It's Time for a Truce in the Betamax Battle

Don Edwards

The Supreme Court has postponed making a decision on the "Betamax" case. The Post, in its July 7 editorial, "Video Outlaws?" correctly urges Congress to act now to resolve the copyright and public policy issues that relate to video recorder technology. The Post states, however, in advising Congress to pass quick-fix legislation that would harm those who create motion picture and television programs, would be anti-consumer and would provide electronic and tape manufacturers with a multi-billion-dollar business at the expense of our constitutionally mandated copyright system.

Congress must rise from the major implications of the videocassette recorder:

When people tape programs, they adversely affect the value of creative property whose economic worth derives from the right of the property owner to control when, how and where it is viewed.

When Universal and Disney used Sony for copyright infringement, there were only 30,000 VCR's. By the end of this year there will be 9 million. By 1980, VCR's will be in 40 to 50 million American homes generating massive amounts of taping.

When people tape programs for later viewing, they eliminate commercials by using devices designed for that purpose. Advertisers have stated they will reduce substantially the rate they pay networks and local stations when viewers "tag" their commercials in this way.

"The expected decline in advertising revenue from mass commercial "skipping" will result in a sharp reduction in revenue to the companies involved in the very high-risk business of making motion pictures and television programs.

"If a movie is taped in the home, a videocassette recording of that work is not rented or purchased at the local video store, enabling another revenue stream necessary to recapture investment.

The consequence of these factors create a political and policy dilemma for Congress. We could pass legislation that ignores totally the property rights of copyright owners by exempting home recording from copyright infringement—and do nothing more. Or we could exempt home recording from copyright infringement and devise a fair and reasonable royalty system on videocassette-recorders and blank videotape so that the men and women who produce creative products are compensated when their property is used.

The first course is politically appealing and is urged on us by VCR and tape manufacturers, who are trying to protect their profits.

But this course has serious implications for consumers and for an important American industry. Without some reasonable system of royalty compensation, the erosion of revenue streams on which motion picture production depends will mean lesser high-quality pictures produced in this country.

Just as important, without some form of royalty system, quality motion pictures will be taken off commercially supported television, from which they are taped. This means that those Americans who can't afford or don't have access to pay and cable TV, or can't afford to tape the family to the movies, will be deprived of the type of "free" entertainment they now get. This could be as many as one-half of all American homes. But tape and VCR manufacturers don't seem to care about the future of free television.

Who should pay the royalties? It should be paid by those who stand to benefit economically from home taping, in proportion to their gain. This is done by manufacturers of the machine, and tape, and is required by law to pay a copyright royalty for the privilege of selling their products. This concept is a well-established practice in our copyright system and has guaranteed a flow of ideas and creativity for the public's benefit since the founding of our nation.

Moreover, the function of price competition in the marketplace will make it difficult for manufacturers to try to pass through a significant portion of the royalty to the retail consumer, and thus only a small portion of the royalty fee may be passed on to consumers, at least in the short term. But as a strong consumer advocate, I'm not afraid to pay the consumers who receive something of value should pay for it.

The manufacturers are trying desperately to convince Congress that, if consumers must pay anything to record and perhaps keep a copy of "Mary Poppins," they are being cheated. It's said when communism is manipulated for the enrichment of one industry at the expense of another. It's unfair to the United States and it's unfair to the American community. This is a blind "deal" because they thought they could win the Supreme Court and perhaps in Congress.

Who would have access to a royalty pool? Here again the VCR and equipment manufacturers would have Congress believe that a royalty system would benefit rich Hollywood movie stars. The facts are otherwise. Large and small production companies, members of unions and creative guilds all across America would be the beneficiaries of a royalty system, some of them on the basis of negotiated bargaining with their employers. By the way, unemployment in the entertainment community is substantially above the national average.

The Post asserts that copyright protection "poverty applies only to commercial use." This statement is both legally incorrect and bad public policy. Our copyright less property protects all creators of the intellect, whether they have commercial value or not. The fact that taping occurs in the home shouldn't deny us from recognizing that such behavior will soon occur in $50 million living rooms and this will materially affect the economic viability of the motion picture and television production industries.

How should Congress resolve the Betamax dilemma? The battle between VCR and tape manufacturers and the motion picture industry has gone on too long. We need a true, fair, and permanent solution so that Congress can act and we can move on to other important issues.

I understand that efforts were made last year by the motion picture industry to approach privately the VCR manufacturers to see whether agreement could be reached on legislation. The manufacturers said "no deal" because they thought they could win in the Supreme Court and perhaps in Congress.

The time has come for those who make VCR's and tapes to come to the table in good faith and begin talking with representatives of the American creative community. This is a sensible way to resolve this problem and pave the way for a fair congressional solution.

The writer is a Democratic representative from California.
I believe that the JUSTICE BLACKMUN's opinion is fundamentally correct in its analysis of the legal issues in this case. The first section of this memorandum discusses whether home use of VTRs to copy programs off-the-air constitutes fair use. The second section considers whether Sony may be held liable for infringing uses of the VTRs it sells.

While I think that JUSTICE STEVENS' opinion might be improved in significant ways, this memorandum does not discuss any suggested changes except to point to possible flaws in his analysis.

I. Fair Use

JUSTICE STEVENS' final draft abandons his earlier argument that the Copyright Act creates an implied exception for the making of single copies off-the-air for private use. As to the underlying question of infringement, the issue is whether such copying is privileged under the fair use doctrine.

Section 107 of the Copyright Act adopts the judicially formulated fair use doctrine. The four factors to be considered in fair use analysis point towards a flexible balancing of the benefits derived from the use against the harm that the use inflicts upon the value of the copyright. Congress conceived of the fair use doctrine, enacted as section 107 of the 1976 Copyright Act, as a "equitable rule of reason." Particularly, although Congress
did not intend itself to "expand" the doctrine in any way by enacting it, it did indicate that the courts were to adapt the doctrine to new technologies. House Report, at 65-66.

In addition, Congress indicated in the legislative history the types of factors which were to be considered in applying the very general terms of the fair use doctrine to particular cases. First, Congress indicates that the fact that single, rather than multiple, copies are made makes a difference in fair use analysis. See, e.g., House Report, at 73 (fair use to make single, but not multiple copies, for blind); Senate Report, at 63 (single but not multiple copies for teachers preparing classes). Further, Congress indicates that the copying of entire works, including timeshifting of audiovisual works, may be fair use, although one may infer from Congress' discussion that this will be the exception rather than the rule. E.g., Senate Report, at 65-66 (timeshifting of educational programs in Alaska and copying of works for blind); id. at 64 (reproduction of works for classroom).

However, the indicia of legislative intent discussed by JUSTICE STEVENS are unconvincing. First, JUSTICE STEVENS refers to a 1961 Report of the Register of Copyrights. This Report has only an attenuated connection with the law enacted by Congress in 1976. Further, although the Report recommends that both private "performances" of motion pictures in the home and reproduction of televised motion pictures be permitted, Congress adopted only the first recommendation. See § 106(4),(5) (copyright as to motion pictures applies only to public display). It is hard to find in
this history an endorsement of the recommendation which Congress in fact did not adopt.

Second, JUSTICE STEVENS relies on the legislative history of the 1971 Act. But as JUSTICE BLACKMUN persuasively explains, this history addresses the problem which arose because no copyright protection applied to recordings, except for protection of the underlying composition. Op., at 16-18. [I shall refer to JUSTICE BLACKMUN's proposed opinion as "op." and to JUSTICE STEVENS' memorandum as "mem."] The situation with regard to home VTRs, used to copy works which enjoy full copyright protection, is clearly different.

Thus, the legislative history supplies only general indications that off-the-air copying, particularly of single copies for home use, might, in certain circumstances, be fair use. Otherwise, the legislative history supplies little guidance as to how the balancing process involved in determinations of fair use is to be conducted.

Aside from his use of the legislative history, JUSTICE STEVENS arrives at a different result from JUSTICE BLACKMUN on the fair use issue in two ways. First, he emphasizes benefits to permitting off-the-air copying. Mem., at 40-42. Second, and more importantly, he would impose a higher standard of proof on the copyright holder who seeks to establish that an allegedly infringing use has diminished the value of the copyright. Mem., at 30-34.

I find JUSTICE STEVENS' discussion of the benefits of permitting VTR use in the home largely unconvincing. First,
there are no special constitutional values implicated merely be-
cause the government seeks to regulate conduct "within the priva-
cy of the home." Stanley v. Georgia, 394 U.S. 557 (1969), the
only case JUSTICE STEVENS cites, concerns a content-based regula-
tion on what is read in private -- in that case, on pornography.
The Court concluded that the reading even of pornography in one's
home deserved some first amendment protection. Id., at 564-565.
In contrast, the copyright laws as applied in this case would not
regulate what an individual reads or experiences in private; they
would regulate copying in private and consequently the subsequent
use of the infringing copies. It is a fundamental premise of
copyright law that an infringing use of a work deserves no first
1265, 1267 (W.D. Okla. 1974); Walt Disney Productions v. Air Pi-
copying violates the copyright laws, the first amendment does not
protect this copying whether the copies are viewed in the home or
in public. Further, Stanley is premised on the observation that
the justifications for banning public distribution of pornography
do not apply to its private use. 394 U.S., at 567. In con-
trast, the purposes of copyright law are served by banning copy-
ing whether the copies are used in the home or displayed public-
ly.

Second, JUSTICE STEVENS emphasizes the benefits from
expanding access to television programs. But an infringer always
increases access to the works he disseminates. Rather, one must
inquire whether the purportedly fair use provides access not ob-
tainable by transactions authorized by the copyright holder. See, e.g., Senate Report, at 64 ("key ... factor is whether or not the work is available to the potential user ... through normal channels"). And convenience to the user of the infringing copy does not suffice to establish fair use. See, e.g., H.C. Wainright & Co. v. Wall St. Transcript Corp., 418 F.Supp. 620, 627 (S.D.N.Y. 1976) (synopses of marketing studies). JUSTICE STEVENS does not cite evidence to show that time-shifting expands access beyond what is available through normal broadcasting, reruns, or renting of tapes; nor does he demonstrate that off-the-air copying serves more than the convenience of the viewer.

Further, JUSTICE STEVENS's cursory analysis fails to distinguish productive from non-productive uses. This point bears more directly on the analysis of standards for proof of harm, and I shall discuss it below.

Third, JUSTICE STEVENS observes that a finding of "no fair use" would brand millions of Americans as law-breakers. Further, although award of statutory damages under the old Copyright Act was discretionary with the trial judge, the language of the new Act supports JUSTICE STEVENS' conclusion that award of statutory damages of $100 is now mandatory. See § 504(c)(1) ("the copyright owner may elect ... to recover ... an award of statutory damages for all infringements ..."), § 504(c)(2) (in certain cases "the court ... may reduce the award to a sum not less than $100").

This is a troubling argument. I agree with the implied premise that the law should not stray too far from the moral in-
tuitions of the community. However, it is for Congress, and not this Court, to act as the vehicle by which popular preferences are enacted into law. The moral constraint upon this Court is not responsiveness to the public will but fidelity to precedent and the rule of law. If the doctrines of fair use which Congress enacted in section 107 indicate that off-the-air copying is infringing, then the fact that a majority of Americans find such copying both convenient and blameless is beside the point. Congress remains free to permit this copying, as it might have done in 1976 had it responsibly considered the problem.

Thus, while off-the-air copying undoubtedly confers benefits, as JUSTICE BLACKMUN's opinion acknowledges, these benefits do not deserve the special weight in fair use analysis which JUSTICE STEVENS' opinion attaches to them.

JUSTICE BLACKMUN and JUSTICE STEVENS also differ on the threshold showing that the copyright holder must make of harm to the copyright. JUSTICE BLACKMUN would require only a "reasonable possibility" that harm will result; JUSTICE STEVENS "some meaningful likelihood of future harm." The choice between these two standards is difficult because it essentially requires a legislative judgment whether to favor protection of the copyright over free dissemination of copied works. Neither past precedent or the 1976 Act clearly guides the Court's decision. Nonetheless, there are reasons to think that JUSTICE BLACKMUN's formulation is sounder.

In most contexts, a showing that an entire work was copied for an unproductive use would end the fair use inquiry. E.g.
Meredith Corp. v. Harper & Row, Publishers, Inc., 378 F.Supp. 686, 689-690 (S.D.N.Y. 1974), aff'd 500 F.2d 1221 (2d Cir. 1974); Meeropol v. Nizer, 560 F.2d 1061, 1070 (2d Cir. 1977). No explicit showing of harm would be required. Courts in effect presume substantial harm when an alleged infringer makes a copy clearly substitutable for the original work; analysis of the similarities between the copyrighted and the infringing work replaces direct analysis of harm. See, e.g., Trebovik v. Grossman Music Corp., 301 F. Supp. 339 (N.D. Ohio 1969); H.C. Wainright & Co v. Wallt St. Transcript Corp., 418 F. 627. In a competitive market, as for books or magazines, there is no question that the infringer's sales take away from the sales of the legitimate copyright holder: the copyright holder presumptively loses a sale each time an infringing copy is purchased or used. The defendant may attempt to overcome this assumption by showing that the the infringing copies are used by individuals who otherwise would be unable or unwilling to obtain the item directly or indirectly from the copyright holder: i.e., that the copy expands access in the ways discussed above. E.g., Williams & Wilkins Co. v. United States, 487 F.2d 1345, 1356-1357 (Ct. Cl. 1973).

The present case poses two difficulties for the copyright holder not present in the ordinary case. First is the unique structure of the "market" for television programs. Advertisers, rather than viewers, pay the program producers. With the market structure of television, prediction of economic harm is more speculative. Second, speculation is required because VTR is
a new technology. The standard approach to fair use analysis adopted by the courts is therefore difficult to apply.

JUSTICE BLACKMUN's "looser" standard for demonstration of harm would help to ensure that the unique difficulties of proof in this case are erected as barriers to enforcement of the programmers' copyrights. This is consistent both with congressional intent and judicial precedent. Congress emphasized that the courts should attempt to deal with the problems posed by new technologies. House Report, at 66. To adopt JUSTICE STEVENS' higher standard of proof in effect decides that new technologies will rarely be found to be infringing, simply because it will be difficult to prove with any certainty what their effects will be.

Further, JUSTICE STEVENS' standard may be inconsistent with precedent in two respects. First, it ignores the difference between productive and unproductive uses. The basic rationale for the fair use doctrine is to further the very creativity the copyright laws themselves were meant to foster by permitting creative use of already copyrighted works. As JUSTICE BLACKMUN reasons, the justification for extending the doctrine to unproductive copying is simply that when there is no harm to the copyright holder, there is no point to forgoing that increased public access that the copying affords. Op., at 21-23. The extension of the doctrine to unproductive works is not unprecedented or unjustifiable; but, as discussed above, wholesale copying whose purpose is merely to increase access to the copyrighted work is more readily condemned than copying which is a component of a creative effort. But JUSTICE STEVENS would recognize no difference in the
standard governing productive and unproductive uses. If his standard is appropriate for productive uses, a lesser standard is surely appropriate for non-productive ones.

Further, by not adjusting the burden to the special difficulties of this case, JUSTICE STEVENS would make it considerably more difficult for programmers than for other authors to protect their copyright. (Although JUSTICE BLACKMUN's formula would apply in any case of unproductive use, the choice between his formula and JUSTICE STEVENS' only makes a difference in especially difficult cases such as the present one. As I have suggested above, in most cases of wholesale copying of an entire work for an unproductive use, harm will be easily demonstrable under any standard.) The premise of copyright is that limiting public access to works is justified to reward authors' creative endeavors; JUSTICE STEVENS' standard makes it harder for the programmers to limit public access and thereby thwarts this policy as it is embodied in past fair use cases. In copyright as in other areas of the law, standards and modes of proof are often adjusted to take into account the evidentiary difficulties posed by special types of cases or issues. See, e.g., 3 Nimmer on Copyright, at § 13.01[B] (presumption that proof of access plus similarity establishes copying); and at least some courts have acknowledged that a "speculative" analysis of a potential market may be the basis for a finding of "no fair use." Metro-Goldwyn-Mayer v. Showcase Atlanta Co-op. Prod., 479 F.Supp. 351, 361 (N.D. Georgia 1979) (predicting the market for stage adaptation of book). See also Dow Jones & Co. v. Bd. of Trade of City of Chicago, 546 F. Supp.
113, 121 (S.D.N.Y. 1982) (examining "potential" impairment of copyright value.)

II. Contributory Infringement

The cases establish that a defendant may be liable for contributory infringement (1) if he is in a position to control the direct infringer and derives profit from the infringement, or (2) if he knowingly aids or participates in the infringing activity. JUSTICE BLACKMUN and JUSTICE STEVENS do not differ on the basic formulation of the doctrine.

Sony cannot directly control the infringing activities of home users; however, Sony has been aware of VTR's infringing uses and might be said to aid and participate in them by selling VTRs and by advertising their infringing uses. Op., at 31-33. Nonetheless, it is a close question whether Sony might be held liable under the second prong of contributory infringement doctrine. The past cases which enunciate this standard concern aid or participation whose sole function is to further an infringing enterprise. In contrast, as the DC found, VTR may be used for noninfringing as well as infringing purposes. In other words, Sony knows that its production and sale of VTRs is contributing to some copyright infringement, although it cannot know in any individual case whether the user of its VTR is an infringer.

To hold Sony liable as a contributory infringer thus expands the doctrine beyond its application in prior cases. However, this expansion seems to follow logically from the basic doctrine that an individual who knowingly aids in the commission of a tort is jointly and severally liable with the tortfeasor.
See Screen Gems-Columbia Music, Inc. v. Mark-Fi Records, Inc., 256 F. Supp. 399, 403 (S.D.N.Y. 1966) (applying tortfeasor doctrine to distributors and advertisers of pirated records). The only difference in the case is that Sony knows of a pattern of infringement but cannot know that any given individual purchaser of the VTR is a direct infringer.

The only reason not to expand the doctrine in this way is that holding Sony liable would interfere with the legitimate -- noninfringing -- uses of VTRs. This problem does not arise in prior cases under this branch of contributory infringement doctrine because those cases concerned actions whose only purpose was to aid infringement. Here, because the contributory activity also serves valuable, noninfringing purposes, these purposes must be considered in fashioning a rule which might condemn Sony's sale of VTRs.

As both JUSTICE BLACKMUN and JUSTICE STEVENS recognize, this concern is similar to that embodied in the "staple article" doctrine of patent law. Op., at 32-34; Mem., at 20-22. However, there are differences between patent and copyright that make it dangerous to use the doctrine as more than a rough analogy. The patent standard evolved in reaction to attempts to control the use of additional articles which were used in conjunction with the patented device. For example, when a patentee attempts to require his licensee to purchase his refrigerant as well as pay royalties for his patent, the patentee attempts to dominate a second market -- that for refrigerant -- as well as to enforce his patent. Carbice Corp. v. American Patents Corp., 283 U.S.
such requirements were condemned, under the doctrine of "patent misuse," as attempts to "expand the scope of the patent." "Contributory infringement" and "patent misuse" were thus diametrically opposed doctrines: for example, the patentee could not sue a rival seller of refrigerant for contributory infringement because the attempt to exert the power over a second market constituted patent misuse. See Dawson Chemical Co. v. Rohm & Haas Co., 448 U.S. 176, 191-197 (1950) (tracing history of contributory infringement doctrine). Congress eventually resolved the opposition between these two doctrines by legislating that attempts to control the use of staple articles of commerce constituted "patent misuse"; otherwise, patentees could control the articles to be used with their patented devices under the doctrine of contributory infringement. 35 U.S.C. §271.

The patent law is not directly applicable here because there is no equivalent in copyright to "patent misuse." The copyright-holder who attempts to prevent copying of his program by VTR does not attempt to derive profit from a second market; he simply seeks to enforce his copyright. The difference is this: The attempt of the patentee to control the second market has no redeeming virtue; the attempt of the copyright holder to enforce his copyright serves purposes central to copyright law.

Thus, the strict patent law standard for demonstrating contributory infringement is not justified for copyright. JUSTICE STEVENS may be correct in asserting that that "there is no reason to grant the copyright holder any broader right to bar noninfringing activities than the patent holder." However, that
observation does not call for use of the patent standard in this case, because the patent standard was developed to solve a totally different problem -- use of the patent to derive profit from a second market, not to bar infringement.

I believe that the standard proposed by JUSTICE BLACKMUN better accommodates the concerns of copyright law. If only an insignificant proportion of VTR use is noninfringing, then the classical test for liability for aiding a tortfeasor is reasonably satisfied. And a finding of contributory liability hardly interferes unduly with legitimate uses of VTR if these uses constitute only an "insignificant" portion of total use. In that case, a balance of the interest in protecting the copyright with that in preserving legitimate VTR uses, would surely favor the former.

III. Conclusion

While the outcome reached by JUSTICE STEVENS is intuitively more appealing than that reached by JUSTICE BLACKMUN, it is useful to remember that his opinion does not reach any final decision on any of the issues raised by this suit. His opinion should perhaps be revised to emphasize that, on remand, it remains to the district court to balance the benefits and harms of off-the-air copying after it has applied the standard for harm that the opinion sets forth. This balance may indicate this copying is fair use even after plaintiffs have made the threshold showing that VTRs cause some harm. In addition, as JUSTICE STEVENS suggests, the DC may find that most copying is of programs not copyrighted or programs whose copyright holders permit copy-
ing. (Indeed, it is arguable that these findings, or a finding that no possibility of harm, is dictated by the record as it now stands. However, JUSTICE BLACKMUN correctly observes that the district court declined to make findings on factual issues which are central to the analysis of the case.)

Further, as JUSTICE BLACKMUN observes, the DC retains broad discretion in fashioning an appropriate remedy. At this stage, the court can effectively consider any doubts about the fairness or practicability of treating Sony as a contributory infringer.
MEMORANDUM TO THE FILE:

81-1687 Sony Corp. v. Universal City Studios

The purpose of this memo is to identify - as a memory refresher - some of the principal points in David's fine memo of 9/29.

The memo is divided logically into two main divisions: "fair use" and "contributory infringement".

In his final draft of June 27, John abandons his "implied exception to the Copyright Act for single copies for private use only". He now relies solely on the fair use doctrine of §107.

The four factors to be considered in fair use analysis suggest a balancing of the benefits derived from the use against the harm that the use inflicts on the copyright owner and the policy of copyright laws. The legislative history - though viewed differently by Harry and John - indicates that Congress was thinking primarily about "single" rather than "multiple" copies. It also considered - perhaps as the controlling factor - whether the use was "productive or beneficial". Also, the extent to which the use may be productive is to be balanced against the harm done the copyright.
John finds some benefit from VTR single recording for home use. I find this rather unpersuasive. If a home user misses a program, the better programs are reproduced on public television. Also tapes may be purchased. My private view is that relatively few of the drama type programs are beneficial in any public sense of that term. I feel differently about Redskins games.

Note: See my memorandum, circulated in 1974 in Williams & Wilkins. At that time, I distinguished between productive and nonproductive use. For me then, productive use meant:

"The creating of something essentially new when the economic value of the new work does not derive primarily from the old". (p. 3)

Typical examples include use of portions of manuscripts in new articles in scientific journals, and use for educational purposes in schools and colleges. Here, the entire copyrighted program is copied and usually only for the personal benefit of the homeowner.

Showing of Harm. John and Harry differ in the wording of the standard:

John: "Copyright holder must show some meaningful likelihood of future harm" - p. 6.

HAB: "Only need show a reasonable possibility".
Again, David thinks HAB has the better argument. The general rule is quite straightforward: copying an entire work for nonproductive use is a conclusive answer to a fair use argument.

John argues that TV is sufficiently different to have a different rule. Advertisers - not the viewers (consumers) - pay the owners of the copyrighted programs. David is not persuaded that this makes any difference.

**Contributory Infringement**

Again David agrees with Part V (pp. 28-35) of HAB's third draft of June 21.

Harry's views are as follows:

"A finding of contributory infringement has never depended on actual knowledge of particular instances of infringement; it is sufficient that the defendant have reason to know that infringement is taking place (i.e. constructive knowledge).

* * *

"It is undisputed that Sony had reason to know that Betamax would be used by some owners to tape copyrighted works." (p. 31).

* * *

"Off the air recording is not only a foreseeable use of Betamax, but is the intended use." . . . "Sony has induced and materially contributed to
the infringing conduct of Betamax owners." (p. 32)

HAB concedes, however, and indeed the DC found, that some of the Betamax recording was noninfringing - i.e. the programs were not copyrighted. HAB then concluded:

"If a significant portion of the product's use is noninfringing, the manufacturers and sellers cannot be held contributorily liable for the product's infringement. If virtually all of the product is to infringe, contributory liability may be imposed."

As the DC made no factual finding on this critical issue of whether significant portions are noninfringing, HAB would remand the case for reconsideration, leaving broad authority to the DC as to the remedy.

L.F.P., Jr.
1. Fair Use. John's draft of 6/27
relied solely on "fair use".

1976 Act relevant
5107 of Act lists four factors
In sum, they reflect a balancing
of the benefits from free use
vs the injury to value of copyright
can "equitable rule of reason"

Factors included:
1. Single rather than multiple use
2. Productive (e.g. educational use is necessary
- e.g. teaching, scientific
- e.g. creating some
never use

I'm not persuaded Bedaux use in productive (i.e. generally beneficial)
Bedaux primarily serves the
person or person who own it

2. Contributory infringement
I'd reserve on this issue

3. Should determine whether
a "significant portion" of product's use is non-infringing (e.g.
non-copyrighted programs)
Drake's 

9,500,000 FVTRs in home.

Fair use today need not be done as previously. Relation of claim to speech in 
Wien & Wickins that we aff'd 4-4.

Says Universal (Resp. here) 

have disapproved the "productive 
use" test.

Proper test is what is the 
effect on copyright owner.

DC said Resp conceded no 

harm at time of use. DC 

rejected Resp argument as to 
future harm. They say 
"time shifts" issue are not 
counted in Nielsen 

rating of TV programs.

No ev. of "liberarism.

Agreed with DC that we could 

"hold" no contributory liability 

of not address the infringement 
issue.
Dunlap v. (cont.)
Relief on "staple article of commerce" test in Patent Law.
But conceded, respectively to HAB, that no court has applied it in a copyright case.

Kraft (Resp).
Disagreed with several of factual assertions by Pet's counsel.
Even if 50% of use were not copyrighted programs, there would be actionable infringement.
"Staple article" (patent law) is unsuited to copyright law - very different considerations.

Explain DC's findings w/t to contributory "damages" issue as resulting from Resp's decision to rely on statutory damages & introduced no ev. (not very smart.)

Time when Betamax is used in copy to advertise (e.g., a Xmas ad. is of no value after Xmas)
Kraft (cont.)

As to § 106: "fair use" is a

manner doctrine and only for

limited use, e.g., educational &

scientific.

What is within involved only the

carrying of one article.

Unless use is "fair" in this sense, one
doesn't cross threshold of the
doctrine.

Sony gave its advertisement

an indemnification vs infringement

liability—a clear recognition

that Betamax may infringe.

Dunlavey (Reply)

More studies have been

handsomely paid.
The Chief Justice  

Rev.  
Still were the war last Term.

Justice Brennan  

Rev.  
After changing mind several times last Term, is now with J.P.S.  
No contributory infringement.

Justice White  

Rev.  
Would adopt "standard article of commerce" test.  
Time shifting is not an infringing use.  
Librarian not involved.
Justice Marshall

App'm

Still with H A B.

Justice Blackmun

App'm on violation & reversal.

No real chance

There is infringement

Remand on issue of reason

Justice Powell

App'm on finding of infringement

& Remand on Cont. Infringement.

Still with H A B - though

I have waivered.
Justice Rehnquist

Affirm or infringement
Remand on contributory infringement.

Justice Stevens
Rev.

No change, (Surprise!)

Findings are adequate and no need to remand or contributory infringement.

Justice O'Connor
Rev.

Exceedingly difficult case.
remand or contributory infringement.
October 6, 1983

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

Dear Harry:

I will be delighted to join your dissent in this case.

Sincerely,

T.M.

Justice Blackmun

cc: Justice Powell
    Justice Rehnquist
October 6, 1983

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

Dear Thurgood:

In view of yesterday's vote, I shall, with your permission, undertake the dissent in this case. Is this all right with you?


Justice Marshall

cc: Justice Powell
Justice Rehnquist
Re: No. 81-1687 – Sony Corp. v. Universal City Studios

Dear John:

As you will have surmised, I shall be undertaking the dissent in this case.

Sincerely,

[Signature]

Justice Stevens

cc: The Conference