ORAL ARGUMENT NOT YET SCHEDULED
No. 18-7141 (Consolidated with 18-7172)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ALLIANCE OF ARTISTS AND RECORDING COMPANIES, INC.,
on behalf of itself and all others similarly situated,
Plaintiff-Appellant,

v.

DENSO INTERNATIONAL AMERICA, INC.; FORD MOTOR COMPANY; CLARION CORPORATION OF AMERICA; GENERAL MOTORS LLC; MITSUBISHI ELECTRIC AUTOMOTIVE AMERICA, INC.; FCA US LLC,
Defendants-Appellees.

On Appeal from the United States District Court for the District of Columbia

---

BRIEF *AMICI CURIAE* OF THE COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION, THE CONSUMER TECHNOLOGY ASSOCIATION, ENGINE, THE CENTER FOR DEMOCRACY AND TECHNOLOGY, R STREET INSTITUTE, THE INFORMATION TECHNOLOGY INDUSTRY COUNCIL, AND THE ELECTRONIC FRONTIER FOUNDATION IN SUPPORT OF AFFIRMANCE

Jonathan Band
Counsel of Record
Jonathan Band PLLC
21 Dupont Circle NW, Suite 800
Washington, D.C. 20036
(202) 296-5675
jband@policybandwidth.com

May 29, 2019

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and *Amici*

All parties and intervenors appearing before the district court and in this Court are listed in the Briefs for Appellant Alliance of Artists and Recording Companies, Inc., and Appellees Denso International, Inc., Ford Motor Company, Clarion Corporation of America, General Motors, LLC, Mitsubishi Electric Automotive America, Inc., and FCA USA LLC. *Amici* appearing in this Court include the Digital Justice Foundation, the Computer & Communications Industry Association, the Consumer Technology Association, Engine, the Center for Democracy and Technology, R Street Institute, the Information Technology Industry Council, and the Electronic Frontier Foundation.

B. Rulings Under Review

References to the rulings at issue appear in the briefs for Appellant and Appellees.

C. Related Cases

The two consolidated district court cases appealed from are stayed pending this Court's decision on appeal. *Amici* are not aware of any related cases.

DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1, *amici* state:

1. The Computer & Communications Industry Association is a trade association representing companies in the computer and communications industry. It has no parent corporation and no publicly traded company has a 10% or greater ownership interest in it.

2. The Consumer Technology Association is a trade association representing companies in the consumer technology industry. It has no parent corporation and no publicly traded company has a 10% or greater ownership interest in it.

3. Engine is a technology policy, research, and advocacy organization. It has no parent corporation and no publicly traded company has a 10% or greater ownership interest in it.

4. The Center for Democracy and Technology is a nonprofit public interest organization. It has no parent corporation and no publicly traded company has a 10% or greater ownership interest in it.

5. The Information Technology Industry Council is a trade association representing companies in the information technology industry. It has no parent corporation and no publicly traded company has a 10% or greater

ownership interest in it.

6. R Street Institute is a nonprofit public policy research organization. It has no parent corporation and no publicly traded company has a 10% or greater ownership interest in it.

7. The Electronic Frontier Foundation is a nonprofit public interest organization. It has no parent corporation and no publicly traded company has a 10% or greater ownership interest in it.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE**

STATUTES AND LEGISLATIVE MATERIALS

OTHER MATERIALS

GLOSSARY

AARC	Appellant Alliance of Artists and Recording Companies
AHRA	Audio Home Recording Act
DAT	Digital Audio Tape
DMR	Digital Musical Recording
DJF	Amicus Digital Justice Foundation
SCMS	Serial Copy Management System

STATUTES

All applicable statutes are contained in the Briefs for Appellant and Appellees.

INTEREST OF *AMICI CURIAE*[1]

The Computer & Communications Industry Association ("CCIA") represents over twenty companies of all sizes providing high technology products and services, including computer hardware and software, electronic commerce, telecommunications, and Internet products and services—companies that collectively generate more than $540 billion in annual revenues.[2]

The Consumer Technology Association ("CTA") is the trade association representing the $398 billion U.S. consumer technology industry, which supports more than 18 million U.S. jobs. More than 2,200 companies—80 percent are small businesses and startups; others are among the world's best-known brands—enjoy the benefits of CTA membership including policy advocacy, market research, technical education, industry promotion, standards development and the fostering of business and strategic relationships. CTA also owns and produces CES—the world's

[1] No counsel for any party authored this brief in whole or part, no party or party's counsel contributed money intended to fund preparation or submission of this brief, and no person other than *amici curiae* or their counsel made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief.

[2] A list of CCIA members is available at https://www.ccianet.org/members.

gathering place for all who thrive on the business of consumer technologies. Profits from CES are reinvested into CTA's industry services.[3]

Engine is a technology policy, research, and advocacy organization that bridges the gap between policymakers and startups, working with government and a community of high-technology, growth-oriented startups across the nation to support the development of technology entrepreneurship. Engine creates an environment where technological innovation and entrepreneurship thrive by providing knowledge about the startup economy and constructing smarter public policy.

The Center for Democracy & Technology ("CDT") is a nonprofit public interest organization working to ensure that the human rights we enjoy in the physical world are realized online, and that technology serves as an empowering force for people worldwide. Integral to this work is CDT's representation of the public interest in the creation and use of technologies that promote the constitutional and democratic values of free expression, privacy, and individual liberty. CDT advocates balanced copyright policies that provide appropriate protections to creators without curtailing the unique ability of technology to empower users, speakers, and innovators. CDT has interest in preserving the technological neutrality of copyright law and

[3] A list of CTA's members is available at http://cta.tech/Membership/Membership-Directory.aspx.

ensuring that lawful uses of general purpose technologies are not unnecessarily restricted.

The Information Technology Industry Council ("ITI") is the global voice of the tech sector. We advocate for public policies that advance innovation, open markets, and enable the transformational economic, societal, and commercial opportunities that our companies are creating. Our members represent the entire spectrum of technology: from internet companies, to hardware and networking equipment manufacturers, to software developers.[4]

R Street Institute is a nonprofit, nonpartisan public policy research organization. R Street's mission is to engage in policy research and educational outreach that promotes free markets as well as limited yet effective government, including properly calibrated legal and regulatory frameworks that support economic growth and individual liberty.

The Electronic Frontier Foundation ("EFF") is a member-supported, nonprofit public interest organization dedicated to protecting civil liberties and free expression in the digital world. Founded in 1990, EFF represents more than 31,000 contributing members. EFF promotes the sound development of copyright law as a balanced legal regime that fosters

[4] A list of ITI members is available at https://www.itic.org/about/member-companies.

creativity and innovation. EFF's interest with respect to copyright law reaches beyond specific industry sectors and technologies to promote well-informed copyright jurisprudence. EFF has contributed its expertise to many cases applying copyright law to new technologies, as party counsel, as *amicus curiae*, and as court-appointed attorneys *ad litem*.

Expanding the scope of the Audio Home Recording Act in the manner advocated by Appellant Alliance of Artists and Recording Companies will place a heavy burden on manufacturers and consumers of computers and other devices far outside the Act's requirements.

SUMMARY OF ARGUMENT

The Audio Home Recording Act ("AHRA") targets what the music industry in 1992 considered to be an existential threat: digital audio tape technology. When it enacted the AHRA in 1992, Congress excluded computers from the AHRA's scope, at the insistence of the computer industry. More than 25 years later, Appellant Alliance of Artists and Recording Companies ("AARC") urges this Court to interpret the AHRA so broadly that it would apply to computers. Appellees in their opposition brief explain why AARC's overly broad interpretation is inconsistent with both the plain language and the legislative history of the AHRA. In this brief, *amici* stress the practical adverse impact of AARC's reading on the

computer and consumer electronics industries. Under AARC's interpretation, every computer that could store music would potentially have to comply with the AHRA's serial copy management requirements or be subject to significant statutory damages. Moreover, manufacturers could potentially have to pay the AHRA's levy for each of their computers. This would impose a heavy burden on consumers and manufacturers.

This brief provides three further reasons for construing the AHRA narrowly. First, the domain of a statute should be restricted to cases anticipated by its framers and expressly resolved in the legislative process. The technology at issue in this case was not anticipated by Congress in 1992. Second, the levy regime created by the AHRA reflects a European approach to private copying, and departs from the fair use approach adopted by the U.S. Supreme Court in *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) ("*Betamax*"). Thus, the AHRA should be confined to express terms. Third, the AHRA has been sharply criticized by commentators as an obsolete *sui generis* form of intellectual property protection that unnecessarily departs from the technological neutrality of the Copyright Act's core provisions. This Court should not expand the AHRA's scope.

ARGUMENT

Congress adopted the AHRA in response to the perceived threat that the digital audio tape technology posed to the music industry in the early 1990s. Its complex definitions were the result of extensive negotiations among stakeholders expressly intended to target the digital audio tape technology. In order to reach agreement, the negotiators specifically excluded computers from the kind of recording device that fell within the AHRA's scope.[5] In simplified terms, the AHRA applies to devices whose digital recording function is designed or marketed with the primary purpose of making a "digital musical recording." The definition of digital musical recording precludes a computer from constituting such a device. Section 1001(5)(B)(ii) provides that a "digital musical recording" does not include a material object "in which one or more computer programs are fixed." 17 U.S.C. § 1001(5)(B)(ii). A computer's hard drive stores the computer programs that run on the computer, including its operating system. Accordingly, music that is stored on a computer's hard drive along with the computer's programs does not meet the definition of a digital musical

[5] In this brief, a computer means a device with a central processing unit and non-removable memory such as a hard drive.

recording. This means that a computer does not produce digital musical recordings, and thus it does not fall within the scope of the AHRA.[6]

Notwithstanding the AHRA's carefully drafted narrow scope, Appellant AARC repeatedly urges this Court to interpret the AHRA broadly. Indeed, AARC uses the words "broad" or "broadly" nineteen times in its opening brief. AARC argues that the AHRA's definitions are sufficiently elastic that a computer could fall within the scope of the AHRA because its hard drive could be partitioned into distinct material objects containing distinct digital musical recordings—and no computer programs. Appellees in their opposition brief explain why AARC's "partition theory" was inconsistent with both the plain language and legislative history of the AHRA. In this brief, *amici* stress the practical adverse impact of AARC's reading on the computer and consumer electronics industries.[7] Under AARC's partition theory, every computer that could store music would

---

[6] The AHRA applies to "digital audio recording devices." A device is a "digital audio recording device" only if its digital recording function is designed or marketed for the primary purpose of making a "digital audio copied recording." 17 U.S.C. § 1001(3). A "digital audio copied recording" is a "digital musical recording" copied directly from another "digital musical recording" or indirectly from a transmission. 17 U.S.C. § 1001(1). A "digital musical recording" is a material object in which only sounds are fixed, but does not include a material object in which one or more computer programs are fixed. 17 U.S.C. § 1001(5).

[7] The policy arguments against AARC's partition theory apply with equal force against AARC's position that a digital audio copied recording is not by definition a digital musical recording.

potentially need to comply with the AHRA's serial copy management requirements or be subject to significant statutory damages. Furthermore, manufacturers would potentially need to pay the AHRA's levy for each of their computers that could store music.

This brief provides three additional reasons for construing the AHRA narrowly. First, as Judge Easterbrook emphasizes, the domain of a statute should be restricted to cases anticipated by its framers and expressly resolved in the legislative process. This is particularly the case with highly technical regulatory frameworks such as the AHRA. Second, the levy regime created by the AHRA reflects a European approach to private copying that departs from the approach adopted by the U.S. Supreme Court in *Betamax*. Thus, the AHRA should be confined to express terms. Third, the AHRA is a much-criticized departure from the technological neutrality of the Copyright Act's core provisions. It should not be expanded unnecessarily.

I. AARC'S PARTITION THEORY WOULD DISRUPT THE COMPUTER AND CONSUMER ELECTRONICS INDUSTRIES AND HARM CONSUMERS.

A. The District Court Correctly Recognized That AARC's Partition Theory Would Have an Adverse Impact on the Computer and Consumer Electronics Industries.

When rejecting Appellant's partition theory, the District Court observed that this "legal theory eviscerates any meaningful definition of a DMR and ultimately alters the careful balance that Congress struck with the AHRA's statutory scheme." *AARC v. General Motors Co*., 306 F. Supp. 3d 422, 441 (D.D.C. 2018). The District Court explained that under the partition theory, manufacturers "would have to satisfy the statute's requirements for all sorts of machines that are not only beyond the imagination of the AHRA's drafters, but also are expressly excluded by the very terms that these legislators specifically negotiated and ultimately adopted." *Id*.

The District Court is exactly right. Under the partition theory, the hard drive of any computer, from a smart phone to a mainframe, could be partitioned as a theoretical matter into separate material objects capable of constituting digital musical recordings. This could potentially require the manufacturer to comply with the AHRA's requirements. Compliance with the serial copy management system would be particularly burdensome. The

serial copy management system requires a device to search any data stream flowing through it for a flag indicating that the data is a first generation copy and therefore cannot by copied or disseminated. 17 U.S.C. § 1002(a). Manufacturers of digital audio tape recorders were willing to comply with this burden as part of a legislative compromise in order to bring their products to market. Computer manufacturers, however, believed that searching every data stream for a flag would impose significant performance penalties on their devices.[8] In particular, this searching could slow down the operation of certain computer functions. For this reason, computer manufacturers insisted that their products be excluded from the scope of the AHRA. *See Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc.*, 180 F.3d 1072, 1078 n.6 (9th Cir. 1999) (citing evidence that "the

[8] When a predecessor to the AHRA was pending before Congress, hearings centered on the efficacy of CBS Records' Copycode System. A signal embedded in a pre-recorded tape indicated that the recording was protected by copyright, directing a chip in the recording device not to make a copy. The Congressional committees asked the National Bureau of Standards to test the Copycode System. The Bureau reported that "the encoding process produced 'false positives,' and thus failed to permit the recording of unencoded material." S. REP. NO. 102-294, at 32 (1991) ("Senate Report"). Further, the system "adversely affected the quality of the sound, occasionally failed to prevent copying, and could easily be circumvented." H.R. REP. NO. 873, at 9 (1991) ("House Report"). *See also* Paul Goldstein, *Copyright's Highway: From Gutenberg to the Celestial Jukebox* 130 (2003). Since that experience, the computer and consumer electronics industries remain skeptical of copy protection systems that rely on legal mandates to comply with a signal rather than are self-protecting.

exclusion of computers from the Act's scope was a part of a carefully negotiated compromise between the various industries at stake, and without which, the computer industry would have vigorously opposed passage of the Act").[9] Instead, they preferred to operate under the *Betamax* fair use regime, discussed *infra* in section II.B.

Computer manufacturers rejected a "do not copy" flag system similar to the AHRA's serial copy management system for digital video, insisting instead that technical protection systems be based on encryption or scrambling, *i.e.*, that they be self-protecting. The anti-circumvention provisions of section 1201 of the Digital Millennium Copyright Act reflect the computer industry's aversion to technology mandates that involve responding to a "do not copy" flag. Section 1201(a)(3)(B) provides that a technological measure effectively controls access to a work "if the measure, in the ordinary course of its operation, requires the application of information, or a process or treatment, with the authority of the copyright owner, to gain access to the work." 17 U.S.C. § 1201(a)(3)(B). Likewise, section 1201(b)(2)(B) provides that a technological measure effectively

[9] Computer manufacturers were similarly concerned about regulatory authority granted to the Secretary of Commerce. Under section 1002(a)(3), devices within the scope of the AHRA had to conform to "any other system certified by the Secretary of Commerce as prohibiting unauthorized serial copying." 17 U.S.C. § 1002(a)(3). Computer manufacturers did not want to empower the Secretary of Commerce to design their products.

protects a right of a copyright owner "if the measure, in the ordinary course of its operation, prevents, restricts, or otherwise limits the exercise of a copyright owner under this title." 17 U.S.C. § 1201(b)(2)(B). To avoid any ambiguity that a manufacturer incurs no liability for failing to respond to a "do not enter" or "do not copy" flag, section 1201(c)(3) provides that "nothing in this section shall require the design of…a consumer electronics, telecommunications, or computing product provide for a response to any particular technological measure…." 17 U.S.C. § 1201(c)(3).

In addition to forcing computer manufacturers to comply with the requirements of serial copy management system, reversal of the decision below would also require manufacturers or importers to pay a two percent royalty payment. 17 U.S.C. § 1004(a)(1). Even if this cost were passed on to the consumer, the manufacturer or importer would still have the administrative burden of preparing certified quarterly and annual reports to the Copyright Office, 17 U.S.C. § 1003(c), as well as properly depositing the payments with the Copyright Office. 17 U.S.C. § 1005.

B. AARC's Partition Theory Would Disrupt Settled Expectations in the Computer and Consumer Electronics Industries.

As explained above and in greater detail in Appellees' brief, the definition of a digital musical recording clearly excludes a musical recording

stored in a hard drive, thereby excluding computers from the scope of the definition of a digital audio recording device. Since 1992, computer manufacturers have understood that their products fall outside of the scope of the AHRA. *See Diamond*, 180 F.3d 1078 n.6. This understanding was confirmed in 1999 by the Ninth Circuit in the *Diamond* decision. There, the court held that "there are simply no grounds in either the plain language of the definition or in the legislative history for interpreting the term 'digital musical recording' to include songs fixed on computer hard drives." *Id*. at 1077. To be sure, in *Diamond*, the computer hard drive was the source of the music, and not its destination. But under the AHRA's web of definitions, that makes no difference. A device can be a digital audio recording device within the meaning of the AHRA only if it can make a digital musical recording, and the Ninth Circuit ruled emphatically that a song fixed in a computer's hard drive was not a digital musical recording.

Moreover, the Ninth Circuit explicitly stated three times in one page that a computer was not a digital audio recording device: "[u]nder the plain meaning of the Act's definition of digital audio recording devices, computers (and their hard drives) are not digital audio recording devices…;" "the legislative history is consistent with the Act's plain language—computers are not digital audio recording devices;" and "because computers

are *not* digital audio recording devices, they are not required to comply with the SCMS requirement…." *Id*. at 1078 (emphasis in original). In response to the district court's conclusion that the exemption of computers generally from the scope of the AHRA "would effectively eviscerate" the AHRA, the Ninth Circuit stated that the AHRA "seems to have been expressly designed to create this loophole." *Id*.

Two years after *Diamond*, the Ninth Circuit reaffirmed its interpretation of the AHRA in *A&M Records, Inc., v. Napster, Inc*., 239 F.3d 1004 (9th Cir. 2004). Once again, it stated that "there are simply no grounds in either the plain language of the definition or in the legislative history for interpreting the term 'digital musical recording' to include songs fixed on computer hard drives." *Id*. at 1024–25.

Diamond and *Napster* further entrenched manufacturers' understanding that computers—and the wide range of devices that incorporate computers—are simply beyond the scope of the AHRA.[10]

[10] The major copyright treatises concur that computers are outside the scope of the AHRA. Melville B. Nimmer & David Nimmer, 2 NIMMER ON COPYRIGHT 8B.02[A][1][ii] (2018) (discussing "exclusion of computers" and *Diamond* decision); William Patry, 4 PATRY ON COPYRIGHT 11:47 (2019) (*Diamond* "is a remarkably straightforward, pragmatic interpretation of a difficult statute"). *See also* David Nimmer, *Copyright Illuminated: Refocusing the Diffuse U.S. Statute* 105 (2008) ("While Congress was preparing for the forthcoming DAT revolution, one matter about which it was certain is that it did not have to integrate its DAT regulations with the

Reversal of the District Court could require the redesign of these devices. The devices would have to either: 1) incorporate a serial copy management system; or 2) be designed in such a manner that there was no possibility that a court would find that the primary purpose of its recording function was recording digital music. *See* 17 U.S.C. § 1001(3) (digital audio recording device defined as device "the digital recording function of which is designed or marketed for the primary purpose of . . . making a digital audio copied recording . . . ."). Neither alternative is palatable to the computer and consumer electronics industries. As discussed above, incorporating a serial copy management system could slow down the operation of a computer as it searches every incoming data stream for a "do not copy" flag. And unless the computer was designed to perform highly specialized tasks, the manufacturer may encounter difficulty proving to a court that the primary purpose of the device's recording function was something other than recording music. A manufacturer would be loath to take its chances on a court's primary purpose analysis given the statutory damages of up to $2,500 per device that violates the AHRA's provisions. *See* 17 U.S.C. § 1009(d)(1)(B)(i).

---

separately burgeoning field of personal computers.[…] For that reason, Congress carved out an exception from the stricture of this 1992 legislation for sound recordings access by computer means.").

In short, reversal of the District Court could throw the market into chaos.

C. The Harm Caused by Expanding the Scope of the AHRA Would Exceed Any Consumer Benefits from a Broader Section 1008 Immunity.

Appellant's *amicus* Digital Justice Foundation ("DJF") argues that expanding the scope of the AHRA to include computers would benefit consumers by commensurately expanding the scope of the immunity for private copying provided by 17 U.S.C. § 1008. DJF suggests that the only cost to the consumer would be the added cost of the levy, capped at $8 per device. DJF overlooks the enormous cost in decreased functionality if computer manufacturers had to comply with a serial copy management system. As noted above, compliance with a serial copy management system would require a computer to search all incoming data flows for a "do not copy" flag, which could slow down the operation of the computer. It would also be likely to interfere with many functions of modern computers. For example, software that searches all incoming data for a "do not copy" flag would be incompatible with the ubiquitous encryption used to protect the privacy and security of Internet transactions. The serial copy management system required by the AHRA would not work without disabling or

defeating this encryption, leaving consumers vulnerable to eavesdropping and impersonation.

Moreover, compliance with a serial copy management system means that a computer could not make second generation copies when such copies would be lawful under the fair use right, 17 U.S.C. § 107, or because the underlying works were in the public domain or subject to a Creative Commons license.

At the same time, the benefit of the section 1008 immunity to a consumer is far more limited than DJF suggests. DJF asserts that "fair use fails to protect certain behaviors that would be protected by Section 1008 immunities," DJF Brief at 24, but then neglects to identify a single behavior of that sort. This is because the scope of private copying understood to be fair use is so expansive. It permits time-shifting, *see Betamax*; it permits space-shifting, *see Diamond*, 180 F.3d at 1079; it permits browser copies, *see Amazon.com v. Perfect 10*, 508 F.3d 1146, 1169–70 (9th Cir. 2007). Fair use permits the private copying that is an inevitable by-product of digital technology. Without fair use, the U.S. information technology industry would not exist. To the extent that DJF is suggesting that section 1008 may permit computer users to download music files from the Internet, this is directly contrary to the position the recording industry has taken for the past

25 years. Indeed, in *Napster*, the Ninth Circuit specifically held that section 1008 "does not cover the downloading of MP3 files to computer hard drives." 239 F.3d at 1024.

DJF seems to suggest that section 1008 would provide consumers with immunity against liability for the 17 U.S.C. § 1201 prohibition against the circumvention of technological protection measures. This is far from certain. Although section 1008 provides immunity for a consumer against any action under title 17 for infringement of copyright, several courts have held that a violation of section 1201 is not a copyright infringement, but a separate offense. *See Chamberlain Group, Inc. v. Skylink Techs., Inc.*, 381 F.3d 1178, 1203 (Fed. Cir. 2004) (in enacting the DMCA, Congress "chose to create new causes of action for circumvention and for trafficking in circumvention devices"); *MDY Indus., LLC v. Blizzard Entm't, Inc*., 629 F.3d 928, 952 (9th Cir. 2010) ("Congress created a distinct anti-circumvention right under § 1201(a)"). Section 1201(c)(1) specifically states that "nothing in this section shall affect rights, remedies, limitations or other defenses to copyright infringement…." 17 U.S.C. § 1201(c)(1).

In sum, DJF understates the costs to consumers of expanding the scope of the AHRA, while overstating the benefit of broadening the section 1008 immunity.

II. THE AHRA SHOULD BE CONSTRUED NARROWLY.

Contrary to AARC's suggestion that this Court interpret the AHRA broadly, the Court should interpret it narrowly.

A. The AHRA Should Be Confined to the Domain Established by Congress.

Prior to his elevation, Judge Frank Easterbrook wrote that unless a statute "plainly hands courts the power to create and revise a form of common law, the domain of the statute should be restricted to cases anticipated by its framers and expressly resolved in the legislative process." Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 544 (1983). Judge Easterbrook observed that this approach is particularly appropriate with respect to statutes with "detailed provisions," which should "preclude judges from attempting to fill gaps." *Id*. at 547. In justifying this approach, Judge Easterbrook argued that "courts cannot reconstruct an original meaning because there is none to find." *Id*. A legislature consists of many members, each with his or her own intent; the legislature as a whole does not have an intent that is "hidden yet discoverable." *Id*. The complexity of the legislative process, with its compromises, logrolling and agenda control, means that "judicial predictions of how the legislature would have decided issues it did not in fact decide are bound to be little more that wild guesses…." *Id*. at 548. Accordingly, a court should declare "legislation

inapplicable unless it either expressly addresses the matter or commits the matter to the common law (or administrative) process." *Id*. at 552.

There is no question that the device at issue in this case was not anticipated by the framers of the AHRA. The legislation was drafted to address the threat of DAT recorders. Congress in 1992 could not have anticipated that 25 years later, cars would have onboard navigation systems that also could support entertainment functions. The District Court stated that "recording technology has evolved significantly since the enactment of the AHRA, and in the instant lawsuit, the Court must determine whether the statute should extend to a more recent innovation." 306 F. Supp. 3d at 424. Judge Easterbrook's approach to determining the applicability of a statute, followed by many courts, *see, e.g*., *Central & Southern Motor Freight Tariff Ass'n, v. United States*, 757 F.2d 301 (D.C. Cir. 1985), indicates that the AHRA should not be extended to Appellees' technology. Moreover, this Court should be wary of setting a precedent of applying highly technical statutes regulating technology outside the statutory domain established by Congress.

B. The AHRA Should Be Construed Narrowly Because Its Copyright Levy Approach, Rooted in European Law, Departs from the General Approach of the Copyright Act to Private Copying.

The second half of the twentieth century saw the development of technologies that facilitated the making of copies—first analog technologies such as the photocopier and the video cassette recorder, then digital technologies such as the scanner and the digital video recorder. These new technologies enabled copying by individuals on a massive scale. Copyright owners feared that this private copying would erode sales of authorized copies. Policymakers on opposite sides of the Atlantic responded differently to the challenging of the new copying technologies. In Europe, legislatures combined exceptions permitting private copying with levies on copying equipment and blank storage media. The levies were paid to collecting societies that were responsible for distributing the royalty payments to copyright owners. In the United States, by contrast, private copying was addressed through the fair use doctrine; an individual was permitted to engage in private copying to the extent permitted by 17 U.S.C. § 107. The one exception to this fair use approach was the AHRA, which Congress explicitly modeled on the European approach. Because the AHRA departs from the prevailing U.S. approach to private copying, the Court should construe it narrowly.

The Federal Republic of Germany in 1965 adopted a levy on photocopiers to compensate copyright owners for the private copying of their works. *See* Goldstein at 133. Thereafter, other countries—predominantly in Europe—adopted similar regimes. Typically, there are two categories of levies. First, reprographic levies are imposed on photocopiers to compensate for the reprographic copying of text and images. Second, audio and video levies are imposed on audio and video recorders, and their respective recording media. In 2001, the European Union incorporated compensation schemes such as levies into the Information Society Directive. Article 5(2)(a) permits a Member State to adopt an exception allowing reprographic reproduction, "provided that the rightsholders receive fair compensation." Directive 2001/29 of the European Parliament and of the Council of 22 May 2001 on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society, 2001 O.J. (L 167). Similarly, Article 5(2)(b) permits a Member State to adopt an exception for reproduction in any medium for private copying, "on condition that the rightsholders receive fair compensation." *Id*. The Directive does not require Member States to adopt levies for private copying. Rather, it permits Member States to allow private copying, so long as the copyright owners receive fair compensation. Most Member States fulfill this fair compensation

obligation through levies. The scope and amount of the levies vary substantially among the Member States, and the United Kingdom, Ireland, and Luxembourg do not have levies at all. Fabian Niemann, *Copyright Levies in Europe*, Bird & Bird (Mar. 2008), https://www.twobirds.com/en/news/articles/2008/copyright-levies-in-europe.[11] The levy regimes have led to extensive litigation at both the Member State and EU levels, particularly whether—and at what rate—the levies apply to modern digital multifunction devices such as computers. *Id*.

The United States followed a different approach. During the extensive deliberations that led to the Copyright Act of 1976, the Copyright Office and members of Congress considered how to treat private copying, including whether private copying should be outside the scope of the reproduction right or considered a fair use. Congress could not reach agreement on private copying, and the Act is silent on the issue, although it did codify the judge-made fair use doctrine in section 107. Goldstein at 106–17. Ultimately, eight

[11] In 2014, the Finnish Parliament replaced its levy system in favor of a government fund to compensate artists for the losses from private copying. Legislators claimed that such a fund would be fairer to consumers and lead to more compensation for artists, presumably because it would be available only to Finnish artists. Monica Zhang, *"Fair Compensation" in the Digital Age: Realigning the Audio Home Recording Act*, 38 HASTINGS COMM. & ENT. L.J. 145, 161 (2015). The Finnish Parliament concluded that although the levy system was well-intentioned, "the scope of products that are subject to levy is too-technologically specific and thus ill-suited to being future-proof." *Id*. at 162.

years later, the Supreme Court ruled in *Betamax* that a consumer's taping of free over-the-air television broadcasts for later viewing was a fair use. *Betamax*, 484 U.S. at 455.[12] The *Betamax* decision is the basis for the lawfulness of the large number of private copies made every day by millions of Americans on their smart phones, laptops, digital video recorders, and other devices, without any remuneration to the copyright owners.

The one exception to the unremunerated private copying permitted under *Betamax* is the AHRA. In 1986, the consumer electronics industry introduced the digital audiotape recorder. Digital audio tape's "promise of near perfect reproduction through multiple generations of copies" led to litigation threats by the record labels against the digital audio tape manufacturers. 6 PATRY ON COPYRIGHT at 21:84. Although the manufacturers believed that *Betamax* permitted the private copying by

[12] Early versions of Justice Stevens' opinion in *Betamax*, released after Justice Thurgood Marshall's death, stated that as a matter of statutory construction, a consumer's making of a single copy for private use did not infringe the reproduction right. Section 106(1) grants the owner of a copyright the exclusive right "to reproduce the copyrighted work in *copies* or *phonorecords*," thus leaving a single copy outside the scope of the reproduction right. 17 U.S.C. § 106(1). In order to gain the support of a majority of Justices, Justice Stevens ultimately based his decision on fair use rather than an interpretation of section 106(1). *See* Goldstein at 122–27; *see also* Jonathan Band & Andrew McLaughlin, *The Marshall Papers: A Peek Behind the Scenes at the Making of* Sony v. Universal, 17 COLUM.-VLA J.L. & ARTS 427 (1994); Jessica Litman, *The Story of* Sony v. Universal Studios*: Mary Poppins Meets the Boston Strangler*, *in* INTELLECTUAL PROPERTY STORIES (Jane C. Ginsburg & Rochelle Cooper Dreyfuss eds., 2006).

digital audio tape devices, Senate Report at 31 ("the electronics industry has maintained the *Betamax* decision applied to virtually all home taping"), they were concerned that litigation by the record labels "could tie up their products in the courts for years." Goldstein at 129. Accordingly, the manufacturers began negotiating a legislative compromise. The agreement reached in Athens, Greece, in 1989, contained two main features: incorporation of a serial copying system in digital audio tape devices in exchange for an exception permitting the private copying of songs. House Report at 9; Goldstein at 131. This compromise fell apart over the objections of music publishers, composers, and performing rights societies over the absence of any royalties. House Report at 10; 6 PATRY ON COPYRIGHT at 21:84. A lawsuit was filed against the manufacturers, leading to another round of litigation. The Athens agreement was amended by adding levies on digital audio tape devices and blank tapes, with the payments allocated among the composers, the music publishers, the performers, and the record labels. This compromise was then enacted by Congress as the AHRA. Goldstein at 132.

Congress clearly understood that it was adopting a European approach to the digital audio tape problem. The Senate report on the AHRA noted that seventeen countries already provided "home taping royalties to creators and

copyright holders for private home copying by statute," and in a footnote listed all seventeen—twelve of which were European. Senate Report at 44 n.57. *See also* Goldstein at 133 ("the levies introduced by the AHRA revealed an American willingness to borrow solutions from abroad—levies have been a feature of European copyright law" since 1965).

The European approach of remuneration for uses permitted by exceptions extends beyond private copying. The European Union's Public Lending Right Directive, Directive 2006/115/EC of the European Parliament and Council of 12 December 2006 on Rental Right and Lending Right and on Certain Rights Related to Copyright in the Field of Intellectual Property, O.J. (L 376), requires remuneration to copyright owners for a library's lending of books in its collection—an approach completely antithetical to the first sale doctrine codified in 17 U.S.C. § 109(a) (providing that the owner of a copy of a work may lend or sell that copy without infringing the distribution right). *See Kirtsaeng v. John Wiley & Sons*, 133 S. Ct. 1351, 1363 (2013) ("the first sale doctrine is a common-law doctrine with an impeccable historic pedigree"). The AHRA's one-time exception to the *Betamax* rule of unremunerated private copies, agreed to under duress by the digital audio tape manufacturers, should be construed narrowly by this Court.

C. The AHRA's Departs from the Technological Neutrality of the Copyright Act's Core Provisions, Further Underscoring That the AHRA Should Be Construed Narrowly.

The pre-digital Copyright Act of 1976 works in a digital age because of the technological neutrality of its core provisions. The *sui generis* AHRA departs from this technological neutrality, providing a final reason for this Court construing it narrowly. David Nimmer explains that the AHRA, "[g]rowing out of the consumer electronics market of the 1980's, … embodied an approach … focusing on DAT recorders." NIMMER ON COPYRIGHT at 8B-29. The failure of that technology to penetrate the consumer market "renders the AHRA's focus, in hindsight, misguided." *Id.* Soon after the AHRA's enactment, the Internet became the primary battle ground for copyright issues, but "the AHRA's structure, whereby computers are excluded from its thrust, places the Internet essentially outside the statute's purview." *Id. See also* Julie Cohen, *et al*., *Copyright in a Global Information Economy* 417 (2015) ("[b]ecause DAT technology was quickly superseded by the personal computer, today the AHRA is interesting largely for historical purposes"); Zhang at 147–48 ("the AHRA has not been able to keep up with the rapid pace of technological advancement due to Congress' passage of narrow statutory language; proving that Congress's view was

shortsighted by a general consensus that the AHRA is irrelevant despite [sic] its well-intentioned bargain").

In a book on copyright legislation, Nimmer states more bluntly that when the AHRA was enacted, he "concluded that it was the worst thing that had ever happened to the Copyright Act." David Nimmer, *Copyright Illuminated: Refocusing the Diffuse U.S. Statute* 103 (2008). He explains that the AHRA was "a forbidding jungle of arbitrary specifications; it marks the turning point, in fact, of Title 17 from a potentially comprehensible embodiment of copyright doctrine into the hopeless mishmash that it has become." *Id*. He reflects that because the need for "this radical deformation was in fact nonexistent, it is an occasion for some sadness in the annals of sensible lawmaking." *Id*.[13]

Nimmer notes that the AHRA defined a serial copy management system with detailed mandates on how that system must be incorporated into

[13] Two commentators argue that Congress adopted the AHRA without insisting upon the presentation of "accurate data to justify the conclusion that the reduction in copyright owners' revenues was so substantial as to outweigh the costs and problems associated with the collection and distribution of funds from such a system or similar potential compensatory mechanisms." Lewis Kurlantzick & Jacqueline Pennino, *The Audio Home Recording Act of 1992 and the Formation of Copyright Policy*, 45 J. COPYRIGHT SOC'Y 497, 544 (1998). Indeed, "the process was biased against the introduction of relevant information and criticisms which would call the record industry's case into question. Necessary questions were never asked, erroneous economic assumptions were made, and clearly questionable data were presented and accepted without dispute." *Id*.

future audio components. The particulars of the implementation of the serial copy management system were contained in a fourteen-page Technical Reference Document. The Technical Reference Document, however, was not included in the legislation. The result is that Congress "passed a law that required compliance with a document that itself was not legislated into existence. To the virtue of *incoherence*, therefore, was added the additional quality of *opaqueness*." *Id*. at 104 (Emphasis in original).

Moreover, "instead of DAT products becoming as ubiquitous as Congress imagined when it frantically adopted this legislation, the revolution never occurred." *Id*. Accordingly, the AHRA "*fails* the reality principle." *Id*. (Emphasis in original).

AARC seeks to expand the scope of the AHRA—to rewrite it so that it would sweep in devices Congress clearly intended to exclude. This Court should reject AARC's request to extend this misguided, unnecessary legislation in a manner that would do real harm to consumers and the computer and consumer electronics industry.[14]

[14] At least one commentator has argued that the AHRA is unconstitutional because it "transgresses a core protection of the Free Press Clause by banning a speech technology." Edward Lee, *Guns and Speech Technologies: How the Right to Bear Arms Affects Copyright Regulations of Speech Technologies*, 17 WM. & MARY BILL RTS. J. 1037, 1081 (2009).

CONCLUSION

For the reasons set forth above, the decisions of the District Court should be affirmed.

Respectfully submitted,

/s/ Jonathan Band

Jonathan Band
Counsel of Record
Jonathan Band PLLC
21 Dupont Circle NW, Suite 800
Washington, D.C. 20036
(202) 296-5675
jband@policybandwidth.com

May 29, 2019

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 28 and 32(g)(1), the undersigned counsel for amici certifies that this brief:

(i) complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6,448 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Circuit Rule 32(e)(1); and

(ii) complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using MS Word in a 14 point Times New Roman font.

/s/ Jonathan Band

Jonathan Band
Jonathan Band PLLC
21 Dupont Circle NW, Suite 800
Washington, D.C. 20036
(202) 296-5675
jband@policybandwidth.com

May 29, 2019

CERTIFICATE OF SERVICE

I hereby certify, that on this 29th day of May, 2019, a true and correct copy of the foregoing Brief of *Amici Curiae* the Computer & Communications Industry Association, the Consumer Technology Association, Engine, the Center for Democracy and Technology, R Street Institute, the Information Technology Industry Council, and the Electronic Frontier Foundation was timely filed electronically with the Clerk of the Court using CM/ECF, which will send notification to all counsel registered to receive electronic notices.

/s/ Jonathan Band

Jonathan Band
Jonathan Band PLLC
21 Dupont Circle NW, Suite 800
Washington, D.C. 20036
(202) 296-5675
jband@policybandwidth.com