

**SONY CORPORATION OF AMERICA, et al., Petitioners, v. UNIVERSAL CITY STUDIOS, INC., AND WALT DISNEY PRODUCTIONS, Respondents.**  
No. 81-1687

OCTOBER TERM, 1982

October 27, 1982

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

**BRIEF AMICUS CURIAE OF CBS INC. IN SUPPORT OF RESPONDENTS**

LLOYD N. CUTLER, JOEL ROSENBLOOM, LOUIS R. COHEN, \* DUANE D. MORSE, WILMER, CUTLER & PICKERING, 1666 K Street, N.W., Washington, D.C. 20006, (202) 872-6000, Counsel for Amicus Curiae CBS Inc.

\* Counsel of Record

Of Counsel: GEORGE VRADENBURG III, HARRY R. OLSSON, JR., CBS Inc., 51 West 52 Street, New York, New York 10019

TABLE OF AUTHORITIES

CASES:

Aro Manufacturing Co. v. Convertible Top Replacement Co., 377 U.S. 476 (1964)

Berlin v. E.C. Publications, Inc., 329 F.2d 541 (2d Cir.), cert. denied, 379 U.S. 822 (1964)

Chappell & Co. v. Middletown Farmers Market & Auction Co., 334 F.2d 303 (3d Cir. 1964)

Columbia Pictures Corp. v. National Broadcasting Co., 137 F. Supp. 348 (S.D. Cal. 1955)

consumers Union of United States, Inc. v. Hobart Manufacturing Co., 189 F. Supp. 275 (S.D.N.Y. 1960)

Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc., 600 F.2d 1184 (5th Cir. 1979)

Elektra Records Co. v. Gem Electronic Distributors, Inc., 360 F. Supp. 821 (E.D.N.Y. 1973)

Elsmere Music, Inc. v. National Broadcasting Co., 428 F. Supp. 741 (S.D.N.Y.), aff'd, 623 F.2d 252 (2d Cir. 1980)

Encyclopaedia Britannica Educational Corp. v. Crooks, 542 F. Supp. 1156

(W.D.N.Y. 1982)

Ferris v. Frohman, 223 U.S. 424 (1912)

Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968)

Gershwin Publishing Corp. v. Columbia Artists Management, Inc., 443 F.2d 1159 (2d Cir. 1971)

G.R. Leonard & Co. v. Stack, 386 F.2d 38 (7th Cir. 1967)

Heim v. Universal Pictures Co., 154 F.2d 480 (2d Cir. 1946)

Henry v. A.B. Dick Co., 224 U.S. 1 (1912), overruled on other grounds, Motion Picture Patents Co. v. Universal Film Manufacturing Co., 243 U.S. 502 (1917)

Inwood Laboratories, Inc. v. Ives Laboratories, Inc., 102 S. Ct. 2182 (1982)

Iowa State University Research Foundation, Inc. v. American Broadcasting Cos., 621 F.2d 57 (2d Cir. 1980)

Italian Book Corp. v. American Broadcasting Cos., 458 F. Supp. 65 (S.D.N.Y. 1978)

Johns & Johns Printing Co. v. Paull-Pioneer Music Corp., 102 F.2d 282 (8th Cir. 1939)

Kalem Co. v. Harper Brothers, 222 U.S. 55 (1911)

Keep Thompson Governor Committee v. Citizens for Gallen Committee, 457 F. Supp. 957 (D.N.H. 1978)

King v. Mister Maestro, Inc., 224 F. Supp. 101 (S.D.N.Y. 1963)

Meeropol v. Nizer, 361 F. Supp. 1063 (S.D.N.Y. 1973)

Meeropol v. Nizer, 560 F.2d 1061 (2d Cir. 1977), cert. denied, 434 U.S. 1013 (1978)

New York Times Co. v. Roxbury Data Interface, Inc., 434 F. Supp. 217 (D.N.J. 1977)

Quinto v. Legal Times, Inc., 506 F. Supp. 554 (D.D.C. 1981)

Rohauer v. Killiam Shows, Inc., 379 F. Supp. 723 (S.D.N.Y. 1974), rev'd on other grounds, 551 F.2d 484 (2d Cir. 1977), cert. denied, 431 U.S. 949 (1978)

Rosemont Enterprises v. Random House, Inc., 366 F.2d 303 (2d Cir. 1966), cert. denied, 385 U.S. 1009 (1967)

Roy Export Co. v. CBS Inc., 672 F.2d 1095 (2d Cir. 1982), cert. denied, 51 U.S.L.W. 3254 (Oct. 4, 1982)

Rubin v. Boston Magazine Co., 645 F.2d 80 (1st Cir. 1981)

Screen Gems-Columbia Music, Inc. v. Mark-Fi Records, Inc., 256 F. Supp. 399 (S.D.N.Y. 1966)

Sid & Marty Krofft Television Productions v. McDonald's Corp., 562 F.2d 1157 (9th Cir. 1977)

Teleprompter Corp. v. CBS, Inc., 415 U.S. 394 (1974)

Time Inc. v. Bernard Geis Associates, 293 F. Supp. 130 (S.D.N.Y. 1968)

Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc., 626 F.2d 1171 (5th Cir. 1980)

United States v. Bodin, 375 F. Supp. 1265 (W.D. Okla. 1974)

Uproar Co. v. National Broadcasting Co., 8 F. Supp. 358 (D. Mass. 1934), modified on other grounds, 81 F.2d 373 (1st Cir. 1935), cert. denied, 298 U.S. 670 (1936)

Wainwright Securities, Inc. v. Wall Street Transcript Corp., 558 F.2d 91 (2d Cir. 1977), cert. denied, 434 U.S. 1014 (1978)

Walt Disney Productions v. Air Pirates, 581 F.2d 751 (9th Cir. 1978), cert. denied, 439 U.S. 1132 (1979)

Walt Disney Productions v. Alaska Television Network, Inc., 310 F. Supp. 1073 (W.D. Wash. 1969)

Wihtol v. Crow, 309 F.2d 777 (8th Cir. 1962)

Williams & Wilkins Co. v. United States, 487 F.2d 1345 (Ct. Cl. 1973), aff'd by an equally divided court, 420 U.S. 376 (1975)

M. Witmark & Sons v. L. Bamberger & Co., 291 F. 776 (D.N.J. 1923)

#### STATUTES:

35 U.S.C. 271(c) (1976)

Pub. L. No. 94-553, 90 Stat. 2541 (1976) (codified at 17 U.S.C. §§ 101-810 (Supp. IV 1980))

Pub. L. No. 92-140, 85 Stat. 391 (1971)

#### LEGISLATIVE HISTORY:

S. Rep. No. 983, 93d Cong., 2d Sess. (1974)

S. Rep. No. 473, 94th Cong., 1st Sess. (1975)

H.R. Rep. No. 2237, 89th Cong., 2d Sess. (1966)

H.R. Rep. No. 487, 92d Cong., 1st Sess., reprinted in 1971 U.S. Code Cong. & Ad.

News 1566

H.R. Rep. No. 1476, 94th Cong., 2d Sess., reprinted in 1976 U.S. Code Cong. & Ad. News 5659

Prohibiting Piracy of Sound Recordings: Hearings Before Subcommittee No. 3 of the House Judiciary Committee on S. 646 and H.R. 6927, 92d Cong., 1st Sess. (1971)

117 Cong. Rec. 12,763 (1971)

117 Cong. Rec. 34,748 (1971)

Statement of Alan Greenspan re Amendment 1333 to S. 1758 Before the Senate Committee on the Judiciary, 97th Cong., 2d Sess. (April 21, 1982)

#### MISCELLANEOUS:

1 M. Nimmer, Nimmer on Copyright (1982)

3 M. Nimmer, Nimmer on Copyright (1982)

Nimmer, Copyright Liability for Audio Home Recording: Dispelling the Betamax Myth, 68 Va. L. Rev. 1505 (November, 1982)

Warner Communications, Inc., A Consumer Survey: Home Taping (1982)

#### INTEREST OF AMICUS CURIAE

CBS broadcasts copyrighted feature films and television programs through five CBS-owned television stations and distributes these materials through the CBS Television Network to approximately 200 affiliated stations. Through the CBS Fox company, CBS markets copyrighted feature films and television programs on prerecorded discs and tapes. CBS also produces and distributes phonograph records and tapes that embody copyrighted sound recordings and musical compositions, and CBS publishes copyrighted musical compositions. All of these activities would be adversely affected by a holding in this case that home tapers are free to appropriate intellectual property without compensating its owner.

Every broadcaster is directly threatened by petitioners' argument that the broadcasting of copyrighted materials makes them fair game for home copying. Motion picture and television producers invest substantial amounts to create copyrighted works. The revenues they receive from the initial broadcast of these works reflect only a portion of their value. The balance is realized through other authorized distributions, including theatrical and cable distribution, later broadcasts, and sales of prerecorded discs and tapes. If the broadcast audience is permitted to copy these works for later discretionary use, a substantial portion of the value that properly belongs to the copyright owner will be lost. To avoid such losses, copyright owners will either shift from broadcast to more secure media of distribution or charge broadcasters more for the use of their works in order to obtain compensation for unlicensed off-the-air copying. But since ratings services do not count and advertisers do not pay for home videotape viewing, the higher cost of obtaining works for broadcast will not be matched by additional advertising revenues.

Although audiotaping is not at issue in this case, the Court's decision may be vitally important to the record industry, in which CBS is a major participant. Uncompensated home audiotaping is having devastating effects on record companies, composers and performing artists, who receive royalties on each record sold. Home taping displaces hundreds of millions of dollars worth of record sales annually. It has led to fewer new releases, smaller royalty payments, fewer opportunities for new artists, and less incentive for creative activity. The Court should not in this video case decide any question relating to audiotaping, which involves different legal, technological, and economic issues, but it should, we respectfully submit, take due note of the severe economic harm done to copyright owners by massive unlicensed home copying by the very people who are the intended audience for a copyrighted work.

Above all, CBS wants the copyright system to continue to provide economic incentives for the creative endeavors that are the lifeblood of its business. The copyright system provides those incentives by permitting creative people to charge for the use of their works. The extraordinary theory being pressed by petitioners -- that a court should authorize free copying in order to give the intended audience broader access to copyrighted works -- is fundamentally inconsistent with the property right that is recognized and protected by the copyright system.

INTRODUCTION: CBS Inc. ("CBS") n1 respectfully submits this brief amicus curiae in support of respondents. n2

n1 CBS Inc. has no parent companies, subsidiaries (except wholly owned subsidiaries), or affiliates. (We construe the terms "parent companies," "subsidiaries" and "affiliates" to mean corporations whose shares are publicly traded and which, in the case of "parent companies," own a majority of the shares of a party; or, in the case of "subsidiaries" and "affiliates," a majority of whose shares are owned by a party.)

n2 The consents of the parties are on file with the Clerk.

#### SUMMARY OF ARGUMENT

Section 106(1) of the Copyright Act gives the copyright owner the exclusive right to "reproduce" or authorize the reproduction of his work. Home taping is reproduction: it is the creation of a tangible copy that can be viewed whenever, and as often, as the copier or anyone to whom the copier gives his copy may wish. Unauthorized creation of such a copy of a copyrighted work is infringement unless it is exempted by some other provision of the statute.

There is no such exemption. The district court discerned an "implied exemption" for home recording, but the statutory scheme clearly precludes implied exemptions, as even petitioners now concede. The broadcast of a copyrighted work does not eliminate its statutory protection, any more than the public performance of a play entitles a member of the audience to make a recording or other reproduction. This Court's CATV decisions -- which involved the question whether simultaneous cable retransmission is an infringing "performance," not the question whether making tangible copies is "reproduction" -- are not in point.

Home taping is not "fair use." The theory of fair use, embodied in Section 107 of the Act, is that a second author should be permitted to make limited and creative use of a first author's work "for purposes such as criticism, comment, news reporting, teaching..., scholarship, or research...." The theory is not, as petitioners contend, that the intended audience for a copyrighted work should be allowed to make free copies whenever the courts think that would promote public "access."

Home video and audio taping bear no resemblance to limited and creative use by a second author of a first author's work. Home taping is massive replication -- one copy at a time -- of entire copyrighted works for the entertainment and convenience of their intended audience. Home taping is fundamentally a commercial activity even though the home copies are not resold: petitioners and others enjoy substantial profits from sales of machines and tapes used to make unauthorized "free" copies, and consumers who use petitioners' products save the cost of buying legitimate copies on which royalties are paid. The fact that copying is done in the home may have a bearing on the appropriate remedy, but it does not save the copying from being infringement.

The fragments of legislative history of the 1971 Sound Recording Amendment cited by petitioners do not indicate that home taping is fair use. They merely confirm that the 1971 Act (which created a copyright in a particular recording of a musical work, separate from the copyright in the composition itself) was intended to deal with commercial piracy and not home taping. The thorough revision of copyright law in 1976 contains nothing in its text or its legislative history that suggests that Congress intended home taping of entire copyrighted works to be freely permissible, either as fair use or on any other theory.

The manufacture and sale of defendants' machines is contributory infringement. The principal use of the recording capacity of a VTR is to make copies of copyrighted materials. That use is, as the court of appeals said, "intended, expected, encouraged, and the source of the product's consumer appeal." n3 Petitioners' speculation that a significant amount of copying is of unprotected materials is contrary to their own evidence.

n3 *Universal City Studios, Inc. v. Sony Corp. of America*, 659 F.2d 963, 975 (9th Cir. 1981).

## TEXT: ARGUMENT

### I. Home Recording of Copyrighted Works Is "Reproduction" in Violation of the Exclusive Right of the Copyright Owner To Reproduce his Work.

This case involves unauthorized copying of copyrighted works, which is a plain violation of a right reserved by statute to the copyright owner. Petitioners seek to obscure that fact by calling the activity "time-shifting" and inventing exceptions not found in the language of the Copyright Act. But the statutory scheme leaves no room for petitioners' linguistic legerdemain.

#### A. Unauthorized home taping violates an exclusive property right granted by statute to the copyright owner.

Section 106 of the Copyright Act of 1976 (the "1976 Act")<sup>n4</sup> grants to the copyright owner certain exclusive property rights that are limited only by the detailed and specific exceptions contained in Sections 107-118. Violation of any of these exclusive rights is infringement. 17 U.S.C. § 501. Among these rights is the right "to reproduce the copyrighted work in copies or phonorecords" or to authorize its reproduction. 17 U.S.C. § 106(1).

<sup>n4</sup> Pub. L. No. 94-553, 90 Stat. 2541 (codified at 17 U.S.C. §§ 101-810 (Supp. IV 1980)).

Home Taping is reproduction. The videotape recorder ("VTR") makes a tangible copy of the copyrighted program. It "fixes" the work on magnetic tape, giving the user the power to view and perform the copyrighted work at his convenience, as often as he wishes. The legislative history of the 1976 Act makes clear that "fixation [of a work] in tangible form [that is] 'sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration'" is reproduction within the meaning of Section 106. <sup>n5</sup>

<sup>n5</sup> H.R. Rep. No. 1476, 94th Cong., 2d Sess. 62-63, reprinted in 1976 U.S. Code Cong. & Ad. News 5659, 5675-76.

Petitioners attempt to disguise the obvious by calling home taping "time-shift reception." But time-shifting is the very essence of reproduction. Copies of books, of phonograph records, of motion pictures, or of television programs enable people to enjoy these works at their convenience, free from externally imposed time constraints. That is what makes copies -- and the copyright owner's exclusive right to make them -- valuable. The creation of an unauthorized personal copy of a broadcast work or a phonograph record, enabling the home tapper to determine the time of its performance, violates that right and is infringement, 17 U.S.C. § 501, unless it is elsewhere excused.

B. There is no special exception for home taping outside the doctrine of fair use.

The only exceptions to the rule that unauthorized reproduction of a copyrighted work is infringement are those specified in Sections 107-118 of the 1976 Act. The district court discerned an "implied exemption" for home recording based upon the legislative history of the 1971 Sound Recording Amendment, <sup>n6</sup> but the court of appeals correctly recognized that the statutory scheme precludes the existence of unstated exceptions to the scope of copyright. <sup>n7</sup> Petitioners apparently concede as much and have abandoned the argument that the 1976 Act contains any special exemption -- explicit or implicit -- for home taping.

<sup>n6</sup> Pub. L. No. 92-140, 85 Stat. 391. That legislative history is discussed in Part IIC of this brief.

<sup>n7</sup> *Universal City Studios, Inc. v. Sony Corp. of America, Inc.*, 659 F.2d at 965-69. Professor Nimmer, America's foremost authority on copyright, concludes in a

forthcoming article that "there is not and never has been an exemption from copyright liability for audio home recording." Nimmer, *Copyright Liability for Audio Home Recording: Dispelling the Betamax Myth*, 68 Va. L. Rev. 1505, 1506 (Nov. 1982).

Nor can home taping be justified on the ground that, by permitting his work to be broadcast, the copyright owner relinquishes his exclusive right to reproduce or authorize reproduction of the work. It is a fundamental principle of copyright that a public performance of a work, including a broadcast performance, does not reduce the copyright owner's rights. n8 As the court said in rejecting a similar argument in *Encyclopaedia Britannica Educational Corp. v. Crooks*, 542 F. Supp. 1156, 1180 (W.D.N.Y. 1982):

n8 See, e.g., *Ferris v. Frohman*, 223 U.S. 424, 435 (1912) (public performance of a play); *Heim v. Universal Pictures Co.*, 154 F.2d 480 (2d Cir. 1946) (public performance of a song); *King v. Mister Maestro, Inc.*, 224 F. Supp. 101 (S.D.N.Y. 1963) (simultaneous public delivery and radio and television broadcast of a speech); *Uproar Co. v. National Broadcasting Co.*, 8 F. Supp. 358, 362 (D. Mass. 1934), modified on other grounds, 81 F.2d 373 (1st Cir. 1935), cert. denied, 298 U.S. 670 (1936) (radio broadcast of a script).

"The plaintiffs' choice of media... does not abrogate their rights as copyright holders. Similarly, whether plaintiffs knew and expected that the broadcasts would be received free of charge does not change their status as copyright holders or mean that they have abandoned their rights under the copyright laws." The copyright owner retains all rights in a work despite its broadcast, including the right to reproduce it in copies or phonorecords, and petitioners do not seriously dispute that fact.

Petitioners invoke the Court's CATV cases, *Fortnightly Corp. v. United Artists Television, Inc.*, 382 U.S. 390 (1968), and *Teleprompter Corp. v. CBS Inc.*, 415 U.S. 394 (1974), but they are not germane. Those cases held that the simultaneous retransmission of a broadcast television performance of a copyrighted work did not amount to an infringing secondary performance of that work but was merely a passive means of enhancing subscribers' ability to receive the broadcast performance. n9 *Fortnightly* and *Teleprompter* did not hold that any of the copyright owner's exclusive rights are lost through broadcast, did not involve copying, and have no application where the issue is not "performance" but "reproduction" in violation of an entirely different statutory right of the copyright owner.

n9 In 1976 Congress effectively overruled *Fortnightly* and *Teleprompter* by creating a statutory mechanism whereby cable operators must obtain a compulsory license and pay royalties to retransmit broadcast works or be liable as infringers. See generally 17 U.S.C. § 111.

The distinction was recognized and applied in *Walt Disney Productions v. Alaska Television Network, Inc.*, 310 F. Supp. 1073 (W.D. Wash. 1969). There CATV operators sought to invoke *Fortnightly* to justify recording broadcast programming

for shipment to and delayed carriage on their cable system in Alaska. The court dismissed the analogy because the defendants had introduced a "time or storage element" that was lacking in *Fortnightly*:

"The 'recording' system used by the defendants captured the impulses and put them in such form that they were capable of being perceived, with proper equipment, innumerable times, and after any passage of time, subject only to the limitations imposed by the characteristics of the plastic tape on which the iron particles were mounted."

*Id.* at 1075. n10 By capturing the broadcast works on tape for later use, the court said, the defendants had violated the copyright owner's exclusive right to make or authorize copies. It was irrelevant that the copying had been necessary to permit retransmission of the copied works on their cable system or that the defendants had not distributed the copies in competition with the copyright owners.

n10 The Court's opinion in *Teleprompter* noted this temporal limitation: "The reception and rechanneling of these signals for simultaneous viewing is essentially a viewer function...." 415 U.S. at 408 (emphasis supplied).

Like *Walt Disney*, this case involves reproduction -- the fixation of entire copyrighted works for later performance -- not simultaneous retransmission. Petitioners say that home taping is like retransmission in that it permits copyrighted works to reach a wider audience than would otherwise be the case, but the same could be said of unauthorized printing of books, manufacture of counterfeit records, or any other form of copying. Congress has granted the copyright owner the exclusive right to reach that wider audience by any means that involves reproduction, and it is the act of reproduction that is the infringement.

The contention that the First Amendment protects unauthorized copying of a copyrighted work has been routinely and repeatedly rejected. n11 Even if the right to receive broadcast signals is regarded as constitutionally protected against some kinds of interference, n12 there is no constitutional right (beyond the scope of fair use) to make an unauthorized copy of someone else's copyrighted work. The First Amendment no more protects the unauthorized reproduction of a broadcast work, such as the television program version of *Roots*, than it would the unauthorized reproduction of the book itself. Both are the property of the copyright owner, and "[t]he first amendment is not a license to trammel on legally recognized rights in intellectual property." n13 Similarly, the Communications Act policy of promoting the fullest use of the broadcast spectrum has no application here. Respondents do not seek to limit either broadcast or reception of their works; they ask only that the programs broadcast and received not be reproduced without authorization.

n11 See, e.g., *Roy Export Co. v. CBS Inc.*, 672 F.2d 1095, 1099-1100 (2d Cir. 1982), cert. denied, 51 U.S.L.W. 3254 (Oct. 4, 1982); *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 758-59 (9th Cir. 1978), cert. denied, 439 U.S. 1132 (1979); *Wainwright Securities, Inc. v. Wall Street Transcript Corp.*, 558 F.2d 91, 95 (2d Cir. 1977), cert. denied, 434 U.S. 1014 (1978).

n12 Brief for the Petitioners ("Pet. Br.") 25.

n13 *Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc.*, 600 F.2d 1184, 1188 (5th Cir. 1979). See *Sid & Marty Krofft Television Prods, v. McDonald's Corp.*, 562 F.2d 1157, 1160-71 (9th Cir. 1977). Cf. *United States v. Bodin*, 375 F. Supp. 1265, 1267 (W.D. Okla. 1974) ("we fail to see as any protected first amendment right a privilege to usurp the benefits of the creative and artistic talent, technical skills, and investment necessary to produce a single long-playing record of a musical performance.").

Given the structure of the statute and the absence of any special exemption for home recording, petitioners must justify their activities, if at all, by showing that they fit within one of the statutory exceptions in Sections 107-118. The only one that has any possible relevance to this case is the fair use exception codified in Section 107.

## II. Home Reproduction of Copyrighted Works Is Not Fair Use.

Home taping is massive, unauthorized, and uncompensated reproduction of copyrighted works for the benefit of the very audience at which the creators of those works are aiming. Unauthorized home copies are direct substitutes for prerecorded discs or tapes of the same programs, movies, or recorded music. Home taping thus displaces sales of copyrighted works, reduces their value to their authors, and decreases the economic incentives for authors to create. As the court of appeals said, a finding of fair use under these circumstances would "stretch [ ] fair use beyond recognition." 659 F.2d at 970 (emphasis in original).

A. The fair use doctrine serves a limited purpose that bears no relation to this case.

Fair use is a privilege in a second author (or other creator) to make limited use of a first author's copyrighted work without his consent. n14 It is a limited privilege to trespass on the intellectual property of another, and it grows out of a recognition that society's interest in promoting "the Progress of Science and useful Arts" is sometimes best served by allowing a second author to build upon a predecessor's creativity. n15 The courts developed and Congress has codified the fair use doctrine "to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster." n16

n14 See *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303, 306 (2d Cir. 1966), cert. denied, 385 U.S. 1009 (1967).

n15 *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541, 544 (2d Cir.), cert. denied, 379 U.S. 822 (1964).

n16 *Iowa State Univ. Research Foundation, Inc. v. American Broadcasting Cos.*, 621 F.2d 57, 60 (2d Cir. 1980), quoted in *Rubin v. Boston Magazine Co.*, 645 F.2d 80, 83 (1st Cir. 1981).

But the societal interest in promoting creativity that is the *raison d'etre* of the fair use doctrine also sets its bounds. As an excused intrusion on literary property, fair use can be no broader than the need from which it springs. The courts have refused

to approve uses that do not serve any creative or productive end, n17 or that tend to undercut the economic incentives for the first author's creativity. n18

n17 See, e.g., *Wainwright Securities, Inc. v. Wall Street Transcript Corp.*, 558 F.2d 91 (reproduction of stock market newsletter not fair use); *Johns & Johns Printing Co. v. Paull-Pioneer Music Corp.*, 102 F.2d 282 (8th Cir. 1939) (reproduction of song choruses in songbook not fair use); *Encyclopaedia Britannica Educ. Corp. v. Crooks*, 542 F. Supp. 1156 (W.D.N.Y. 1982) (off-the-air taping of educational television programs not fair use); *Quinto v. Legal Times, Inc.*, 506 F. Supp. 554 (D.D.C. 1981) (publication of copyrighted article not fair use); *Rohauer v. Killiam Shows, Inc.*, 379 F. Supp. 723 (S.D.N.Y. 1974), rev'd on other grounds, 551 F.2d 484 (2d Cir. 1977), cert. denied, 431 U.S. 949 (1978) (performance of copyrighted silent film not fair use).

n18 See, e.g., *Iowa State Univ. Research Foundation, Inc. v. American Broadcasting Cos.*, 621 F.2d at 62 (fair use rejected because "ABC did foreclose a significant potential market to Iowa"); *Wainwright Securities, Inc. v. Wall Street Transcript Corp.*, 558 F.2d at 96 (fair use rejected because the challenged use had the intent and effect of "fulfilling the demand for the original work"); *Meeropol v. Nizer*, 560 F.2d 1061, 1070 (2d Cir. 1977), cert. denied, 434 U.S. 1013 (1978) (fair use inapplicable if "the market for republication or for sale of motion picture rights [to the Rosenberg letters] might be affected by the infringing work"); *Encyclopaedia Britannica Educ. Corp. v. Crooks*, 542 F. Supp. at 1168 (off-the-air copying of educational broadcasts not fair use since "these practices tend to diminish and prejudice the potential market for these works"). Cf. *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d at 1169 n.13 (infringement found where "the value of the... series, particularly as to its merchandising potential, was sizeably diminished after the McDonaldland commercials appeared.").

The doctrine of fair use is not a device to enable the intended audience to make free copies of a copyrighted work whenever a court thinks society would benefit from wider distribution. "The fair use doctrine is not a license for... theft, empowering a court to ignore a copyright whenever it determines the underlying work contains material of possible public importance." n19 To the contrary, the fair use doctrine assumes that the copied work is accessible to the public and asks whether the preparation of a second work "requires some use of prior materials dealing with the same subject matter." n20 The doctrine allows that "use of prior materials" where to do so will serve society's interest in encouraging the second author's creative efforts without limiting the potential market for the first work.

n19 *Iowa State Univ. Research Foundation, Inc. v. American Broadcasting Cos.*, 621 F.2d at 61.

n20 *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d at 307.

Petitioners ask the Court to depart several miles from traditional fair-use analysis. They would have the Court balance, in each case, the copyright owner's interest in the protection of his property against society's interest in the greater "access" that would result from allowing free copying. But the fair use doctrine is not a roving

commission to weigh private incentives against public access, or a general license for the courts to prefer the audience to the author.

It is the copyright system itself that serves society's overriding interest in making creative work available to the public. The system provides economic incentives for creative work, and it protects against unauthorized use so that authors need not fear to make their works public. Congress codified the fair use doctrine for application in cases where a finding of infringement would inhibit rather than encourage creativity. Petitioners' "access" argument is like saying that, after a toll bridge has been built, the "public interest in access" to the bridge would be better served by eliminating the tolls. It is an argument that would destroy the economic foundation of the copyright system.

B. Home taping does not satisfy any of the criteria of fair use.

Congress codified the fair use doctrine in Section 107 of the 1976 Act. Section 107 states that fair use means use "for purposes such as criticism, comment, news reporting, teaching..., scholarship, or research...." Making a personal copy of the whole of a feature film or popular record, solely for one's own convenience and entertainment, does not remotely resemble anything on that statutory list.

In addition to listing examples, Section 107 codifies the four factors the courts have looked to for guidance in determining whether a challenged use is fair. *Meeropol v. Nizer*, 560 F.2d at 1068-69. n21 Analysis of the use in this case under the four factors listed in Section 107 and the case law from which they were drawn shows conclusively that home taping is not fair use.

n21 Section 107 restates the judicially developed fair use doctrine, without enlargement, restriction or change. S. Rep. No. 473, 94th Cong., 1st Sess. 62 (1975); H.R. Rep. No. 1476, 94th Cong., 2d Sess. 66 (1976), reprinted in 1976 U.S. Code Cong. & Ad. News 5659, 5679.

The first factor -- the purpose and character of the use -- has been held to exclude from fair use so-called intrinsic uses of a copyrighted work. n22 "Fair use" has always meant creative use; use that is incidental to some distinct, productive endeavor such as parody, n23 scholarship, n24 research, n25 biography, n26 news reporting, n27 criticism n28 and the like. n29 Copying a work to use it for its intended purpose has never been held to be fair use because it supplants demand for the copyrighted original and reduces its value. n30 Professor Nimmer has termed this distinction the "functional test": if the defendant's use performs the same function as the copyrighted work, it is infringement. 3 M. Nimmer, *Nimmer on Copyright* § 13.05[B] at 13-65-72 (1982). n31 Obviously, home videotaping of creative works in their entirety solely for the convenience and enjoyment of the VTR owner lacks the fundamental productive character of a fair use.

n22 The only case claimed by petitioners to hold an intrinsic use of a copyrighted work to be fair use is *Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd* by an equally divided court, 420 U.S. 376 (1975), a decision whose rationale the court below termed "singularly unpersuasive." 659 F.2d at 970. *Williams & Wilkins* involved copying by the National Institutes of Health and the

National Library of Medicine of isolated articles from medical and scientific journals to fill single requests of library patrons, generally scientists and physicians. The Court of Claims found this to be a fair use, in part because it was "convinced that medicine and medical research will be injured by holding these particular practices to be an infringement." 487 F.2d at 1354. This Court's 4-4 affirmance, of course, lacks any precedential force.

Whether or not *Williams & Wilkins* represents a proper application of the fair use doctrine in the context of copying for scholarly purposes and CBS believes it does not -- it does not authorize the wholesale appropriation of copyrighted works solely for convenience and entertainment. Moreover, the *Williams & Wilkins* problem apparently has been resolved legislatively by Sections 108(a) and (d) of the 1976 Act. Those Sections provide that, in most situations, it is not an infringement of copyright for a library to reproduce no more than one copy of a journal article if the copy becomes the property of the requesting patron and the work is to be used for private study, scholarship or research. This fact suggests Congress disagreed that the use at issue in *Williams & Wilkins* was a fair use and therefore found it necessary to construct an exception beyond the limits of the fair use doctrine.

n23 See, e.g., *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541 (song parodies); *Elsmere Music, Inc. v. National Broadcasting Co.*, 482 F. Supp. 741 (S.D.N.Y.), *aff'd*, 623 F.2d 252 (2d Cir. 1980) (same); *Columbia Pictures Corp. v. National Broadcasting Co.*, 137 F. Supp. 348 (S.D. Cal. 1955) (movie parody).

n24 See, e.g., *Time Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130 (S.D.N.Y. 1968) (use of movie frames in book presenting a theory of President Kennedy's assassination).

n25 See, e.g., *G.R. Leonard & Co. v. Stack*, 386 F.2d 38, 39 (7th Cir. 1967) (use of copyrighted rate directory to verify and augment defendant's independent compilation).

n26 See, e.g., *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966) (reproduction of magazine articles in biography of Howard Hughes); *Meeropol v. Nizer*, 361 F. Supp. 1063 (S.D.N.Y. 1973) (reproduction of private letters in book about Julius and Ethel Rosenberg).

n27 See, e.g., *Italian Book Corp. v. American Broadcasting Cos.*, 458 F. Supp. 65 (S.D.N.Y. 1978) (reproduction of performance of copyrighted song in news coverage of a parade).

n28 See, e.g., *Consumers Union of United States, Inc. v. Hobart Mfg. Co.*, 189 F. Supp. 275 (S.D.N.Y. 1960).

n29 See, e.g., *Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171 (5th Cir. 1980) (comparative advertising); *Keep Thompson Governor Comm. v. Citizens for Gallen Comm.*, 457 F. Supp. 957 (D.N.H. 1978) (partial use of campaign song in opponent's political advertisement); *New York Times Co. v. Roxbury Data Interface, Inc.*, 434 F. Supp. 217 (D.N.J. 1977) (index of plaintiff's work).

n30 Compare *Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc.*, 626 F.2d at 1177 (comparative advertising held fair use since "we are simply unable to

find any effect -- other than possibly de minimis -- on the commercial value of the copyright"); *Berlin v. E.C. Publications, Inc.*, 329 F.2d at 543 (parody held fair use since no claim of passing off or "that defendants' parodies might satisfy or even partially fulfill the demand for plaintiffs' originals"); *Time Inc. v. Bernard Geis Assocs.*, 293 F. Supp. at 146 (use of photos to illustrate theory held fair use since "no competition between plaintiff and defendants"), with *Iowa State Univ. Research Foundation, Inc. v. American Broadcasting Cos.*, 621 F.2d at 62 (broadcast of film held not fair use because "ABC did foreclose a significant potential market to Iowa"); *Wainwright Securities, Inc. v. Wall Street Transcript Corp.*, 558 F.2d at 96 (copying of stock market reports for distribution to investors held not fair use because the use had "the obvious intent, if not the effect, of fulfilling the demand for the original work"); *Encyclopaedia Britannica Educ. Corp. v. Crooks*, 542 F. Supp. at 1169 (off-the-air taping and distribution to schools of educational films held not fair use because these practices "tend to diminish and prejudice the potential market for these works").

n31 The Senate Committee on the Judiciary echoed this view in its 1975 Report on the proposed revision of the Copyright Act: "With certain special exceptions (use in parodies or as evidence in court proceedings might be examples) a use that supplants any part of the normal market for a copyrighted work would ordinarily be considered an infringement." S. Rep. No. 473, 94th Cong., 1st Sess. 65 (1975).

The second factor -- the nature of the copyrighted work -- also argues against a finding of fair use here. Because the fair use doctrine is designed to effect an accommodation between the author's exclusive right to charge for the use of his work and the public interest in allowing other authors to build on that work, the scope of fair use depends on the extent to which the copyrighted work lends itself to productive use by others. n32 Informational works, which lend themselves readily to productive use, are much more likely to be held subject to fair use than are purely imaginative or creative works, which do not. n33 Obviously, the works most often recorded by VTR owners (copyrighted television programs and feature films) and those most often copied on audiotape recorders (popular records) are creative works designed primarily to entertain. n34 The Court should be particularly reluctant to characterize their unauthorized use as fair.

n32 See *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d at 307. See also *Meeropol v. Nizer*, 560 F.2d at 1068-71.

n33 See *Rohauer v. Killiam Shows, Inc.*, 379 F. Supp. at 733; 3 M. Nimmer, *Nimmer on Copyright*, § 13.05[A][2] at 13-61 (1982). It is true, of course, that parodists sometimes make productive use of creative or imaginative works, See, e.g., *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541. This case, however, involves nonproductive copying rather than parody.

n34 Petitioners' own survey indicates that entertainment shows account for over 80 percent of the programs recorded by Betamax owners. *Crossley Surveys, Inc., A Survey of Batamax Owners*, R. 2353, DX OT, Table 20.

The third factor -- the amount and substantiality of the portion used -- is by itself sufficient to preclude a finding of fair use in this case. The home taper reproduces

an entire copyrighted work, not just a portion of it. Petitioners attempt to play down this factor by arguing that "the brief duration of the VTR recording counterbalances its 'amount and substantiality'," Pet. Br. 21 n.32, but that argument is clearly beside the point. The VTR owner records the entire work because he intends it to become an exact substitute for the copyrighted original. How long he keeps the unauthorized copy and how often he uses it (matters over which the copyright owner has no control) have no bearing on his right to make the copy in the first place. n35

n35 See, e.g., *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 758 (9th Cir. 1978), cert. denied, 439 U.S. 1132 (1979) ("excessive copying precludes fair use"); *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d at 310 ("the fair use privilege is based on the concept of reasonableness and extensive verbatim copying or paraphrasing of material set down by another cannot satisfy that standard"); *Wihtol v. Crow*, 309 F.2d 777, 780 (8th Cir. 1962) ("it is not conceivable to us that the copying of all, or substantially all, of a copyrighted song can be held to be "fair use").

*Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171, is not to the contrary. That case involved the reproduction of the cover of TV Guide magazine in a comparative advertisement for the defendant's competing publication. In the first place, the court rejected "Triangle's argument that the cover of TV Guide is separately copyrighted and that therefore Knight-Ridder ha[d] reproduced an entire copyrighted work." Id. at 1177 n.15. Moreover, Knight-Ridder used the cover for comparative advertising, not for its intrinsic purpose of covering a magazine. Id. at 1176 n.12.

The fourth factor -- the effect of the use on the potential market for or value of the copyrighted work -- reveals the fallacy of petitioners' fair use argument. Far from being the harmless activity that petitioners make it out to be, home taping is essentially a commercial activity whose economic effect is no different from that of commercial piracy: by creating an exact substitute for a prerecorded copy, home taping destroys, pro tanto, the potential market for legitimate copies of the recorded work. n36 And while the copying activities of any individual VTR or audiocassette recorder owner may have only a small effect, that effect is multiplied thousands of times by the activities of other owners. In the area of audiotaping, the cumulative activities of individual home tapers cost copyright owners hundreds of millions of dollars in lost record and tape sales annually. n37 Congress has made clear that the fair use doctrine does not sanction such displacement:

n36 *Encyclopaedia Britannica Educ. Corp. v. Crooks*, 542 F. Supp. at 1171, is instructive in this regard. There, the court found that off-the-air taping and reproduction of educational television programs by a nonprofit educational organization was not fair use even though the unauthorized copies were not sold:

"In this form, these videotape copies plainly had the effect of fulfilling a demand for the original work,... since without the videotape copies, these works would not have been available at all. This use causes harm to the plaintiffs' copyright, for even if the use was insufficient to warrant purchase..., defendants could have leased or rented these three works from the plaintiffs for classroom use. Thus, the videotape use here directly interferes with the marketability of plaintiffs' copyrighted works...

and the cumulative effect of this videotaping tends to diminish and prejudice the potential market for these works." Id. (citations omitted).

n37 In 1980, home tapers recorded the equivalent of approximately 455 million albums. Warner Communications, Inc., A Consumer Survey: Home Taping 20 (1982). It has been estimated conservatively that nearly 40 percent of home taping activity is in lieu of the purchase of prerecorded discs or tapes and that the industry lost over a billion dollars in 1981 -- \$900 million in lost sales and \$150 million due to artificially depressed prices -- as a result. Statement of Alan Greenspan re Amendment 1333 to S. 1758 Before the Senate Committee on the Judiciary, 97th Cong., 2d Sess. 5 (April 21, 1982).

"When the unauthorized copying displaces what realistically might have been a sale, no matter how minor the amount of money involved, the interests of the copyright owner need protection. Isolated instances of minor infringements, when multiplied many times, become in the aggregate a major inroad on copyright that must be prevented." n38

n38 H.R. Rep. No. 2237, 89th Cong., 2d Sess. 64 (1966). See S. Rep. No. 983, 93d Cong., 2d Sess. 118 (1974). See also *Encyclopadia Britannica Educ. Corp. v. Crooks*, 542 F. Supp. 1156.

Petitioners assert that home videotaping does as much good as harm to copyright owners because it enables broadcast works and their sponsors to reach people who were within the intended audience of the broadcast from which the recording was made but were unable or unwilling to view it off the air. But ratings services do not count instances of viewing of home tapes and advertisers do not pay for such viewers. Given the "pause" and "fast-forward" capabilities of petitioners' machines and the other factors that make VTR viewers less valuable to sponsors, it is the sheerest speculation that advertisers will pay for VTR viewing in the future, let alone pay enough to compensate for the displacement of the market for legitimate copies.

People unable or unwilling to watch a first broadcast constitute a separate and important potential market for the copyrighted work. They may be part of the audience for a subsequent broadcast or potential purchasers of prerecorded tapes or discs. Congress gave the right to exploit that market to the copyright owner, and that right should not be destroyed by the courts merely because technological advances have now given members of that potential market the physical capability to seize the work without paying anything for it.

Even if there were evidence that home taping produces some offsetting benefits to the copyright owner, that would not excuse the taking of his property. The Second Circuit made this clear in *Iowa State Univ. Research Foundation, Inc. v. American Broadcasting Cos.*, when it rejected the defendant's argument that its unauthorized broadcasts of portions of the plaintiff's copyrighted film in connection with coverage of the 1972 Olympics were excused because the film's market value had been enhanced by the broadcasts. Granting that premise, the court said:

"Nevertheless, we believe that ABC did foreclose a significant potential market to Iowa -- sale of its film for use on television in connection with the Olympics... When

ABC telecast without purchasing the film, it usurped an extremely significant market. Iowa had no right to insist that the network use its film, but its copyright entitled it to attempt to exploit the commercial market controlled by ABC, and, if it could not, to withhold permission to use the film in that market. Accord, 3 Nimmer on Copyright § 13.05 [B]."

621 F.2d at 62. We are dealing not with a regulatory scheme in which the burdens and benefits of each unauthorized use are to be weighed, but with property rights that the copyright owner is entitled to exploit as he sees fit. It has long been settled that violation of those rights is infringement, regardless of any incidental benefit the violation may produce. n39

n39 See, e.g., Chappell Co. v. Middletown Farmers Market & Auction Co., 334 F.2d 303, 305 (3d Cir. 1964); M. Witmark & Sons v. L. Bamberger & Co., 291 F. 776, 780 (D.N.J. 1923).

Nor, finally, is it material to the question of fair use that the unauthorized reproduction at issue in this case takes place in the home. That fact may, for reasons that have nothing to do with copyright or fair use, affect the appropriateness of certain remedies that ordinarily are available under the statute, but it does not change the legal status of home taping. The Court would have no difficulty holding a commercial pirate who manufactured unauthorized videotapes or phonorecords liable for infringement even if his factory was in his basement and he sold to others "only for private use." The fact that here the infringer sells the machine and lets his customers do the actual copying does not make the copying fair use. n40 Decentralized infringement is, nevertheless, infringement.

n40 Cf. Elektra Records Co. v. Gem Electronic Distributors, Inc., 360 F. Supp. 821, 824-25 (E.D.N.Y. 1973) (duplication of prerecorded audiotapes held infringement despite the fact that the copies were made by individual customers).

C. The 1971 legislative history does not convert otherwise impermissible copying into fair use under the 1976 Act.

Petitioners attempt to escape the fact that home taping does not meet the statutory criteria for fair use by suggesting that Congress nevertheless intended the activity to be treated as fair use. The legislative history, however, does not support that conclusion.

Petitioners' argument is based entirely on three statements made during House consideration of the 1971 Sound Recording Amendment (the "1971 Amendment"), n41 a stop-gap measure that amended the 1909 Act to provide immediate relief against unauthorized commercial manufacturing of phonograph records, which had reached epidemic proportions by 1971. n42 Petitioners' attempt to find in these statements a general congressional intent that all home taping be treated as fair use fails on several accounts.

n41 Pub. L. No. 92-140, 85 Stat. 391. To make clear that the bill was aimed at record piracy, not at amateur recording for personal use, the Assistant Register of

Copyrights testified that the bill would not cover tape recording in the home by a child and expressed the view that home taping generally could not be controlled or restrained. Prohibiting Piracy of Sound Recordings: Hearings before Subcomm. No. 3 of the House Judiciary Comm. on S. 646 and H.R. 6297, 92d Cong., 1st Sess. 22-23 (1971). Similarly, the House Report on the 1971 Amendment stated that "... it is not the intention of the Committee to restrain 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." H.R. Rep. No. 487, 92d Cong., 1st Sess. 7, reprinted in 1971 U.S. Code Cong. & Ad. News 1566, 1572. And in a colloquy on the floor of the House, Representative Kastenmeier, the Chairman of the House Committee, affirmed that the bill covered duplication "for commercial purposes only," and expressed the view without citation or explanation that home taping by a child would be fair use since "[t]he child does not do this for commercial purposes." 117 Cong. Rec. 34,748-49 (1971).

n42 See, e.g., 117 Cong. Rec. 12,763 (1971) (remarks of Senator McClellan). The 1909 Act afforded no copyright protection to particular recordings of copyrighted songs. Since neither record companies nor recording artists could sue for infringement, and since the interests of songwriters were generally too small to justify the expense of an infringement action, commercial pirates operated virtually unchecked until the 1971 Amendment became law.

First, the 1971 legislation did not purport to codify, enlarge, restrict, or otherwise affect the doctrine of fair use in any way. It was intended to address the specific problem of commercial record piracy by giving record companies a "sound recording" copyright so that they could pursue the pirates as infringers. It contained no reference whatever to the fair use doctrine and no indication that home recording or any other activity was to be treated as fair use. n43 Remarks in the legislative history concerning fair use would offer no interpretative guidance, because the legislation was not on that subject.

n43 Musical compositions embodied in phonorecords had enjoyed copyright protection, including the exclusive right to make discs or tapes, since 1909, see, e.g., *Screen Gems-Columbia Music, Inc. v. Mark-Fi Records, Inc.*, 256 F. Supp. 399 (S.D.N.Y. 1966), and the 1971 Amendment did not purport to limit that protection in any way. A home tapper necessarily copies the musical composition. The legal status of uncompensated copying of copyrighted musical compositions, prohibited since 1909, was of course not affected by remarks in the 1971 legislative history of a statute that provided a new and additional form of copyright protection.

Second, two of the three statements cited by petitioners do not use the words "fair use" or appear to refer to that doctrine. The Assistant Register's remarks seem more consistent with the view that a copyright owner's right to prevent copying would be difficult to enforce against a home tapper than with the idea that the activity is permissible, as fair use or otherwise. And the House Report simply indicates that the Committee, perhaps motivated by the same consideration, did not intend the bill itself to restrain private noncommercial taping activity. Only Representative Kastenmeier used the words "fair use", and he did so in the heat of debate and with reference to a child engaged in a hobby. This is surely a skimpy basis for inferring

that Congress as a whole thought the home taping industry was engaged in fair use.

In any event, the legislative history of the 1971 Amendment is irrelevant to the question whether home taping is fair use today. The 1909 Act and its 1971 Amendment were superseded by the 1976 Act, which fundamentally changed the system of property rights and exceptions at issue in this case. In particular, it was in 1976 that the copyright owner's exclusive right to "reproduce" was separated from his right to "distribute" copies, making it clear that reproduction without distribution nevertheless is infringement. 17 U.S.C. §§ 106, 501. Sound recordings -- which were the subject of the 1971 Amendment -- and audiovisual works -- which are at issue in this case -- are treated separately and afforded different degrees of copyright protection. 17 U.S.C. §§ 106, 114. The provisions of the 1971 Amendment -- which petitioners would like the Court to believe were simply reenacted in 1976 -- have been replaced by language in four separate sections of the 1976 Act. See 17 U.S.C. §§ 101, 102(7), 106 (1), (2) & (3), and 114. And the fair use doctrine is now codified in Section 107, which of course makes no reference to home taping.

Congress said nothing in 1976 that indicates home taping activity was intended to be exempt or to be treated as fair use under the new act. To the contrary, both the Senate and House Committee reports state plainly that the 1976 Act was "not intended to give [photocopying or taping] any special status under the fair use provision or to sanction any reproduction beyond the normal and reasonable limits of fair use." n44 And the Senate Committee report strongly implies that Congress did not consider home taping to be fair use. n45

n44 H.R. Rep. No. 1476, 94th Cong., 2d Sess. 66, reprinted in 1976 U.S. Code Cong. & Ad. News 5659, 5679; S. Rep. No. 473, 94th Cong., 1st Sess. 62 (1975).

n45 Noting that schools located in time zones several hours removed from the point of origin of educational television transmissions might need to record that programming for delayed presentation to students, the Committee stated that it believed such recording to be a fair use. But the Committee was careful to point out that it "[did] not intent to suggest, however, that off-the-air recording for convenience would under any circumstances, be considered 'fair use'." Id. at 66.

### III. Petitioners Are Liable as Contributory Infringers.

The Second Circuit has stated the rule of contributory infringement as follows:

"[O]ne who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another, may be held liable as a 'contributory' infringer."

Gershwin Publishing Corp. v. Columbia Artists Management, Inc., 443 F.2d 1159, 1162 (2d Cir. 1971) (footnote omitted). Both the lower courts and the petitioners have acknowledged that this is an accurate statement of the rule. n46 The only question before the Court is its proper application to this case.

n46 Universal City Studios, Inc. v. Sony Corp. of America, 480 F. Supp. 429, 459 (C.D. Cal. 1979); Universal City Studios, Inc. v. Sony Corp. of America, 659 F. 2d at

975; Pet. Br. 43.

There can be no question that petitioners induced, caused or materially contributed to the infringement of respondents' copyrighted works. They designed, built, promoted and sold the home VTR for the primary purpose of recording broadcast programs. The VTR owners who reproduced respondents' copyrighted works merely used that instrumentality for its obvious purpose. Petitioners' actions clearly played an important part in the infringement, and they do not seriously contend otherwise.

Instead, petitioners argue that they cannot be held liable as contributory infringers because they had no knowledge of or intent to facilitate the infringing activity. They contend that the VTR is but a staple item of commerce, capable of substantial noninfringing use, and that they had no way of knowing that any particular customer would use it to reproduce copyrighted works. But both the premise and the conclusion of this argument are wrong.

The premise that there are substantial noninfringing uses for the home VTR is incorrect. VTRs are designed specifically to make tapes of audiovisual works received off the air or by cable. Indeed, unless a VTR owner spends several hundred dollars extra to purchase a videotape camera, this is virtually the only use of his machine's "record" capability. n47 Since almost everything broadcast on television is an audiovisual work in which "copyright protection subsists," n48 use of a VTR for its intended purpose of recording broadcast programs is almost always infringement. n49

n47 Petitioners' argument that the ability of VTRs to play prerecorded videocassettes makes them suitable for substantial noninfringing use is frivolous. It is the ability of VTRs to make recordings that is at issue in this case. (Videodisc players, which lack a record capability but can play prerecorded discs, are readily available at a considerably lower cost than VTRs). The fact that the recorder comes in the same box with the playback capacity does not make the recorder suitable for noninfringing use.

n48 "Copyright protection subsists" in any work that is "fixed in any tangible means of expression... from which it can be perceived..., either directly or with the aid of a machine or device." 17 U.S.C. § 102.

For example, a recorded performance of a Shakespeare play is a copyrighted audiovisual work. Virtually the only broadcast works that are not copyrighted are audiovisual works that, because of age or prior divestitive publication, are themselves in the public domain; government audiovisual works ineligible for copyright; and live programs that are not recorded simultaneously with their transmission and hence are never "fixed". It should be noted that even public domain materials often are accompanied by copyrighted commentary, music or graphics.

n49 It is irrelevant that owners of unregistered works cannot bring infringement actions. 17 U.S.C. § 411. So long as the works remain fixed, they are copyrighted, and their unauthorized reproduction is infringement. 17 U.S.C. § 501.

Nor is it significant that petitioners were able to obtain the statements of various organizations -- mostly sports leagues, religious associations and nonprofit educational groups n50 that have no prospect of marketing copies of their works -- that they do not object to home recording of audiovisual works that incorporate their materials. Petitioners' own evidence establishes that over 80 percent of the programs copied by Betamax owners are entertainment programs, commercially produced motion pictures and television series, whose copying has not been authorized by anyone, and that recording of religious, educational and sports programming collectively accounts for less than 9 percent of home taping activity. n51

n50 See Pet. Br. 7. Such groups generally own only an uncopyrightable component of the copyrighted audiovisual work. For example, a football league -- if it owns anything -- owns only the game itself (which is not a copyrightable work of authorship), not the music, graphics, and commentary or the audiovisual work in which the game coverage is embodied. See H.R. Rep. No. 1476, 94th Cong., 2d Sess. 52, reprinted in 1976 U.S. Code Cong. & Ad. News 5659, 5665; 1 M. Nimmer, Nimmer on Copyright § 2.18[H][3] at 2-212 (1982).

n51 Crossley Surveys, Inc., A Survey of Batamax Owners, R. 2353, DX OT, Table 20. According to the Crossley survey, religious programs account for less than 0.05 percent of the programs taped by Betamax owners. The comparable figure for educational programs is 1.6 percent. And even home taping of sports programs represents only 7.3 percent of Betamax recording.

Even if the VTR were capable of substantial noninfringing use, that fact would not absolve petitioners of liability. As the Court has recognized, the question whether a defendant who sells an article that is used for infringing purposes is liable for contributory infringement depends on whether he sold it with the intent and purpose that it would be so used. n52 The necessary intent and purpose obviously are present when the article has no noninfringing use. n53 But the Court has held that, even where there are noninfringing uses, a purpose and intent to facilitate infringing activity "may be inferred when [the article's] most conspicuous use is one which will co-operate in an infringement [and] sale to such user is invoked by advertisement." *Henry v. A.B. Dick Co.*, 224 U.S. at 48-49, citing *Kalem Co. v. Harper Brothers*, 222 U.S. 55 (1911).

n52 *Henry v. A.B. Dick Co.*, 224 U.S. 1, 48 (1912), overruled on other grounds, *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502 (1917). Cf. *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 102 S. Ct. 2182, 2188 (1982) ("if a manufacturer or distributor intentionally induces another to infringe a trademark, or if it continues to supply its product to one whom it knows or has reason to know is engaging in trademark infringement, the manufacturer or distributor is contributorily responsible for any harm done as a result of the deceit.").

n53 *Id.* Cf. 35 U.S.C. § 271(c) (1976): "Whoever sells a component of a patented machine... knowing the same to be especially made or especially adapted for use in an infringement of such patent, and not a staple article or commodity of commerce suitable for substantial noninfringing use, shall be liable as a contributory infringer."

The Kalem Co. decision (on which petitioners also rely, Pet. Br. 42) illustrates this point nicely. In that case, the defendant had reproduced a motion picture dramatizing plaintiff's copyrighted book and sold it for exhibition at various theatres. The Court assumed for purposes of its decision that the film as such did not infringe the copyright in the book since its individual frames did not constitute an infringing dramatization unless exhibited in sequence. *Id.* at 62. The Court also accepted the defendant's argument that it had not exhibited the film but had merely sold it to jobbers. *Id.* Nevertheless, the Court rejected the defendant's staple-item-of-commerce defense and held it liable as a contributory infringer because

"The defendant not only expected but invoked by advertisement the use of its films for dramatic reproduction of the story. That was the most conspicuous purpose for which they could be used, and the one for which especially they were made. If the defendant did not contribute to the infringement it is impossible to do so except by taking part in the final act."  
*Id.* at 62-63.

The present case deals with a machine whose most conspicuous use -- the use that is "intended, expected, encouraged, and the source of the product's consumer appeal" n54 is the unauthorized reproduction of copyrighted materials. Petitioners designed and engineered the VTR specifically to carry out off-the-air taping operations. They included features, such as the capability to make unattended recordings, that are uniquely suited to that purpose. They advertised, promoted and demonstrated its use as a means of reproducing copyrighted programs and motion pictures. Under these circumstances, it is of no consequence that the VTR may be capable of certain lawful uses, for petitioners plainly expected and intended it to be used for infringement. n55

n54 *Universal City Studios, Inc. v. Sony Corp. of America*, 659 F.2d at 975.

n55 It is irrelevant that petitioners could not have known with certainty prior to the decision in this case that unauthorized home taping is infringement. The requirement that a contributory infringer have prior knowledge not only of the infringing activity but of its legal status derives from specific language in the patent statute and has no application here. See *Aro Mfg. Co. v. Convertible Top Replacement Co.*, 377 U.S. 476, 488 (1964). A contributory infringer of copyright need only have actual or constructive knowledge of the infringing activities. 3 M. Nimmer, *Nimmer on Copyright* § 12.04[A] at 12-34 (1982). Cf. *Screen Gems-Columbia Music, Inc. v. Mark-Fi Records, Inc.*, 256 F. Supp. 399, 404 (S.D.N.Y. 1966) (defendants who had been hired to advertise pirated records could be held liable for contributory infringement if the unusually low price for the records should have served as notice of their infringing nature).

## CONCLUSION

For the foregoing reasons, CBS respectfully requests the Court to affirm the judgment of the Court of Appeals.

Respectfully submitted,

Of Counsel: GEORGE VRADENBURG III, HARRY R. OLSSON, JR., CBS Inc., 51 West  
52 Street, New York, New 10019

LLOYD N. CUTLER, JOEL ROSENBLOOM, LOUIS R. COHEN \* DUANE D. MORSE,  
WILMER, CUTLER & PICKERING, 1666 K Street, N.W., Washington, D.C. 20006,  
(202) 872-6000, Counsel for Amicus Curiae CBS Inc.

\* Counsel of Record

October 27, 1982