

Nos. 00-16401 and 00-16403

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NAPSTER, INC., a corporation

Defendant-Appellant

v.

A & M RECORDS, INC., a corporation,

(For Full Caption See Following Pages)

Plaintiffs-Appellees.

NAPSTER, INC., a corporation

Defendant-Appellant,

v.

JERRY LEIBER, individually and dba JERRY LEIBER MUSIC,

(For Full Caption See Following Pages)

Plaintiffs-Appellees.

**On Appeal from the U.S. District Court for the Northern District of
California in Nos. C 99-5183 MHP & C 00-0074 MHP,
The Hon. Marilyn Hall Patel Presiding**

**BRIEF OF DIGITAL MEDIA ASSOCIATION
AS NEUTRAL *AMICUS CURIAE***

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Appeal No. 00-16401

NAPSTER, INC., a corporation,

Defendant-Appellant

v.

A & M RECORDS, INC., a corporation; GEFLEN RECORDS, INC., a corporation; INTERSCOPE RECORDS, a general partnership; SONY MUSIC ENTERTAINMENT, Inc., a corporation; MCA RECORDS, INC., a corporation; ATLANTIC RECORDING CORPORATION, a corporation; ISLAND RECORDS, INC., a corporation; MOTOWN RECORDS COMPANY L.P., a limited partnership; CAPITOL RECORDS, a corporation; LA FACE RECORDS, a joint venture; BMG MUSIC d/b/a/ THE RCA RECORDS LABEL, a general partnership; UNIVERSAL RECORDS INC., a corporation; ELEKTRA ENTERTAINMENT GROUP INC., a corporation; ARISTA RECORDS, INC., a corporation; SIRE RECORDS GROUP. INC., a corporation; POLYGRAM RECORDS, INC., a corporation; VIRGIN RECORDS AMERICA, INC., a corporation; and WARNER BROS. RECORDS INC., a corporation,

Respondents-Appellees.

Appeal No. 00-16403

NAPSTER, INC., a corporation,

Defendant-Appellant,

v.

JERRY LEIBER, individually and dba JERRY LEIBER MUSIC, MIKE STOLLER, individually and dba MIKE STOLLER MUSIC, and FRANK MUSIC CORP., on behalf of themselves and all others similarly situated,

Plaintiffs-Appellees.

CORPORATE DISCLOSURE STATEMENT

Amicus Curiae Digital Media Association is a Delaware non-stock corporation. It has no parent corporations, and no publicly held company owns 10% or more of its stock.

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INTEREST OF THE DIGITAL MEDIA ASSOCIATION AND
SUMMARY OF ARGUMENT

Amicus Curiae Digital Media Association (“DiMA”) submits this brief, without supporting any party on the merits of the case, in order to address pivotal issues relating to the importance and the continuing vitality of contributory copyright infringement principles laid down by the Supreme Court in *Sony Corp. v. Universal City Studios*, 464 U.S. 417 (1984) (“*Sony-Betamax*”). DiMA submits this brief with the consent of all parties.

DiMA is a trade association comprising 62 member companies that develop and utilize digital technologies which enable transmission, performance, distribution, sale and protection of music and video content over the Internet and via other digital networks. DiMA’s members have created and continue to lead the new media economy, enabling consumers to legitimately enhance their enjoyment of audio and video entertainment through the use of Internet-based radio and television-style programming, Internet-enabled media management technologies, and digitally connected portable devices.

A list of DiMA’s members is attached in an addendum to this brief.

DiMA files this brief because, if the district court's distortion of *Sony-Betamax* is permitted to endure, there would be significant adverse consequences for DiMA members as well as for the consumers who utilize

DiMA members' technologies. The uncertainty and confusion that the district court's decision has created pose a significant and unwarranted impediment to DiMA member companies and virtually all other technology companies, which depend on settled expectations arising from the *Sony-Betamax* case to continue advancing their innovative businesses which benefit consumers and content owners alike.

DiMA respects copyright. DiMA members own copyrights and depend on the continued vitality of copyright law. As technology companies, however, they value and depend upon the delicate balance needed to protect both copyright holders and companies that develop consumer technologies that benefit society. Protection of copyright is enshrined in Article I, Sec. 8 of the U.S. Constitution, which provides that:

The Congress shall have Power . . . to Promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

The importance of the Supreme Court's decision in *Sony-Betamax* in promoting the "Progress of Science and useful Arts," with respect to both creative works and technology, cannot be overstated. In that case the Supreme Court imposed a heavy burden on a party that wishes to impose liability on a technology provider on the ground of contributory copyright infringement. Without the protection of *Sony-Betamax*, the development of

new technologies, particularly by young, small, and vulnerable companies, would be easily stifled.

Drawing upon analogies from patent law, the Supreme Court in *Sony-Betamax* held that a party could not be held liable for contributory copyright infringement merely by reason of distribution of technology having the potential for facilitating infringement by its users, so long as that technology was capable of substantial non-infringing uses.

DiMA files this brief to urge that the standard set forth by the Supreme Court -- whether a product is "*capable of substantial noninfringing uses*" -- must be preserved against depredation if technological innovation in the media field is to continue in this country. This standard must not be whittled away, even in a controversial case where the court is clearly focused on allegations of rampant misuse of the technology. Nor should *Sony-Betamax* be distinguished in such a way as to render it meaningless.

DiMA further urges this Court to respect the public interests underlying copyright law and the Intellectual Property Clause of the Constitution by encouraging the development of technologies with beneficial uses. This Court should recognize the important societal interests in encouraging the rapid and unfettered development of new technologies, especially technologies affecting activities of communication and

association, without chilling the development of those technologies by punishing the providers of technologies for the alleged misdeeds of their users.

ARGUMENT

I. Introduction

Although this is a controversial case that has been characterized simply as pitting “sharing” against “theft,” it is really about the rules of liability that govern companies that develop and market new, cutting-edge technologies for widespread public use. The profound issues posed by the district court’s decision affect virtually every developer of new technologies for mass market use, and the rules that emerge from this case will have a significant effect on technology industries.

A core question in this case is whether initial, allegedly improper uses of a new technology justify a judicial prohibition of the new technology before it has had a chance to adapt itself to a mainstream, predominately legitimate role.

DiMA expresses no view on many issues of this case, such as whether the injunction should be overturned or affirmed on other grounds. Nor does DiMA express a view as to how a correct application of the *Sony-Betamax* case would result in this case. DiMA simply wishes to address the

importance of protecting the settled law of *Sony-Betamax* against disturbing changes wrought by the district court.

This case is controversial because public reaction has been extreme on both sides. The district court's distaste for Napster is palpable. The lower court wrote a forceful opinion, ruling against Napster on virtually every available finding, conclusion, and interpretation of law. DiMA fears that the strength of the lower court's views may have prompted it to push its interpretation of *Sony-Betamax* in an incorrect and dangerous direction. Regardless of the ultimate merits of the case, and of the outcome of this appeal, DiMA urges this Court to respect the fundamental soundness of the *Sony-Betamax* decision and to preserve the protection that case affords new technologies, even when those technologies can be used for both good and ill.

II. *Sony-Betamax* Established A Clear, Strict Standard For Contributory Infringement Liability: The Accused Technology Must Not Be Capable Of Substantial Noninfringing Uses.

The Supreme Court in *Sony-Betamax* vigorously rebuffed the contributory infringement claims brought by movie studios against the manufacturer and distributors of the Sony Betamax video tape recorder, which allowed users to record movies from television for both "time-shifting" and archiving. It referred to "respondents' unprecedented attempt

to impose copyright liability upon the distributors of copying equipment.” 464 U.S. at 421. The Court also stated that there was no precedent in the law of copyright for the imposition of vicarious liability based on sales of technology with constructive knowledge of the fact that their customers may use that equipment to make unauthorized copies of copyrighted material. *Id.* at 439.

In *Sony-Betamax* the Court reviewed the careful limitations of contributory infringement liability under patent law. The Court noted that, in the patent context, “cases deny the patentee any right to control the distribution of unpatented articles unless they are ‘*unsuited for any commercial non infringing use*, unless a commodity ‘*has no use except through practice of the patented method*,’ the patentee has no right to claim that its distribution constitutes contributory infringement. . . . ‘[A] sale of an article which though adapted to an infringing use is also adapted to other and lawful uses, is not enough to make the seller a contributory infringer. Such a rule would block the wheels of commerce.’” *Id.* at 441 (citations omitted; emphasis added).

The Court also rejected the suggestion, made by plaintiffs in *Sony-Betamax*, that exercise of copyright rights called for limitations upon distribution of technology. *Id.* at 441 & n.21. The Supreme Court

underscored the importance of not allowing intellectual property rights holders to extend their monopoly beyond the limits of their specific grants.

The Court stated:

The Court of Appeals' holding that respondents are entitled to enjoin the distribution of VTR's [video tape recorders], to collect royalties on the sale of such equipment, or to obtain other relief, if affirmed, would enlarge the scope of the respondents' statutory monopolies to encompass control over an article of commerce that is not the subject of copyright protection. Such an expansion of the copyright privilege is beyond the limits of the grants authorized by Congress.

Id. at 421.

The Supreme Court also gave several justifications against expanding liability for contributory copyright infringement. First, the Court noted that "[t]he judiciary's reluctance to expand the protections afforded by the copyright without explicit legislative guidance is a recurring theme." *Id.* at 431.¹ Second, the Court noted that "[t]he Copyright Act does not expressly

¹ In this vein the Court also observed:

One may search the Copyright Act in vain for any sign that the elected representatives of the millions of people who watch television every day have made it unlawful to copy a program for later viewing at home, or have enacted a flat prohibition against the sale of machines that make such copying possible.

It may well be that Congress will take a fresh look at this new technology, just as it so often has examined other innovations in the past. But it is not our job to apply laws that have not yet been written.

464 U.S. at 456.

render anyone liable for infringement committed by another,” and it contrasted the non-statutory doctrine of contributory copyright infringement with the statutory provision for contributory patent infringement, 35 U.S.C. § 271(b). *Id.* at 434.

The Supreme Court, reviewing contributory infringement cases, borrowed from patent law a doctrine regarding “staple articles of commerce,” which are articles designed for multiple uses and not suited only to infringing conduct. *Id.* at 440. The Court concluded:

The staple article of commerce doctrine must strike a balance between a copyright holder’s legitimate demand for effective – not merely symbolic – protection of the statutory monopoly, and the rights of others freely to engage in substantially unrelated areas of commerce. Accordingly, the sale of copying equipment, like the sale of other articles of commerce, does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes. *Indeed it need merely be capable of substantial noninfringing uses.*

Id. at 442 (emphasis added). The Court continued:

The question is thus whether the Betamax is capable of commercially significant noninfringing uses. In order to resolve that question, we need not explore all the different *potential* uses of the machine and determine whether or not they would constitute infringement. Rather, we need only consider whether on the basis of the facts as found by the district court a significant number of them would be non-infringing. Moreover, in order to resolve this case we need not give precise content to the question of how much use is commercially significant. *For one potential use of the Betamax plainly satisfies this standard*, however it is understood: private, noncommercial time-shifting in the home.

Id. (emphasis added)

In applying the “staple article of commerce doctrine,” the Court held that the plaintiffs had not borne their burden of proving that there were no substantial noninfringing uses of the Betamax. *Id.* at 456. The Court indeed focused on two noninfringing uses.

One such use was recording of programs that was authorized by copyright holders, either currently or in the future. The Court noted that “respondents have no right to prevent other copyright holders from authorizing [time-shifting] for their programs.” *Id.* The Supreme Court stated that:

the business of supplying the equipment that makes [authorized] copying feasible should not be stifled simply because the equipment is used by some individuals to make unauthorized reproductions of respondents’ works. The respondents do not represent a class of all copyright holders. Yet a finding of contributory infringement would inevitably frustrate the interests of broadcasters in reaching the portion of their audience that is available only through time-shifting.

Id. at 446.

The Court referred to evidence in the record about a significant quantity of authorized copying of sports, religious, educational, and other programming as well as *a significant potential for future authorized copying.* *Id.* at 444. The Court’s discussion of the potential of future

authorized copying would have been superfluous if it were not enough, by itself, to justify protection against contributory infringement liability.

Moreover, the Supreme Court noted that, in addition to time-shifting activities, “a substantial number of [survey] interviewees had accumulated libraries of tapes.” *Id.* at 423. Thus the Supreme Court expressly acknowledged substantial uses that were not for the fair use of time-shifting; but they did not deflect the Court from the critical question of whether the technology was capable of substantial noninfringing uses.

In *Sony-Betamax*, “[t]he Court of Appeals [had] concluded . . . that VTR’s were not suitable for any substantial noninfringing use even if some copyright owners elect not to enforce their rights” *See id.* at 428 (citation omitted). The Supreme Court also noted that the Court of Appeals had held that “Sony was chargeable with knowledge of the homeowner’s infringing activity because the reproduction of copyrighted materials was either ‘the most conspicuous use’ or ‘the major use’ of the Betamax product.” *Id.* at 428.

In reversing the Court of Appeals, the Supreme Court overturned as irrelevant the appellate court’s determination that video tape recorders were “sold ‘for the primary purpose of reproducing television programming’ and ‘virtually all’ such programming is copyrighted material.” *Id.* The

discredited analysis of the court of appeals in that case is remarkably similar to the district court's analysis in this case, as discussed below.

III. The District Court Applied The *Sony-Betamax* Standard Backwards And Incompletely By Dwelling On Infringing Uses Rather Than Both Actual And Potential Noninfringing Uses, And By Failing to Focus On Whether The Technology Is *Capable Of Noninfringing Uses*.

The district court acknowledged that:

Under *Sony*, the copyright holder cannot extend his monopoly to products "capable of substantial noninfringing uses." *Sony*, 464 U.S. at 442. Defendant fails to show that space-shifting constitutes a commercially significant use of Napster. Indeed, the most credible explanation for the exponential growth of traffic to the website is the vast array of free MP3 files offered by other users – *not* the ability of each individual to space-shift music she already owns. Thus, even if space-shifting is a fair use, it is not substantial enough to preclude liability under the staple article of commerce doctrine."

(ERO4247:23-ER04248:1) The district court also stated:

Nor do other potential non-infringing uses of Napster preclude contributory or vicarious liability. Defendant claims that it engages in the authorized promotion of independent artists, ninety-eight percent of whom are not represented by the record company plaintiffs. However, the New Artist Program may not represent a substantial or commercially significant aspect of Napster. The evidence suggests that defendant initially promoted the availability of songs by major stars, as opposed to "page after page of unknown artists." Its purported mission of distributing music by artists unable to obtain record-label representation appears to have been developed later.

Other facts point to the conclusion that the New Artist Program was an afterthought, not a major aspect of the Napster business plan....

In any event, Napster's primary role of facilitating the unauthorized copying and distribution [of] established artists' songs renders *Sony* inapplicable.

Plaintiffs do not object to *all* of the supposedly non-infringing uses of Napster. They do not seek an injunction covering chat rooms or message boards, the New Artist Program or any distribution authorized by rights holders. Nor do they seek to enjoin applications unrelated to the music recording industry. Because plaintiffs do not ask the court to shut down such satellite activities, the fact that these activities may be non-infringing does not lessen plaintiffs' likelihood of success. The court therefore finds that plaintiffs have established a reasonable probability of proving third-party infringement.

(ER04248:28-ER04249:28)(citations and paragraph numbers omitted)

In addressing the issue of contributory infringement, the district court misread *Sony-Betamax* and used that misreading to declare *Sony-Betamax* inapplicable, while continuing to refer to it nonetheless.

The district court attempted to distinguish the present case from *Sony-Betamax* by explaining that "the Supreme Court determined in *Sony* that time-shifting represented the *principal*, rather than an occasional use of VCRs." (ER04247:19-20 (emphasis in original)(citing *Sony-Betamax*, 464 U.S. at 421)). This is, however, the *opposite* of the Supreme Court's analysis in that case.

It is noteworthy that, time and again, the district court focused on allegedly infringing uses rather than on the non-infringing uses. The clear focus in *Sony-Betamax*, however, is on the *capability* of substantial *non-infringing* use.

While repeatedly citing statistics of infringing uses, the district court notably omitted any statistics – which appeared easily calculable – from the discussion of noninfringing uses, instead characterizing them qualitatively as “de minimis” and “not a significant aspect of defendant’s business.” (ER04230:16, ER04230:23-25, ER04241:6-8, ER04247:15-17). In failing to apply the same statistical approach to noninfringing use that it applied to infringing use the district court inverted the Supreme Court’s analytical framework in *Sony-Betamax*. Moreover, by focusing only on alleged misuses of the technology, the district court wholly failed to address whether the technology is *capable* of substantial noninfringing uses. Capability is the touchstone under *Sony-Betamax*, not selective surveys of particular usage at a given time.

Moreover, the district court acknowledged that the technology was “specifically designed to allow users to locate music.” (ER04251:24-25) Although the district court went on to say that “the majority of [music] is copyrighted,” the district court acknowledged the broad fundamental purpose of the technology. The question in this case then becomes: does the allegation that a majority of music available through the technology is copyrighted mean that the technology is incapable of a substantial noninfringing use? DiMA respectfully submits that the district court did not

properly apply the *Sony-Betamax* standard, and it severely distorted that standard.

These comments of the district court cause DiMA grave concern for several reasons. First, the district court appears to have substituted a subjective “primary purpose,” or motive, test with respect to development of technology in place of the objective standard set forth in *Sony-Betamax* relating to the capability of the technology. *See also* Opinion at ER04267:3-8 (appearing to adopt “primary purpose” test). Application of a motive test will make future cases against technology providers particularly unsuited to disposition on summary judgment, placing technology providers at undue risk of intimidation through litigation brought by copyright holders who seek to extend their power of copyright into control over technological development.

Second, the district court imposed an odd “timing” test: if a technology is capable of substantial non infringing uses, but those uses develop over time, the district court appeared to reject them because they were not present at the outset. Indeed, it is a commonly known fact that, as some new technologies take root, their exploitation develops from avant-garde to mainstream uses. In any event, the district court’s refusal to consider the evolution of noninfringing uses flies in the face of *Sony-*

Betamax's discussion of potential uses and uses of which a technology is *capable*.

Third, the district court's evaluation of the "primary role" of the technology, instead of the capacity of the technology for substantial noninfringing uses, would both undermine the clear *Sony-Betamax* standard and would subject the same technology to different litigation outcomes as different uses waxed and waned as "primary."²

Fourth, the district court appears to have improperly dissected infringing and noninfringing aspects of what the district court itself described as an "integrated service, including but not limited to its software, servers, search functions, and indexing functions." (ER04264:4-5). This dissection is both unwarranted under *Sony-Betamax* and unworkable in practice: the characterization of particular aspects of modern, integrated technology offerings as "ancillary" or "principal" is prone to unpredictable variation.

The district court's improper dissection of the integrated Napster system led it to rule that, if a technology provider cannot feasibly separate

² In this sense the "primary role" test would collapse into a version of the district court's objectionable timing test, because the choice of "primary role" would depend upon a plaintiff's choice of the relevant time period for suit.

out infringing and non-infringing aspects of its service, the provider is responsible for its “all-or-nothing predicament” and is subject to an injunction that affects the entire technology system. (ER04256:25-ER04257:24) As the district court stated, “Even if it is technologically impossible for Napster, Inc. to offer such functions as its directory without facilitating infringement, the court still must take action to protect plaintiffs’ rights.” (ER04257:21-23) Similarly, the district court, while claiming to enjoin only infringing aspects of the defendant’s system, acknowledged:

Although even a narrow injunction may so fully eviscerate Napster, Inc. as to destroy its user base or make its service technologically infeasible, the business interests of an infringer do not trump a rights holder’s entitlement to copyright protection. Nor does defendant’s supposed inability to separate infringing and non-infringing elements of its service constitute a valid reason for denying plaintiffs relief or for issuing a stay.

(ER04261:21-25)

All of the district court’s findings, and apparently the court’s very instincts, thwart the clear and well established rule of *Sony-Betamax*: a challenged technology *need merely be capable of substantial noninfringing uses* to be freed from the specter of contributory infringement liability. 464 U.S. at 442.

IV. Protection Against Contributory Infringement Liability Does Not, And Should Not, Depend on Whether The Technology Supplier And User Have No Ongoing Contacts; Technology Suppliers For The Mass Market Cannot Be Made Responsible To Police Individual Uses of Their Technology.

In distinguishing this case from *Sony-Betamax* on the ground that this case involves extended contact between a technology provider and its users, unlike the single contact between Sony and Betamax purchasers at the moment of sale (ER04248:8-26), the district court has introduced a disquieting principle that will subject technology providers to an extraordinary burden of policing uses of the technology. This principle is premised on a flawed reading of *Sony-Betamax*. The district court's distinction of *Sony-Betamax* in effect distinguishes that case to meaninglessness.

Although the Supreme Court in *Sony-Betamax* mentioned that the technology vendor in that case had contact with the purchaser (at least with respect to that purchase) only at the time of purchase, the Court did not establish a rule related to how many contacts a vendor had with the purchaser. The Court's holding does not turn on the number of contacts; it turned on whether a technology was capable of substantial noninfringing uses.

The reliance upon a distinction between a single contact and extended contact, like a distinction between “products” and “services,” must fail as unworkable and meaningless. Products are sold with warranties and repair contracts; they are sold with bundled services, such as personal computers with bundled Internet service contracts; owners register their purchases with manufacturers; manufacturers target communications at their registered customers; consumers and businesses lease rather than buy products; software is licensed, not sold; and huge segments of the computer software industry have transformed from delivering software on diskettes to providing remote management, maintenance, and updating of their customers’ software resources or to furnishing software “application services” instead of the software applications themselves.

The defendant’s technology offerings identified by the district court – software, search engine (which combines software with a database), servers (which are computers and computer hardware), and “[the] means of establishing a connection” (which is a website open to the Internet) (ER04231:11-15, ER04252:26-27) are all staple articles of commerce with multiple uses, universally available to strangers through and on the World Wide Web.

The district court provided a telling, but misguided, discussion of the relevance to this case of *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259 (9th Cir. 1996), which involved contributory copyright infringement liability for organizers of a “swap meet” that conducted sales of infringing products. *See id.* at 264. (ER04252:23-ER04253:1)

The technology offerings in *Sony-Betamax* and this case are dramatically different from the conduct of swap meets. To say that a technology vendor, whether of physical technology products or of technology offered electronically over the World Wide Web, can supervise users on the Web in a way a swap meet organizer can supervise the swap meet activities on its property, is to misunderstand profoundly the realities of the technology marketplace and technology distribution.³

³ The district court has also created an untenable “Hobson’s choice” for technology providers with respect to their ability to control or influence the behavior of users of the technology. The district court remarkably held that defendant’s efforts to implement procedures to take advantage of safe-harbor provisions of the Digital Millennium Copyright Act, 17 U.S.C. § 512, by instituting methods to block users alleged to have abused the system, demonstrate the requisite degree of control to make the defendant vicariously liable for copyright liability. (ER04267:17-201) Use of DMCA safe-harbor safeguards by a defendant should not be counted against the defendant, as the district court did here.

V. There Is a Strong Public Interest In The Development of New Technologies, And Those Technologies Should Not Be Stifled By Undue Expansion of Contributory Infringement Liability.

DiMA and its members, who provide a variety of technologies to the public, are mindful of the public interest in the availability of useful technologies. As the Supreme Court explained, drawing on analogies from patent law, the public interest in access to a technology is “necessarily implicated” when there is a charge of contributory infringement predicated entirely on sale of an article of commerce that can be used for infringement. *See Sony-Betamax*, 464 U.S. at 440.

Litigation threats have a real and substantial chilling effect on the development of new technology, especially by new companies that need venture funding to bring new ideas to light. During the pendency of proceedings in *Recording Industry Association of America v. Diamond Multimedia Systems*, 180 F.3d 1072 (9th Cir. 1999), companies that had previously announced portable MP3 music players kept them off the market awaiting the outcome of Diamond Multimedia’s case. The lawsuit itself, in which the technology developer was victorious, slowed development of the legitimate MP3 marketplace.

Litigation risks are best managed by clear, administrable rules and settled expectations. *Sony-Betamax* has provided both with its forceful and

clear statement that technologies capable of substantial noninfringing uses do not create liability for contributory copyright infringement.

The district court's decision in this case replaces *Sony-Betamax's* clear standard with analyses of "principal purpose," the timing and evolution of uses of new technologies, and the "primary role" of technology. The district court's standard, if applied in other cases, will thwart the development of new, powerful, and beneficial technologies because of fears of litigation based upon the possibility of their misuse.

It is true that technological development puts pressures on business models and legal relationships. The issues in this case are complex, as is apparent from the fact that many copyright holders (including many DiMA members) are also technology providers. *Sony-Betamax* has provided a consistent and fair balance between copyright holders and technology providers, and that balance should not be altered.

As the Supreme Court noted in *Sony-Betamax*, copyright law has always responded to pressures of technological development. Changes in copyright law to meet the challenge are the province of Congress, however, not the courts. 464 U.S. at 431. Congress has enacted several waves of legislation addressing copyright in the digital era, and Congress has the

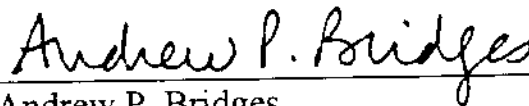
power to alter the law again if necessary. Until Congress chooses to speak in this arena, however, *Sony-Betamax* still rules the day.

CONCLUSION

Digital Media Association respectfully urges this Court, in reviewing the decision of the district court, to resist the standard used by the district court and to apply the correct *Sony-Betamax* standard. Liability for contributory copyright infringement based upon provision of technology must require that the accused technology be *incapable* of any substantial noninfringing use.

Respectfully submitted,

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August 25, 2000

STATEMENT OF RELATED CASES

The Digital Media Association is aware of no relating cases pending before this Court.

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached brief is proportionately spaced, has a typeface of 14 points, and contains 4333 words according to the word count of the word-processing system used to prepare this brief.

DATED: August 25, 2000

Andrew P. Bridges
Andrew P. Bridges

CERTIFICATE OF SERVICE AND FILING

I hereby certify that on August 25, 2000, I caused to be served two copies of the foregoing BRIEF OF DIGITAL MEDIA ASSOCIATION AS NEUTRAL *AMICUS CURIAE* by consigning them to a courier service for next business day delivery to the following persons:

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San Francisco, CA 94108

and that I filed an original and 15 copies of the foregoing BRIEF OF DIGITAL MEDIA ASSOCIATION AS NEUTRAL *AMICUS CURIAE* by consigning them for next business delivery to the courier addressed as follows:

Cathy A. Catterson
Clerk of the Court
U.S. Court of Appeals for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94119-3939

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at Palo Alto, California on August 25, 2000.

Barbara K. St. Onge-Blanks

Barbara K. St. Onge-Blanks



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