IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 02-M-1662 (MJW)

ROBERT HUNTSMAN and
CLEAN FLICKS OF COLORADO, L.L.C.,

Plaintiffs,

and

VIDEO II, GLENN DICKMAN, J.W.D. MANAGEMENT CORPORATION, TRILOGY STUDIOS, INC., CLEANFLICKS, MYCLEANFLICKS, FAMILY SHIELD TECHNOLOGIES, LLC, CLEARPLAY INC., CLEAN CUT CINEMAS, FAMILY SAFE MEDIA, EDITMYMOVIES, FAMILY FLIX, U.S.A., L.L.C., and PLAY IT CLEAN VIDEO,

Counterclaim Defendants,

vs.

STEVEN SODERBERGH, ROBERT ALTMAN, MICHAEL APTED, TAYLOR HACKFORD, CURTIS HANSON, NORMAN JEWISON, JOHN LANDIS, MICHAEL MANN, PHILLIP NOYCE, BRAD SILBERLING, BETTY THOMAS, IRWIN WINKLER, MARTIN SCORSESE, STEVEN SPIELBERG, ROBERT REDFORD, SYDNEY POLLACK, METRO-GOLDWYN-MAYER STUDIOS, INC., TIME WARNER ENTERTAINMENT CO. L.P., SONY PICTURES ENTERTAINMENT, DISNEY ENTERPRISES, INC., DREAMWORKS L.L.C., UNIVERSAL CITY STUDIOS, INC., TWENTIETH CENTURY FOX FILMM CORP., and PARAMOUNT PICTURES CORPORATION,

Defendants and Counterclaimants,

and

THE DIRECTORS GUILD OF AMERICA,

Defendant in Intervention and Counterclaimant in Intervention

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BRIEF AMICUS CURIAE OF ELECTRONIC FRONTIER FOUNDATION IN SUPPORT OF PLAYER CONTROL PARTIES' MOTION FOR SUMMARY JUDGMENT

INTEREST OF AMICUS

Amicus Electronic Frontier Foundation is a leading membership-supported nonprofit public interest organization concerned with maintaining the proper balance in copyright law. Because Plaintiffs' copyright claims in this case threaten to impinge on the public's rights and upset the delicate statutory balance of copyright, Amicus respectfully request that the Court consider this brief in determining whether or not to grant Defendants' Motion For Summary Judgment as it pertains to the copyright claims at issue in this case.

I. INTRODUCTION

In fashioning the Copyright Act over the course of more than a century, Congress has struck a careful statutory balance between the rights of creators and the rights of the public. This is most readily apparent in the central feature of the statutory copyright scheme – the explicit list of exclusive rights set forth in 17 U.S.C. § 106: the right to reproduce a work, the right to distribute it, the right to make a derivate work, and the rights to publicly display and perform the work. 17 U.S.C. § 106. Conversely, Congress has reserved *all remaining uses* that do not intrude on these statutory rights to the public—for example, we do not need the permission of a copyright owner to read a book we own, or to sing along with the radio in our cars. *Twentieth Century Music v. Aiken*, 422 U.S. 151, 155 (1975); *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 393-395 (1968).

Defendants and Counterclaimants Metro-Goldwyn-Mayer Studios, Inc., Time Warner Entertainment Co. L.P., Sony Pictures Entertainment, Disney Enterprises, Inc., Dreamworks L.L.C., Universal City Studios, Inc., Twentieth Century Fox Film Corp., and Paramount Pictures Corporation ("The Studios") seek in this lawsuit to unlawfully usurp one of these rights – the right of private performance – from the public via an unprecedented expansion of the exclusive right to create derivative works. In their view, pre-scripted private performances of a store-bought DVD are somehow "derivative" works distinct and separate from the DVD itself. Such a theory finds no support in judicial precedents, directly contravenes both the statutory text of the Copyright Act and the writings of the United States Supreme Court, and would give copyright

holders control over the way we experience movies within the privacy of our own homes. For these reasons, Amicus respectfully asks the Court to grant Defendants' Motion For Summary Judgment and dismiss the copyright claims in this action.

II. COPYRIGHT LAW IS A CAREFUL BALANCE BETWEEN PRIVATE OWNERSHIP AND PUBLIC ACCESS

Copyright law is and always has been a balance between private rights of the copyright owner and the greater public interests that copyright serves. For example, the Constitution permits the grant of copyrights only for "limited times." U.S. CONST. ART. I, § 8, CL. 8. The "limited times" provision guarantees that copyrights will eventually expire, and that the public will ultimately receive the right to use all works created by authors. Copyright also balances the scope of its protection so as to limit only use of creative expression and not public access to underlying ideas or facts, thereby preventing copyright owners from removing vital knowledge and information from the public domain. *Feist Publ'ns v. Rural Tel. Ser. Co.*, 499 U.S. 340 (1991); *Graham v. John Deere & Co.*, 383 U.S. 1, 5-6 (1966) (noting that Congress may not authorize the removal of knowledge from the public domain or restrict free access to materials already available). Moreover, even where public use does tread upon the exclusive uses of the copyright owner, the First Amendment and other equitable considerations require that copyright law permit certain "fair uses" of protected works to benefit society. *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 549 (1985); 17 U.S.C. § 107.

These balances are not mistakes. Rather, they provide essential protection to ensure that copyright fulfills its mission of providing public access to information and cultural works of art. As the Supreme Court stated in *Harper & Row*, "copyright is intended to increase and not to impede the harvest of knowledge." 471 U.S. at 545. To reap such benefits, the public must not only be free to make unfettered use of works after the copyrights expire but also be permitted to make certain uses of works during the copyright term. As the *Harper & Row* Court explained, copyright "is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and *to allow the public access to the products of their genius*…." *Id.* at 546

(emphasis added).[1] Thus, promoting public access to information is as important to copyright as the exclusive rights it provides to copyright owners.

III. COPYRIGHT HOLDERS CANNOT CONTROL PRIVATE PERFORMANCES

A. SECTION 106 OF THE COPYRIGHT ACT EXPRESSLY DEFINES THE LIMITS TO WHAT A COPYRIGHT HOLDER CAN CONTROL

In an effort to ensure sufficient public access to copyrighted works, Congress made sure that the Copyright Act did not give the copyright holder absolute control over all possible uses of his work. *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 432 (1984); *Fortnightly*, 392 U.S. at 393-395. Rather, Congress wrote Section 106 of Title 17 to "enumerate[] several 'rights' that are made 'exclusive' to the holder of the copyright. If a person, without authorization from the copyright holder, puts a copyrighted work … to a use not enumerated in [Section 106], *he does not infringe*." *Fortnightly*, 392 U.S. at 393-395 (emphasis added). Thus, a copyright holder can only enforce those rights explicitly enumerated in Section

[1] Striving for balance between these goals has been a consistent theme in The Supreme Court's intellectual property cases. *See, e.g., Graham*, 383 U.S. at 9 ("The patent monopoly was not designed to secure to the inventor his natural right in his discoveries. Rather, it was a reward, an inducement, to bring forth new knowledge."); *Mazer v. Stein*, 347 U.S. 201, 219 (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 . . . ."); *see also Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 524 (1994) ("The primary objective of the Copyright Act is to encourage the production of original literary, artistic, and musical expression for the good of the public."); *Feist*, 499 U.S. at 349-50 (stating that the "primary objective of copyright" is to promote public welfare); *Stewart v. Abend*, 495 U.S. 207, 224, 224-25 (1990) (noting the Copyright Act's "balance between the artist's right to control the work . . . and the public's need for access"); *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 167 (1989) (noting the "careful balance between public right and private monopoly to promote certain creative activity"); *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (stating that the limited monopoly conferred by the Copyright Act "is intended to motivate creative activity of authors and inventors . . . and to allow the public access to the products of their genius…"); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (noting that "private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and other arts"); *Goldstein v. California*, 412 U.S. 546, 559 (1973) (discussing Congress's ability to provide for the "free and unrestricted distribution of a writing" if required by the national interest); *United States v. Paramount Pictures*, 334 U.S. 131, 158 (1948) ("The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of the authors.").

106 and nothing more.

Section 106 of the Copyright Act explicitly defines the five basic rights of a copyright holder: (1) reproduction; (2) distribution; (3) derivative works; (4) public performance; and (5) public display. 17 U.S.C. § 106(1)-(6). Notably included are the rights to *public* performance and *public* display; notably absent are <u>any</u> rights to *private* performance or *private* display. In fact, the Supreme Court has explicitly held that private performances do not infringe any of the enumerated rights under Section 106. *Aiken*, 422 U.S. at 155 ("No license is required by the Copyright Act, for example, to sing a copyrighted lyric in the shower.").

This distinction between *public* performances, on the one hand, and *private* performances, on the other, is a central feature of the statutory scheme. Congress intentionally defined "performance" very broadly. 17 U.S.C. § 101 (definition of performance). Even turning on the radio constitutes a "performance," *see* H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 52-53 (1976) at 63, as does singing in the shower, *see Aiken*, *supra*. However, Congress was also extremely careful to limit the copyright owner's dominion to *public* performances – thereby exempting myriad everyday activities that would otherwise violate a general performance right, such as reading a book aloud to one's children, singing in the shower, and watching television in your living room. *See Sony*, 454 U.S. at 468-9 (Blackmun, J., dissenting); *Aiken*, *supra*.

B. <u>WATCHING A DVD IN ONE'S HOME IS A PRIVATE PERFORMANCE OUTSIDE THE CONTROL OF COPYRIGHT OWNERS</u>

As noted above, copyright holders have no right to control how we perform a copyrighted work when such performance is within the privacy of our own homes. Section 101 of the Copyright Act explicitly states that to "perform" a work means "to recite, render, play, dance, or act it, either directly or by means of any device or process *or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible*." 17 U.S.C. § 101 (emphasis added).

Playing a DVD in one's home (even a so-called "edited" DVD) certainly involves showing its images in a sequential order and making at least some of its accompanying sounds

audible. In fact, the Player Control Technologies at issue in this litigation line up exactly with the language of the Copyright Act. Here, the Player Control Technologies simply provide a mechanism to determine the sequence of images to be shown to the family watching the video and/or whether or not to make the accompanying sounds audible. Thus, consumer use of the Player Control Technologies falls squarely within the Copyright Act's definition of "performance."

As to whether such performance is public or private, Section 101 defines two methods of performance that qualify as public:

> (1) to perform . . . it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or
>
> (2) to transmit or otherwise communicate a performance . . . of the work to a place specified by clause (1) or to the public, by means of any device or process…

17 U.S.C. § 101. Home performance for family and friends is not a public performance but a private one that is outside the scope of copyright owner control. This view is supported by the writings of the Supreme Court, as exemplified in Justice Blackmun's dissenting opinion from the seminal copyright case of *Sony v. Universal*:

> When Congress intended special and protective treatment for private use, moreover, it said so explicitly. One such explicit statement appears in § 106 itself. The copyright owner's exclusive right to perform a copyrighted work, in contrast to his right to reproduce the work in copies, is limited. Section 106(4) grants a copyright owner the exclusive right to perform the work "publicly," but does not afford the owner protection with respect to private performances by others. A motion picture is "performed" whenever its images are shown or its sounds are made audible. § 101. Like "[singing] a copyrighted lyric in the shower," Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 155 (1975), watching television at home with one's family and friends is now considered a performance. 1975 Senate Report 59-60; 1976 House Report 63. n17 Home television viewing nevertheless does not infringe any copyright … because § 106(4) contains the word "publicly." n18 See generally 1975 Senate Report 60-61; 1976 House Report 63-64; Register's 1961 Report 29-30.

Sony, 454 U.S. at 468-9; *Accord Columbia Pictures Indus., Inc. v. Prof. Real. Estate Investors, Inc.*, 866 F.2d 278 (9th Cir. 1989) (watching of laser discs by hotel guests constitutes a private performance).

The Studios here allege that the Player Control Parties have created an "unauthorized

edited version" of each DVD at issue. Motion Picture Studio Defendants' Statement Clarifying Claims ("Studio Clarification Statement") at 3. While the Studios have not been entirely clear about the precise nature of their claim, there appear to be only two possibilities. First, they appear to suggest that a derivative work is created when a person utilizes the Player Control Parties' technologies to automatically skip and mute objectionable portions of a DVD. Studio Clarification Statement at 5. Yet none of these "skipped" or "muted" versions are ever fixed in a tangible medium of expression, and Plaintiffs acknowledge that these "edited" versions of their film are perceived only if and when customers choose to employ the Player Control Technologies during a private performance of the DVD. The actual DVD itself is never altered or changed from its original form at any time. Thus the unauthorized "versions" to which the Studios object are really just unauthorized "performances" over which the Copyright Act grants them no control. Whether authorized by the copyright owner or not, any such performance is private and therefore authorized by law. Private performances, and the technology that enables them, cannot infringe the Studios' copyrights.

Moreover, it borders on disingenuous for the Studios to argue that a "version" of a work can become infringing based on the subjective perceptions of its audience during a performance. For example, suppose a parent plans to attend a play with a child. Before arrival, the parent learns of a precise point in the play that has loud explosive sound effects. Knowing that the child is sensitive to loud sounds, the parent covers the child's ears at that point. The child does not hear the explosions. Has the parent somehow created a derivative work of the play? Has the parent created an "unauthorized edited version" of the performance? We think not.

Yet this outcome is precisely what the Studios contend, for the rule they seek to apply against an individual's use of software could be applied as well to a parent exercising control over a child's viewing experience. For example, in response to Question 5 in their Studio Clarification Statement, the Studios argue that the version "which a consumer views while utilizing . . . the [Player Control Parties]' products is an infringing work." Studio Clarification Statement at 6. If this were true, then the version that a child views while his or her parents

cover her eyes is also an infringing work if the parent determined ahead of time to cover the child's eyes at a certain point in the film's plot. Under the Studios theory, both cases would be infringement; under common sense and copyright law, however, this cannot be what Congress intended.

Second, the Studios appear to allege that creating a computer-executable script of DVD and television commands, such as fast-forwarding and muting, is the same as creating a derivative work of the DVD. Studio Clarification Statement at 5-6. Adopting this theory would also impermissibly impinge on the private performance rights of public citizens. The Copyright Act defines "a computer program" in Section 101 as "a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result." If the Player Control Parties had provided a set of instructions directly to parents for them to carry out, rather than to the computer program for parents to use, indicating at which point to mute the sound, fast-forward through a scene, or cover a child's eyes, both the legal and *de facto* results would be identical. Yet the Studios' position condemns the parent just as certainly as the software. Accordingly, the Studios' response to Question 4 in their Statement Clarifying Claims argues that

> the unauthorized derivative works created by the [parents] include, without limitation, (1) the edited version (or versions) of a Studio's film which is created by the [parents] based upon the studios' copyrighted films, and (2) [the actions produced by the parents' muting, fast-forwarding or covering their child's eyes] based upon and derived from the Studios' copyrighted films and containing film-specific [cues for controlling] display devices (such as DVD players and computer DVD drives) for the playback of unauthorized edited versions of the studios' films.

In short, the Studios argue that the act of viewing a film in an unintended manner converts the work into a derivative work. But copyright law is not so tortured. The Copyright Act has never denied the reader the right to skip a page in a book, to close one's eyes during a movie, mute the sound for a given scene or copyrighted commercial, or to get up and go to the bathroom just as the murder's identity is being revealed. Nor does the Copyright Act prohibit a trusted neighbor from advising a parent which scenes to skip, to mute, or whether to watch a film at all. Thus it is

fully consistent with copyright law and policy to enable a parent to take advantage of modern technology and, instead of having to personally implement the instructions of a trusted neighbor who has seen the film, allow computer code to implement the instructions of a trusted company to adjust a private performance to the parent's preferences.

The Studios attempt to cloak the weaknesses of their argument by claiming that it is not the customer herself who is "editing" the performance of the DVD, but instead a "product" that has been preprogrammed to do so. Studio Clarifying Statement at 7. According to the Studios, copyright law is somehow to be applied differently in a digital world. Yet this argument fails to provide a distinction with any real difference. Congress has enacted numerous laws to address the changes brought about by digital technology. *See* Technology, Education, and Copyright Harmonization (TEACH) Act, Pub. L. No. 107-273, 116 Stat. 1758 (2002); Digital Millennium Copyright Act (DMCA), Pub. L. No. 105-304, 112 Stat. 2860 (1998); No Electronic Theft (NET) Act, Pub. L. No. 105-147; 111 Stat. 2678 (1997); Digital Performance Right in Sound Recordings Act (DPRA). Pub. L. No. 104-39, 109 Stat. 344 (1995). In each of these efforts, it has fully examined the impact that digital devices have on the current goals of copyright. Yet none of these bills have made a single change to the original balance between public and private performance that resides in Section 106. Given Congress' choice to retain the public/private performance balance as it is, this Court should not be lured into altering it in this case at the bequest of the Studios. *See Sony*, 454 U.S. at 431 (**"**Repeatedly, as new developments have occurred in this country, it has been the Congress that has fashioned the new rules that new technology made necessary. Thus, long before the enactment of the Copyright Act of 1909, 35 Stat. 1075, it was settled that the protection given to copyrights is wholly statutory…. The remedies for infringement 'are only those prescribed by Congress.'") (internal citations omitted).

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IV. CONCLUSION

For the foregoing reasons, Amicus Electronic Frontier Foundation respectfully requests the Court to grant Defendants' Motion for Summary Judgment and dismiss the copyright claims in this case.

DATED: June 18, 2003

Respectfully submitted,

ELECTRONIC FRONTIER FOUNDATION

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CERTIFICATE OF SERVICE

I certify that, on this ____ day of July, 2003, a true and correct copy of _____ was served via U.S. Mail, postage prepaid, upon the following:

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