or future technological feasibility or commercial viability where technology professionals, engineers, and venture capitalists themselves may radically disagree and where answers may differ depending upon whether one focuses upon the time of product development or the time of distribution.

Grokster, 545 U.S., at 958 (Breyer, J., concurring).

[5] *E.g.*, Congress overturned the Court's *White-Smith Music* decision in the Copyright Act of 1909, and the *Fortnightly* decision in the "secondary transmission" provisions of the 1976 Copyright Act, 17 U. S. C. § 111(d)(2)(B) and § 111(d)(5) (enacted "after years of detailed congressional study," *Sony*, 464 U.S. , at 430 n. 11).

[6] The movie industry, post-*Sony*, met with little success in its attempts to persuade Congress to overturn the Court's holding in the case; there was "little enthusiasm" among the peoples' elected representatives for "imposing a copyright tax on videocassette recorders or blank tapes." Jessica Litman, *The Sony Paradox*, 55 Case W. Res. L. Rev. 917, 952 (Summer 2005); *see also* Pamela Samuelson, *The Generativity of Sony v. Universal: The Intellectual Property Legacy of Justice Stevens*, 74 Fordham L. Rev. 1831 (March 2006).

In retrospect, the *Sony* case perfectly illustrates the wisdom of the Court's deferential approach; not only would the history of home entertainment and home entertainment technology in the late 20th century have been dramatically altered had the copyright owners been able to block distribution of VCRs but, as has often happened in the history of copyright, the new technology proved to be a substantial boon to the very industries that were attempting to inhibit its development. *See*,

Numerous post-*Sony* cases, in this Circuit and elsewhere, have adhered to this interpretive canon. *See, e.g., Sega Enters. v. Accolade, Inc.*, 977 F.2d 1510 (9th Cir 1992) (noting that the Copyright Act must be construed in light of its basic purpose "when technological change has rendered an aspect or application of the Copyright Act ambiguous," and rejecting copyright owner's attempt to construe Copyright Act to prohibit reverse engineering of computer programs because such a construction would "defeat[ ] the fundamental purpose of the Copyright Act - to encourage the production of original works by protecting the expressive elements of those works while leaving the ideas, facts, and functional concepts in the public domain for others to build on") (citing *Sony*, 464 U.S. at 432); *Eastern Microwave, Inc. v. Doubleday Sports, Inc*., 691 F.2d 125, 127 (2d Cir. 1982), *cert. denied*, 459 U.S. 1226 (1983) ("Confronted with the need to divine and apply the intent of Congress, and with a statute enacted in the technological milieu of an earlier time, we look to the 'common sense' of the statute . . ., to its purpose, [and] to the practical consequences of the suggested interpretations . . . for what light each inquiry might shed"); *Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 1126 F.3d 365 (2d

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e.g., Mark A. Lemley, *Is the Sky Falling on the Content Industries?*, 9 Telecomm. & High Tech. L. 125, 132-33 (Winter 2011); Michael A. Carrier, *Innovation for the 21st* Century, 128-30 (Oxford, 2009) (describing how videocassette revenues became the principal source of revenue for the movie industry within two years of the *Sony* decision). *See, generally*, Peter DiCola and Matthew Sag, *An Information-Gathering Approach to Copyright Policy*, 34 Cardozo L. Rev. 101 (2012) (collecting case studies).

Cir. 1997), *cert. denied*, 523 U.S. 1106 (1998) (relying on Justice Stewart's "concise discussion of the principles that correctly govern the adaptation of the copyright law to new circumstances" in *Twentieth Century Music, supra*); *Vault Corp. v. Quaid Software, Ltd.*, 847 F.2d 255 (5th Cir. 1988) (rejecting copyright owner's "narrow construction" of the exception contained in § 117 of the Copyright Act, 17 U.S.C. § 117, on the grounds that copyright owner's "appeal . . . must be made to Congress [because] 'It is not our job to apply laws that have not yet been written'") (quoting *Sony*, 464 U.S. at 456). It is supported by a broad swath of scholarly opinion as well.[7]

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[7]*See, e.g.*, Shyamkrishna Balganesh, *Foreseeability and Copyright Incentives*, 122 Harv. L. Rev. 1569, 1590-91 (April 2009) (describing how advances in technology that are unforeseeable to a copyright owner at the time a work is created often result in "copyright windfalls [that] allow creators to engage in monopolistic pricing in new markets that are unlikely to have formed a crucial part of their incentives in creating the work . . . . [and which] give creators control over markets that they clearly are not best positioned to develop . . . stifling innovation in the process"); James Boyle, *Intellectual Property Policy Online: A Young Person's Guide*, 10 Harv. J.L. & Tech. 47, 54 (Fall 1996) (arguing that copyright law has a tendency to "over-protect" when faced with revolutionary new technologies because "it is always easier to imagine an infringing use of a new technology than to imagine the ways in which the technology will lower costs and offer new markets"); Stacey L. Dogan, *Code Versus the Common Law*, 2 J. Telecomm. & High Tech. L. 73, 101 (Fall 2003) (legislature should require "clear evidence that existing legal tools cannot bring infringement to a manageable level" before expanding copyright owners' rights and remedies); William W. Fisher, III, *Copyright & Privacy – Through the Wide Angle Lens*, 4 J. Marshall Rev. Intell. Prop. L. 285, 287 (Winter 2005) (arguing that "the principal aspiration of law-makers and law-interpreters [should] be to organize [copyright law] doctrines in a fashion that would facilitate the emergence of new business models that would simultaneously capitalize on the opportunities of the new technologies while

avoiding and mitigating the accompanying hazards"); Kevin M. Lemley, *The Innovative Medium Defense: A Doctrine to Promote the Multiple Goals of Copyright in the Wake of Advancing Digital Technologies*, 110 Penn St. L. Rev. 111, 135 (Summer 2005) (summarizing the "rich history" of copyright owner protest against technological advances"); Mark A. Lemley, *Is the Sky Falling on the Content Industries?*, 9 Telecomm. & High Tech. L. 125, 132-33 (Winter 2011) ("innovation regimes in which no one can develop a new technology unless they get the collective permission of all the content owners whose content might be distributed with that technology are not going to work"); Mark A. Lemley & R. Anthony Reese, *Reducing Digital Copyright Infringement Without Restricting Innovation*, 567 Stan. L. Rev. 1345, 1350 (May 2004) (arguing that "[c]opyright owners have no incentive to permit optimal innovation by facilitators [of digital means of dissemination], because they do not benefit from that innovation, except indirectly"); Jessica Litman, *The Sony Paradox*, 55 Case W. Res. L. Rev. 917, 952 (Summer 2005) (describing background of Sony's attempts to find the "appropriate balance between copyright owners and innovators," and describing the post-*Sony* industry efforts to overturn the decision in Congress, which met with "little enthusiasm . . . for imposing a copyright tax on videocassette recorders or blank tapes"); Declan McCullagh, *Copyright & Privacy – Through the Political Lens*, 4 J. Marshall Rev. Intell. Prop. L. 306, 310-11 (Winter 2005) (describing the harm done to innovation by "requiring inventors to seek permission from the government before creating new products"); David McGowan, *Copyright Nonconsequentialism*, 69 Mo. L. Rev. 1, 6 (Winter 2004) (arguing that advancements in digital technology and the Internet "present Congress and the courts with an all-or-nothing choice: give authors virtually complete control of their works or allow virtually limitless consumer copying"); Peter S. Menell, *Envisioning Copyright Law's Digital Future*, 46 N.Y.L. Sch. L. Rev. 63, 163 (2002-2003) (describing how the "threat of new technologies" has often been the basis "for obtaining new legislation expanding rights and enforcement powers of copyright owners"); Pamela Samuelson, *The Generativity of Sony v. Universal: The Intellectual Property Legacy of Justice Stevens*, 74 Fordham L. Rev. 1831, 1849-55 (March 2006) (contrasting majority and dissenting opinions in *Sony*, and noting Sony's holding that "in the absence of a clear congressional direction about the legality of time shifting or other private copying or about liability of technology developers for infringing acts of users, the Court should construe the monopoly rights narrowly"); Sara K. Stadler, *Incentive and Expectation in Copyright*, 58 Hastings L.J. 433, 435-36, (February 2007) (describing the cycle of incentives and influence of copyright owners on the legislature and, consequently,

While we recognize that there may be reasonable disagreement about how this interpretive principle is to be applied with respect to any particular technology in any particular case, we respectfully urge this Court not to abandon the principle or the judiciary's traditional circumspection when asked to expand the protections afforded by the copyright without explicit legislative guidance.

CONCLUSION

The Copyright Act favors neither copyright owners nor technology innovators; it seeks the balance between them that best serves the *public* interest in the creation and dissemination of creative works of authorship. That balance is for Congress, ultimately, to strike. When the statute is silent or ambiguous on the copyright implications of a new technology– where Congress has not (yet) spoken on the question or performed the necessary and often-difficult balancing of competing interests – the court's role in construing the statute is not to produce maximum authorial reward, but maximum public benefit. Where that means (as it often does) that it is the copyright owners who must persuade Congress to address the matter and adjust the balance so that it tips more in their favor, they are entitled and well-equipped to do that, as they have done so often in the past.

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on the Copyright Act itself, and noting that "Congress increasingly relies upon stakeholders to propose (and even to draft) amendments to the Copyright Act").

Dated: May 16, 2013 Respectfully submitted,

s/ Mark A. Lemley
Professor Mark A. Lemley

Attorney for Amici Curiae
Intellectual Property and
Copyright Law Professors

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. This brief uses a proportional typeface and 14-point font, and contains 3,388 words.

APPENDIX A

Appendix A

LIST OF AMICI CURIAE INTELLECTUAL PROPERTY AND COPYRIGHT LAW PROFESSORS

Institutional affiliations are provided for identification purposes only, and imply no endorsement of the views expressed herein by any of the institutions or organizations listed.

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CERTIFICATE OF SERVICE

I hereby certify that on May 16, 2013, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Stephen Moore