To:         JUSTICE POWELL  
From:  Michael  
Re:  Sony Corp. v. Universal City Studios, Inc., No. 81-1687

I have not studied JUSTICE STEVENS's memorandum in detail, but I think he makes a strong case. Of course I am a sympathetic audience. I have thought all along that he should be right, even if the law is against him. When JUSTICE BLACKMUN circulates his draft, I will study both positions more carefully.

In the meantime, I have two thoughts on the memorandum.

First, it was not clear to me on first reading which analytic framework JUSTICE STEVENS is adopting. At some points he seems to think that home use is acceptable because Congress did not intend the Copyrights Act to cover it at all. Despite the broad language of the Act, it is not broad enough to include home-use video-taping. At other points he seems to think that home-use video-taping falls within the "fair use" exception. In other words, the general language of the Act includes it, but a narrower provision excludes it. I do not think that the latter position can be correct. Fair use is a narrow doctrine that does not apply here. (JUSTICE STEVENS's reliance on Williams and Wilkins v. United States is particularly troublesome. When that case was here, you fought very hard to have it reversed.) I think he makes a much more convincing case on the former position.

Second, I am not sure that JUSTICE STEVENS can get a Court for his views even if you join him. JUSTICE BRENNAN, at
least, would distinguish between "time shifting" and "library building." JUSTICE STEVENS does not mention library building, but I do not see how his analysis could fail to apply to it. If a majority of the Court (JUSTICE BRENNAN and the rest of JUSTICE BLACKMUN's supporters) continues to believe that library building is illegal, it presumably would be necessary to remand the case to determine if Sony is liable on that account.
June 6, 1983

Personal

81-1687 Sony Corp. v. Universal City Studios

Dear John:

I have enjoyed reading your draft of June 3. It is clear, well written, and persuasive.

I have no specific suggestions. You make two basic arguments: (i) the 1976 Act does not cover home video copying exclusively for home use, and (ii) in any event this would come within the "fair use" judicial doctrine that at least arguably was adopted by Congress in Section 107.

Subject to further consideration, I am inclined to think that the former is a more solid analytical framework. As you note, the language of Section 106 does not compel the reading given it by CA9, and the legislative history of the Copyright Act (including numerous expressions in Congressional Committee reports) fairly can be said to provide evidence of no Congressional intention to proscribe single copying for home use only. This reading of Congressional intent may be buttressed by the judicial doctrine of "fair use", although that has been construed rather narrowly (as I recall).

I do not believe you mentioned "library building". I suppose your three "critical criteria" would not preclude this so long as the only purpose was home use.

My unpublished opinion in Wilkins v. United States reflect the view I held at that time. Perhaps that case is distinguishable on its facts, as NHII not only was copying but was making rather wide distribution to scholars and researchers.

I will, of course, reserve a final decision until I see what Harry writes. The case always has been a close one for me. It is another example of Congressional "passing of the buck" - a practice I would like to check although as long as "this Court sits" it probably expects too much to think that politicians would not take this advantage of us.

Sincerely,

Justice Stevens

LFP/vde
June 13, 1983

MEMORANDUM TO THE CONFERENCE

Re: 81-1687 - Sony Corp. v. Universal Studios, Inc.

The attached printed memorandum was prepared before receiving Harry's draft opinion. On Saturday, Harry kindly made a typed copy available to me, and I delivered this memorandum to his office. Having studied his opinion, I expect to circulate a few supplemental comments later today or early tomorrow.

Respectfully,

[Signature]

John
June 13, 1983

MEMORANDUM TO THE CONFERENCE

Re: 81-1687 - Sony Corp. v. Universal Studios, Inc.

Now that Harry and I have each circulated our views, I offer the following additional comments.

First, as a general matter I note that Harry agrees that this is a case of first impression on the question whether the making of a single copy for a noncommercial, nonpublic use is an infringement. Similarly, he does not question the central thesis of Part I of my memorandum--Congress has always taken the lead in responding to major technological changes that affected the copyright system. Indeed, it is significant that he concludes his opinion with a quotation from the dissenting opinion in *Fortnightly*.

As for the specific question presented, I read Harry's opinion as agreeing with Professor Nimmer and me that there is a legal distinction under present law between the tape recording of a broadcast song and the video tape recording of a televised program. For that reason, the 1971 Sound Recording Amendments, discussed at pp. 9-11 of my memorandum and pp. 14-18 of Harry's opinion, are critical. The legal argument can be stated in a three part syllogism:

(a) Under the 1909 Act, the writer of a song that was played over the radio was given protection identical to that given the writer of a movie screenplay that was broadcast on television. The performer of the song, however, was given no protection. The 1971 Amendments were intended to bring the song performer into the same position as the song writer and the movie writer.

...
(b) A literalist reading of the 1909 Act would have made home recording for private use an infringement of the song writer's rights. But the 1971 House Report explicitly declares that such a literalist reading of the 1909 Act would have been wrong. It states that after the 1971 Amendment, "the record producers and performers would be in no different position from that of the owners of copyright in recorded musical compositions over the past 20 years." 1971 House Report 7. And it states that "it is not the intention of the Committee to restrain the home recording, from broadcasts or from tapes or records, of recorded performances, where the home recording is for private use and with no purpose of reproducing or otherwise capitalizing commercially on it." Thus, the House Report on the Sound Recording Amendments of 1971 indicates that a literalist reading of the 1909 Act was wrong. Noncommercial home taping was exempt.

(c) The 1976 Act was not intended to change the rules on private home recording. As Harry concedes in n. 5, "the controlling legal principles under the [1976 and 1909] Acts are the same." Thus, noncommercial home taping is still exempt.

I believe the relevant question is thus whether the intent of Congress is more accurately reflected by the 1971 House Report and the colloquy with Representative Kastenmeier—as I contend—or by the negative inferences Harry draws from certain explicit exemptions in the 1976 Act. See Harry's opinion, at 12-14. I disagree with Harry's view that my reading of the Act would make these exemptions "superfluous"; all of them concern copying that is either public or commercial or both.

My approach does not separate "infringement" analysis and "fair use" analysis into separate compartments in the context of this case. I base my conclusion that there is no infringement in this case on the facts that Congress has never explicitly sought to regulate private noncommercial copying, that
Congress has recognized that such activity is exempt in the audio recording context, and that the courts fashioned the "fair use" exception long before it was a statutory term in order to avoid extending the copyright monopoly to activities literally covered by the statute but unforeseen by Congress. Because "fair use" lies at the core of Harry's analysis, however, I shall comment on his approach.

On the one hand, Harry appears to agree with me that fair use was not historically understood as a rigid four-factor test. On the other hand, he proposes a new synthesis of that history that turns on two factors: whether the copying activity is "socially laudable," p. 23, and whether it would "affect the value of, or the market for, the author's work," p. 26. My problem with the first factor derives from this case. Harry's opinion suggests that "VTR recording creates no public benefits sufficient to justify [allowing it]," p. 24, and that home use of a VTR "creates no benefit to the public at large," p. 27. But time shifting makes television programming available to viewers who would otherwise miss it, thereby serving a public interest that we unanimously recognized in our Gottfried opinion earlier this year, slip op. at 9-10, id., at 6 (dissenting opinion). My problem with the second factor is that it does not enter the analysis until too late: it is irrelevant unless the user can demonstrate affirmatively that permitting the use would have no tendency to harm the market for or the value of the copyrighted work," p. 26. Although Harry's opinion suggests that a citizen "photocopying a newspaper clipping to send to a friend" may be able to carry that burden, I find that somewhat doubtful.

I should also comment specifically on a statement in the 1975 Senate Report that is quoted at pages 25-26 in Harry's opinion and that can easily be misunderstood. The sentence appears in a paragraph in which the Senate Committee gave an illustration of off-the-air recording in order to enable the program to be seen at a more convenient time, and states that the particular example of time shifting would constitute "fair use." The Committee then added a comment that it
I did not intend to suggest that every recording for convenience should be considered fair use. The complete paragraph reads as follows, with the sentence in question italicized:

"The committee's attention has been directed to the special problems involved in the reception of instructional television programs in remote areas of the country. In certain areas it is currently impossible to transmit such programs by any means other than communications satellites. A particular difficulty exists when such transmissions extend over several time zones within the same state, such as in Alaska. Unless individual schools in such states may make an off-air recording of such transmissions, the programs may not be received by the students during the school's daily schedule. The committee believes that the making by a school located in such a remote area of an off-the-air recording of an instructional television transmission for the purpose of a delayed viewing of the program by students for the same school constitutes a 'fair use.' The committee does not intend to suggest, however, that off-the-air recording for convenience would under any circumstances be considered 'fair use.' To meet the requirement of temporary use the school may retain the recording for only a limited period of time after the broadcast." S. Rep. 94-473, pp. 65-66.

A hasty reading of the italicized sentence—especially the phrase "under any circumstances"—might suggest that the committee intended to prohibit any time-shifting. But the sentence preceding the italicized one proves that reading impossible, since it expressly authorizes certain time-shifting for public display. In context, the italicized sentence merely ensures that the preceding sentence not be read too broadly. The Committee wanted to make sure that its approval of one form of time-shifting for public display (instructional television for students in remote areas), not be read as suggesting that all time shifting for public display is permissible. In brief, the words "under any circumstances" obviously mean
always." There is no reason to believe that the sentence was intended to reach beyond the context of the paragraph (public displays), and to bring home taping for non-public viewing within the scope of the Act's coverage.

Finally, Harry and I agree that the prospective harms of which respondents complain "are speculative at present," p. 29, that "there can be no really satisfactory solution of the problem presented here, until Congress acts," p. 37, and that in the meantime fashioning judicial relief "might require bringing other copyright owners into court," p. 37, n.48. There can be no doubt concerning the enormous complexity of the remedy issues. Although Harry does not believe that these factors affect the likelihood that Congress intended the underlying conduct to be covered by the statute, I would not read congressional silence as commanding the Judiciary to take the lead in resolving issues comparable to those presented by cable TV and the compulsory licensing of sound recordings.

Respectfully,
MEMORANDUM TO THE CONFERENCE:

It is only with some trepidation that I add to the pile of material we are all studying in this case, but I think it will be difficult for me to join either Harry's or John's opinion as written, and I would like to put a third alternative on the table. At Conference, I expressed the view that CA9 should be affirmed in part only, on the ground that "library building" was infringement but that "timeshifting" was fair use. I continue to believe that for purposes of fair use a distinction can be drawn between the two, but I doubt an all-encompassing definition of either can or should be framed, and I now agree with John that CA9 should be reversed outright and that this litigation should end here. In brief, here are my reasons.

I cannot agree with John that Congress has implicitly enacted a broad exemption from the Copyright Act for all cases of private, noncommercial, single-copy reproduction. See JPS Memorandum 12. At most, one might interpret the 1971 Act as embodying an exemption for home audio recording of that nature, although Harry's opinion demonstrates that if a case were to put that directly in issue the answer would not be clear. The home-use audio exemption, if it exists, was the product of a specific political compromise, and it cannot provide a theoretical basis
for a broader exemption. Under my view, however, it is unnecessary to address this question.

What I now consider dispositive are questions of the relationships between fair use and contributory infringement, and between contributory infringement and remedy. As Harry explains, Sony can be liable for contributory infringement only if the Betamax's "most conspicuous purpose" or "primary use" is an infringing use. Opinion 35. I understand Harry to suggest that all unauthorized recording of copyrighted material for "ordinary" use is infringement. I, however, think that a good deal of timeshifting is fair use. Like John, see JPS Memorandum to the Conference 3, I question whether the "ordinary"/"productive" distinction can be used to shift the burden of proving or disproving economic harm in a broad class of cases, see HAB Opinion 25-27, although it describes a relevant "sliding scale" that could be used in case-by-case fair use determinations. The prospect of economic harm to the copyright holder is relevant to a fair use determination, especially where—as here—considerations of privacy and the public interest in maximizing use of the video spectrum are involved. In my view, the Studios' allegations of potential harm, which Harry discusses at 27-28 of his Opinion, are simply empty when applied to most timeshifting. Unless the burden is shifted, there is no need for a remand to determine that a substantial amount of timeshifting is fair use. And if that is true, then I cannot agree that the Betamax's "primary use" is infringement or that Sony's advertisements evince a purpose to profit from infringement.
Given that conclusion, I do not think that the Copyright Act authorizes the sort of complex, multiparty proceeding that Harry's opinion contemplates to frame an appropriate remedy. If a court could enjoin sales of the Betamax altogether under §502 of the Act, it might be able to impose a half-measure like compulsory royalties instead of a ban. But I do not think there is authority to ban the Betamax if its primary use is not infringement, and therefore I find no legislative authority for an intermediate solution other than statutory damages for each infringement. Bear in mind that in enacting the Copyright Act Congress carefully specified those areas in which a tax-like compulsory license was appropriate, and it created a specialized legislative tribunal to administer those areas. Not only does the Copyright royalty Tribunal have precise directions from Congress on such issues as the size of the royalty, the parties who should be responsible for payment, and how the royalty should be divided among copyright owners, it also has special procedures for handling disputes like this, which involve everyone in several industries at once. In Harry's view, as I understand it, see HAB Opinion 36-37, the District Court may proceed to do much the same thing in this case without specific legislative authorization. I just can't go that far—it would require writing "ghost" legislation as complex as the actual Copyright Act or the treaties Harry cites in his n. 48.

In sum, I think that much home video recording is infringement, but that much is not infringement. I would not attempt to define precisely the line between fair use timeshifting and in-
fringing library building, because that would be unnecessary to this case. As long as the Betamax has substantial noninfringing use, and Sony did not promote it specifically for infringing uses, the Copyright Act cannot be read to authorize the kind of complex proceedings and delicate remedy this case would seem to require. Accordingly, I would reverse and remand with instructions to dismiss. Copyright owners can, if they wish, seek damages for specific acts of infringement, and Congress can and should amend the Act, as it has in the past, to provide some more efficient method for compensating copyright owners.

In due course, I shall put these views in opinion form. Given the date, however, I am content to express them only in "bare bones" fashion, unless a substantial number of others agree with me.

Sincerely,

WJB, Jr.
MEMORANDUM TO THE CONFERENCE

Re: No. 81-1687 - Sony Corp. v. Universal City Studios, Inc.

The circulating opinions in this case must speak for themselves, of course, but I think a few comments are in order in response to John's detailed memorandum of June 13.

(1) John is correct in noting that Congress previously has "taken the lead in responding to major technological changes that affected the copyright system." Congress has done so, however, only because this Court consistently had refused to apply copyright statutes to technologies that were not specifically considered by Congress at the time the statutes were passed. I see nothing in the 1976 Act to indicate that Congress approved of this state of affairs or intended to preserve it. To the contrary, Congress' reaction to this Court's limiting decisions in the copyright area was hostile. See, e.g., 1975 Senate Report 51 (broad language of §102 "is intended to avoid the artificial and largely unjustifiable distinctions, derived from cases such as White-Smith Publishing Co. v. Apollo Co., 209 U.S. 1 (1908), under which statutory copyrightability has been made to depend upon the form or medium in which the work is fixed"); 1976 House Report 52 (same); 1976 House Report 87 ("The majority of the Supreme Court in Twentieth Century Music Corp. v. Aiken, 422 U.S. 151 (1975) based its decision on a narrow construction of the word 'perform' in the 1909 statute. This basis
for the decision is completely overturned by the present bill and its broad definition of 'perform' in section 101").

The legislative history of the 1976 Act makes clear to me that Congress wanted the 1976 Act, unlike its predecessors, to cover all technologies and all uses whether or not they were specifically contemplated or even known at the time the Act was passed. In other words, Congress wanted to free itself of the need to amend the statute to accommodate each technological change -- as this Court's restrictive decisions had forced it to do in the past. See, e.g., 1975 Senate Report 60 ("performance" may be accomplished by "all kinds of equipment for reproducing or amplifying sounds or visual images, any sort of transmitting apparatus, any type of electronic retrieval system, and any other techniques and systems not yet in use or even invented"); 1976 House Report 63 (same); 1975 Senate Report 61 (definition of "transmit" is "broad enough to include all conceivable forms and combinations of wired or wireless communications media, including but by no means limited to radio and television broadcasting as we know them"); 1976 House Report 64 (same); 1975 House Hearings 115 (remarks of Representative Kastenmeyer) ("the operation of the bill does apply whether or not we specifically deal with a subject or not"); see also 17 U.S.C. §101, §7 (protection extends to copying "by any method now known or later developed").

(2) I do not believe John is correct in asserting that "[u]nder the 1909 Act, the writer of a song that was played over
the radio was given protection identical to that given the writer of a movie screenplay that was broadcast on television." In White-Smith Publishing Co. v. Apollo Co., 209 U.S. 1 (1908), this Court had held that a mechanical reproduction of a song was not a "copy" of the song and therefore was not infringement of the song writer's copyright. The 1909 Act gave song writers protection against the making of unauthorized mechanical reproductions, but the protection was not complete. Mechanical reproductions still were not considered "copies" of the song. Reproduction still was permissible without authorization, although the reproducer was required to pay a statutory royalty. This limited mechanical-reproduction right was an odd hybrid that did not fit neatly into the pattern of copyright law, and the nature of the right was never fully explored by the case law.

Home reproduction of sound recordings did not infringe the sound recording copyright prior to 1976, because the sound recording copyright was limited to protection against commercial piracy. Whether home reproduction technically infringed the songwriter's copyright was, as Congress knew, a meaningless question; the penny-wise limitation of damages made the right unenforceable and consequently no "right" at all. The 1976 Act did change the nature of the sound recording copyright, and it may well be that home reproduction of sound recordings is now an infringement of copyright.

(Footnote 5 of my opinion states that the legal principles concerning motion pictures are the same under the 1909 and 1976 Acts;
other aspects of copyright law, of course, changed significantly.)
The question of home reproduction of sound recordings is not raised in this case, and my opinion does not reach it. I have tried to make clear, however, that the principles governing mechanical reproduction of songs prior to 1976 bear very little relationship to the legal principles governing reproduction of motion pictures at any time.

(3) There is nothing particularly startling about the fact that no recovery is being sought from individual Betamax users in this case. It is frequently impossible to recover from individual infringers, and it is precisely this fact that gave rise to the doctrine of contributory infringement. This was explained recently in Dawson Chemical Co. v. Rohm & Haas Co., 448 U.S. 176, 188 (1980), a patent case; after describing an early case in which liability was imposed on a manufacturer whose product enabled purchasers to infringe, we stated:

"The court permitted the patentee to enforce his rights against the [manufacturer] who brought about the infringement, rather than requiring the patentee to undertake the almost insuperable task of finding and suing all the innocent purchasers who technically were responsible for completing the infringement. ...

"[This early case] demonstrates, in a readily comprehensible setting, the reason for the contributory infringement doctrine. It exists to protect patent
rights from subversion by those who, without directly infringing the patent themselves, engage in acts designed to facilitate infringement by others. This protection is of particular importance in situations ... where enforcement against direct infringers would be difficult, and where the technicalities of patent law make it relatively easy to profit from another's invention without risking a charge of direct infringement."

Similar concerns were expressed by Barbara Ringer, the Register of Copyrights, in explaining to Congress the need for contributory copyright liability in the "dance hall" context. See 1975 House Hearings 1813.

(4) I agree with John that the remedy problem is a difficult one, but I see no reason to assume, prior to briefing and prior to exploration of the problem by the District Court, that it will be insuperable. Complex class litigation is a familiar part of our modern judicial system, and it should be fairly simple for plaintiff and defendant classes to be joined in this litigation on remand. With respect to the royalty and licensing schemes discussed by the parties, the Copyright Royalty Tribunal is already in place and authors' collecting societies have successfully issued blanket licenses for years; these institutions may well be able to aid in the collection and distribution of any agreed-upon fees. On remand, of course, the District Court may decide that fashioning relief of this kind is not possible. The Studios then would be
relegated to statutory damages for particular instances of copying that they could prove. But the possibility that complete relief may be unavailable should not, I believe, affect our interpretation of the statute. Our job, at the moment, is to determine whether home VTR recording violates the 1976 Act. I am not aware of any doctrine of statutory interpretation that should lead us to find no violation simply because relief is uncertain.

(5) Finally, I might note that the single-copy exemptions listed in the House and Senate reports do not all "concern copying that is either public or commercial or both." The making of a single, free recording of a work for a blind person, and the copying of a brief excerpt of a work by a student calligrapher, are perhaps the best examples.

I repeat that the opinions circulating must speak for themselves, for John and I do not wish to get into a "battle of memoranda."
The principal dispute between JUSTICE BLACKMUN and JUSTICE STEVENS is on the 1971 legislative history. JUSTICE STEVENS relies almost exclusively on this legislative history for his legal argument. See JPS draft, at 9-11, and 11-12 n. 12. JUSTICE BLACKMUN has a full section explaining why the 1971 legislative history is simply inapplicable in the Betamax context. See HAB draft, at 14-19. As a legal matter, I think JUSTICE BLACKMUN has the better of the argument.

The secondary dispute revolves around the fair use doctrine. JUSTICE STEVENS believes that home use video-taping is "fair use," either under the statutory "fair use" exception or because Congress never intended to cover it. JUSTICE BLACKMUN argues that home use video-taping is not "fair use." On a clean slate, I could see this argument being resolved either way. But if you still adhere to your unpublished views in Williams and Wilkins v. United States, I think you must agree with JUSTICE BLACKMUN.

Last winter you voted with JUSTICE BLACKMUN at Conference. Shortly thereafter JUSTICE STEVENS circulated a memo suggesting that he had a new theory supporting reversal. The disputes I discuss here, however, are the same arguments that were stressed by the parties. Although JUSTICE STEVENS may express
the arguments better, I do not think he has added anything fundamentally new. His discussion of "copy" versus "copies" may support his legislative history argument, but I do not think it can stand alone. And his other arguments seem more appropriately addressed to Congress. In short, I do see any reason to change your Conference vote that was not already before you at Conference.

I should add that this memo is limited the basic question: which way to vote? If you decide to join JUSTICE BLACKMUN, I will have several more specific points to raise.
To: JUSTICE POWELL
From: Michael
Re: Sony Corp. v. Universal City Studios, Inc., No. 81-1687

This memo addresses two points: your unpublished opinion in Williams & Wilkins Co. v. United States, No. 73-1279, and the damages problem.

I should preface my discussion by noting that there are at least two reasons why you should not feel compelled to follow your unpublished opinion in Williams & Wilkins. The first, and most obvious, is that it was an unpublished memorandum. The second is that the case arose under the 1909 Act. Neither of these factors require you to abandon your earlier views. Opinions can be correct without being published in the United States Reports—vice versa. Although the 1976 Act incorporated the judicial doctrine of "fair use" without change (and Congress clearly said that this is what it was doing), Congress carefully left open the question of whether the court of claims view in Williams & Wilkins was a correct statement of the doctrine. But if you have changed your mind, these two factors can give you an "out."

The factual setting in Williams & Wilkins is significant. Petr was a publisher of medical journals and books. It charged that the Dept. of Health, Education, and Welfare—operating through the National Institutes of Health (NIH) and the National Library of Medicine (NLM)—was infringing its copyrights
in certain medical journals. In particular, NIH regularly made photocopies of journal articles for the benefit of NIH research workers. NLM provided photocopies of difficult-to-obtain journal articles to other libraries and similar "research-and-education-oriented institutions." Both NIH and NLM would provide only a single copy of an article pursuant to a given request. And on the record before the court of claims, all copies were made for researchers "in connection with their professional work and were used solely for those purposes." 487 F.2d 1345, 1349 (Ct. Cl. 1973).

If we focus on JUSTICE STEVENS's three factors (single copy, private, noncommercial use), therefore, we find that all three are present, at least to some extent, in Williams & Wilkins. (i) Although NIH and NLM might copy a given article more than once over the course of time, they would make only a single copy for a single researcher. The court of claims relied on the single-copy aspect of the case. See, e.g., 487 F.2d, at 1351, 1354. (ii) The NIH and NLM photocopying was not so private as home-use video-taping, which is generally done in the privacy of one's living room. But it was not public, either. The photocopying was available only to a narrow class of people and institutions who had some continuing tie to NIH and NLM. See id., at 1354-1355. (iii) Finally, the photocopying was clearly noncommercial. The court of claims relied on this fact, see, e.g., id., at 1354, and you noted it in your memorandum, see, e.g., p. 1. Indeed, the facts in Williams & Wilkins are about as sympa-
thetic as one could imagine, for the photocopies were being used
to advance medical research.

In this context, you still concluded that the "fair use"
exception did not apply. You wrote:

Although courts and commentators disagree widely as to
the outer edges of the doctrine, there is general
agreement as to its central meaning: use of a copy-
righted work is fair when it is for the purpose of cre-
ating something essentially new, and when the economic
value of the new work does not derive primarily from
incorporating sections of the old.

Memorandum in Williams & Wilkins, No. 73-1279, at 2-3. In my
view, the application of this test in Williams & Wilkins itself
was a close case. In the stereotypical Betamax situation (video-
taping an episode of M*A*S*H or Masterpiece Theatre for later
viewing), the answer is much clearer. There is no question of
the viewers creating something new, and the sole economic value
of the copy is derived from the prior work. If NIH and NLM are
copyright infringers, Betamax users must be infringers in the
stereotypical situation.

II

In my bench memo I did not discuss the remedy issue in
any detail, since the question is not before the Court. I said
then, and I continue to believe, that a total sales ban would be
inappropriate if there are realistic noninfringing uses. I also
suggested that the continuing royalty proposed by CA9 might be
unjustified if the DC were usable to correlate the royalty to the
frequency and severity of infringement. In light of these prob-
lems, I noted that a judicial remedy might be infeasible. I assume that you are now interested in the argument advanced by JUSTICE STEVENS (with some indirect support from JUSTICE BRENNAN) that the lack of an effective remedy counsels the Court to conclude that there has been no infringement.

I do not agree completely with JUSTICE BLACKMUN's treatment of this problem in his opinion. As I mentioned in my last memo, "[i]f you decide to join JUSTICE BLACKMUN, I will have several more specific points to raise." One of these is to suggest some changes in this section. For example, the opinion should make clear that the DC is free to reject CA9's continuing royalty approach if it is impossible to implement in a judicial proceeding. (I understand that JUSTICE BLACKMUN is willing to make this change.) Nevertheless, I essentially agree with JUSTICE BLACKMUN's treatment. The choice of a remedy is a difficult one, but that difficulty should not prevent us from recognizing the existence of infringement.

I do not know if the continuing royalty solution would be possible. Since no one has taken the time to study the problem in detail, we have very little to guide us. (I have long thought that it was a mistake to grant this case in its interlocutory posture.) As a matter of approach, I note that CA9's proposal is not all that different from your suggestion in Williams & Wilkins. See pp. 3-8 of your memorandum. The specifics of that suggestion do not survive the passage of the 1976 Act, but you at least indicated a willingness to consider an equitable solution to the problem. Even if the continuing royalty solution
would be impossible, however, the DC would have other remedies available. For example, it clearly could award statutory damages in individual cases of proven infringement. It might also require Sony to include copyright warnings in its advertising, rather than buried in its owners' manuals.

In sum, it would be a mistake to remand this case with instructions to the DC to impose a continuing royalty system. But that is not the only option available. It is clear that there are some feasible remedies available. Those remedies may not be what the studios hoped to win, but they do not prevent the Court from deciding whether home-use video-taping can be a copyright infringement.

III

Once again, I add that this memo is limited in scope. If you decide to join JUSTICE BLACKMUN, I will have several more specific points to raise. I am sure he will be receptive to any changes you propose.
June 14, 1983

Re: No. 81-1687 Sony Corp. v. Universal City Studios

Dear Harry:

The fourth part of your memorandum of today, dealing with the remedy in this case, satisfies my previously expressed concerns about that aspect of it. If you can see your way clear to put a few of the observations presently contained in your memo into the last part of your opinion, I will be happy to join it.

Sincerely,

Justice Blackmun

cc: The Conference