

**SONY CORPORATION OF AMERICA, et al., Petitioners, v. UNIVERSAL 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 OF MOTION PICTURE ASSOCIATION OF AMERICA, INC., AMICUS CURIAE, IN
SUPPORT OF AFFIRMANCE**

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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)

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CONSTITUTIONAL PROVISIONS AND STATUTES:

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U.S. Const. amend. I

1976 Copyright Act, 17 U.S.C. § 107, §§ 108-118 (Supp. IV 1980)

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Communications Act of 1934, 47 U.S.C. § 301 et seq. (1976, Supp. IV 1980, and West Supp. 1982)

8 Anne c. 19 (1709)

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S. Rep. No. 473, 94th Cong., 1st Sess. 62 (1976)

House Comm. on the Judiciary, 88th Cong., 1st Sess., Copyright Law Revision, Part 2, Discussion and Comments on Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law 345 (Comm. Print 1963) (Statement of Edward A. Sargoy, of Counsel, The Copyright Committee of Motion Picture Association of America, Inc.)

Copyright Law Revision -- Part 2: Hearings before Subcomm. No. 3 of the Comm. on the Judiciary of the House of Representatives, H.R. 4347, H.R. 5680, H.R. 6831 and H.R. 6835, 89th Cong., 1st Sess. 1029-33 (1965)

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Statement of David Ladd, Register of Copyrights and Assistant Librarian of Congress for Copyright Services, Before the S. Comm. on the Judiciary, 97th Cong., 2d Sess. 23 (April 21, 1982)

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Chafee, *Reflections on the Law of Copyright: I*, 45 *Colum. L. Rev.* 503, 511-12 (1945)

L. Seltzer, *Exemptions and Fair Use in Copyright* 11-12 (1978)

2 Nimmer on Copyright, § 7.16[A][1], at 7-111

3 Nimmer on Copyright, § 13.05[A] at 13-56 (1981)

W. Prosser, *Handbook of the Law of Torts*, § 46 (4th ed. 1971)

INTEREST OF THE AMICUS

The Motion Picture Association of America, Inc. is a not-for-profit corporation, organized under the laws of the State of New York, whose purposes include the fostering of the common interests of those engaged in the motion picture industry in the United States. The Association represents the major producers and/or distributors of motion pictures in the United States.

The members of the Association frequently license their products to pay television, television networks, and local stations. When broadcast, such productions are vulnerable to being copied on video tape recorders ("VTRs").

Some (though not all) of the members of the Association are joining individually with certain other firms in a separate amicus brief.

INTRODUCTION: The Motion Picture Association of America, Inc., amicus curiae, submits this brief in support of affirmance of the decision of the United States Court of Appeals for the Ninth Circuit in this case, 659 F.2d 963 (9th Cir. 1981), and in support of the position of respondents, Universal Studios, Inc. and Walt Disney Productions. Written consent of all parties to the filing of amicus briefs is on file with the Clerk of the Court.

SUMMARY OF ARGUMENT

For more than 250 years Anglo-American law has recognized that substantial copying of a protected work is unlawful except for the purpose of making a new original work. Home videocopying of televised works protected by copyright involves no creative effort by the copyist and therefore cannot be fair use under the case law or under 17 U.S.C. § 107. Neither the First Amendment nor the Communications

Act of 1934 provides any reason to stretch the doctrine of fair use to cover the facts of this case.

Petitioners are liable as joint direct infringers because they induced widespread infringement. They are also liable as contributory infringers because they supplied the indispensable tools for the infringement (VTRs and blank tapes) with knowledge to a moral certainty that those tools would be used for widespread infringement. The "staple article of commerce" doctrine in patent law provides no defense. A finding that petitioners are liable will not doom VTR technology.

The Motion Picture Association has never acquiesced in the view that home videocopying is a fair use. An argument to the contrary in one of the amicus briefs is mistaken.

TEXT: I. NON-CREATIVE COPYING OF COPYRIGHTED TELEVISION PROGRAMS AND FILMS IN THE HOME IS NOT A FAIR USE.

The doctrine of "fair use" was developed in case law, and codified in § 107 of the 1976 Copyright Act, 17 U.S.C. § 107. The statute was intended to endorse the prior doctrine, not to enlarge it, narrow it, or otherwise change it. n1 Therefore, the prior case law remains controlling. As shaped by those cases, the doctrine is not the equitable free-for-all that petitioners contend it is, but rather is a coherent set of legal principles crafted over more than 250 years and reflecting the English and American judges' accumulated understanding of the interests at stake.

n1 H.R. Rep. No. 1476, 94th Cong., 2d Sess. 66 (1976) (hereinafter cited as "H.R. Rep."); S. Rep. No. 473, 94th Cong., 1st Sess. 62 (1976) (hereinafter cited as "S. Rep.").

A standard definition of "fair use" is the "privilege in others than the owner of a copyright to use the copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner." n2 The doctrine comes into play only where there has been a substantial similarity in expression. 3 Nimmer on Copyright § 13.05[A] at 13-56 (1981).

n2 *Rosemont Enterprises v. Random House, Inc.*, 366 F.2d 303, 306 (2d Cir. 1966), cert. denied, 385 U.S. 1009 (1967), quoting Ball, *The Law of Copyright and Literary Property* 260 (1944).

The purpose of the privilege is the purpose of the law of copyright: "To Promote the Progress of Science," U.S. Const. art. 1, § 8, cl. 8. *Rosemont Enterprises v. Random House, Inc.*, supra, 366 F.2d at 307; *Iowa State University Research Foundation v. American Broadcasting Companies*, 621 F.2d 57, 60 (2d Cir. 1980). See also *Sayre v. Moore*, 1 East 361, 362, 102 Eng. Rep. 139, 140 (K.B. 1785) (Mansfield, C.J.). As the claimant to copyright must be, in the constitutional sense, an "Author," n3 so must the counter-claimant to the privilege of fair use be an "Author," and not merely a copyist. The doctrine is one of "fair use," not "fair copying." A fair use may amount to parasitism, n4 but it may not be mere cloning.

n3 The Copyright and Patent Clause reads in full: "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." See also 3 Nimmer on Copyright § 1.06[A] (1981).

n4 B. Kaplan, *An Unhurried View of Copyright* 57 (1967) (hereinafter cited as "Kaplan").

In the early cases under the first English copyright law, 8 Anne c.19 (1709), the judges looked "not so much to what the defendant had taken as to what he had added or contributed." Kaplan 17. So strong was the emphasis on independent creation that it was debated whether it might be not only necessary for a successful defense, but also sufficient. n5 The upshot was that independent creation was not in all cases a sufficient defense for substantial copying, Kaplan 17-22, but it was never doubted that it was necessary for a defense.

n5 Professor Chafee commented in *Reflections on the Law of Copyright: I*, 45 Colum. L. Rev. 503, 511-12 (1945): (footnote omitted) (hereinafter cited as "Chafee"):

In the late eighteenth century, this ideal of the encouragement of independent creation was pushed so far as to allow translations and abridgments without the author's consent, on the ground that the new man had put in a great deal of his own work. Thus Lord Apsley, backed by Blackstone, gave immunity to an abridgment of Hawksworth's *Voyages*, calling it "a new and meritorious work," less expensive and more convenient to handle than the original: he said it could be read in a quarter of the time with all the substance preserved in language as good as Hawksworth's or better and in a more agreeable and useful manner. This sort of reasoning made Dr. Johnson's blood boil. During the *Tour to the Hebrides*, Boswell mentioned Lord Monboddo's opinion, that if a man could get a work by heart, he might print it, as by such an act "the mind is exercised."

"Johnson. 'No. sir, a man's repeating it no more makes it his property than a man may sell a cow which he drives home.'

"I said printing an abridgement of a work was allowed, which was only cutting the horns and tail off the cow.

"Johnson. 'No. sir, 'tis making the cow have a calf.'"

Certainly this "exercise of the mind" test will not hold water. The author should not lose a large portion of his market so easily. Fortunately, our copyright law has abandoned its early tolerance of unauthorized abridgments and translations.

In *Folsom v. Marsh*, 9 F. Cas. 342, 345 (C.C.D. Mass. 1841) (No. 4,901), Justice Story laid down for American law that the privilege is earned by "intellectual labor and judgment...; and not merely the facile use of the scissors." n6 In *Lawrence v. Dana*, 15 F. Cas. 26, 60 (C.C.D. Mass. 1869) (No. 8,136), Justice Clifford characterized fair use as a "privilege allowed by law to a subsequent writer." He

referred with approval to the English doctrine that the innocence of the copyist's intention would not be a defense "unless it appeared that the defendant had bestowed such mental labor upon what he had taken as to produce an original result." Id.

n6 Justice Story went on to identify other factors to be considered in fair use cases, which are strikingly similar to those listed in § 107. See 9 F. Cas. at 348.

The theme that creative work is an indispensable element of fair use has been a leitmotiv in the cases. n7 In *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), where photocopying by medical libraries was found to be a fair use, the court emphasized that the copying was for "scientific personnel who need the material for their work," 487 F.2d at 1355 (emphasis added), and that "medical science would be seriously hurt if such library photocopying were stopped," 484 F.2d at 1356. n8

n7 See, e.g., *Chautauqua School of Nursing v. National School of Nursing*, 238 F. 151, 153 (2d Cir. 1916); *College Entrance Book Co. v. Amsco Book Co.*, 119 F.2d 874, 876 (2d Cir. 1941); *Conde Nast Publications, Inc. v. Vogue School of Fashion Modelling*, 105 F. Supp. 325, 332-33 (S.D.N.Y. 1952); *Wainwright Securities, Inc. v. Wall Street Transcript Corp.*, 558 F.2d 91, 94 (2d Cir. 1977), cert. denied, 434 U.S. 1014 (1978).

n8 *Williams & Wilkins* was an anomaly in that it was the only fair use case that approved systematic and multiple copying of entire articles where the copies would be free-standing entities, not necessarily incorporated into a derivative work. Even there, however, the circumstances of the copying were permeated by creative work of the most socially valuable kind, and of which the law of copyright has been particularly respectful. The copies were made for the sole purpose of facilitating further research. The libraries involved were professional libraries serving a community of researchers. Thus the purpose of the fair use doctrine was arguably served by judicial recognition of a somewhat looser connection between the original, copyrighted work and subsequent creative works. In any event, Congress has removed the whole subject of photocopying by libraries out of the doctrine of fair use (§ 107) and into a separate statutory exemption (§ 108). For that reason and in view of the uniqueness of its facts, see 487 F.2d at 1362, *Williams & Wilkins* has not exerted, and should not exert, any general influence on the law of fair use. In the instant case there are no subsequent creative works that justify application of the fair use doctrine.

This emphasis on independent creative work is reflected in § 107, whose examples of fair use are "criticism, comment, news reporting, teaching, scholarship, or research...." Each involves independent creative work. If a use is not of that character, the purpose of the doctrine is not served, and the doctrine does not apply. n9 Taping has no broader privilege than other forms of copying. n10

n9 The four factors listed in § 107 should be considered only in determining whether a use suitable for fair use -- i.e., an independent creative use -- is, under all

the circumstances, fair.

n10 See H.R. Rep. 66; S. Rep. 62.

The home videocopyist makes no independent or creative effort; he contributes nothing to advance science or culture. He merely chisels -- by making a copy for nothing. That is not fair use.

Section 107 directs that four factors be considered in determining whether a use is fair:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

Purpose and character of use. What is at issue here is an intrinsic use -- i.e., a use for the same purpose as is served by the original work, so that the copy substitutes for the original. Intrinsic use cannot be a fair use. n11 No type of use can be more destructive of the incentives for creating copyrightable works than intrinsic use, which ousts the original, without paying for the labor that created it. That the intrinsic use is private and noncommercial is not a defense. "The question is not whether a copy is marketable, but whether it is piratical." *Fishel v. Lueckel*, 53 F. 499, 500 (C.C.S.D.N.Y. 1892). Even a fair. *Wihtol v. Crow*, 309 F.2d 777 (8th Cir. 1962).

n11 See, e.g., *Folsom v. Marsh*, supra, at 344-45. In *Meredith Corp. v. Harper & Row, Publishers*, 378 F. Supp. 686, 690 (S.D.N.Y.), aff'd, 500 F.2d 1221 (2d Cir. 1974), the court held: "As to the purpose of the 'use', there is no question on this record that it was to enable Meredith to compete with the very text from which the selections were taken... That this is impermissible hardly needs statement."

Nature of the copyrighted work. The Register of Copyrights has observed that this factor "establishes a somewhat higher degree of insulation from the fair use exemption for highly creative works, as distinguished from informational works. On this score, motion pictures number among the most complex and creative works protected by copyright." n12

n12 Statement of David Ladd, Register of Copyrights and Assistant Librarian of Congress for Copyright Services, Before the S. Comm. on the Judiciary, 97th Cong., 2d Sess. 23 (April 21, 1982) (hereinafter cited as "Ladd Testimony").

Amount and substantiality of the taking. The copying at issue here is copying of entire copyrighted works. Such copying cannot be fair use. n13 The copying of an entire work is unlikely to be a creative use; it is likely to be an intrinsic use (as in the instant case). Even for educational purposes, the copying of the entirety of a substantial work, such as a motion picture, is not fair use. See *Encyclopaedia Britannica Educ. Corp. v. Crooks*, 447 F. Supp. 243 (W.D.N.Y. 1978); *Wihtol v. Crow*, 309 F.2d 777 (8th Cir. 1962) (copying of copyrighted song for use by school and church choirs is not fair use); S. Rep. 64.

n13 E.g., *Leon v. Pacific Tel. & Tel. Co.*, 91 F.2d 484, 486 (9th Cir. 1937); *Public Affairs Associates v. Rickover*, 284 F.2d 262, 272 (D.C. Cir. 1960) (Reed, J.), vacated for insufficient record, 369 U.S. 111 (1962); *Wihtol v. Crow*, 309 F.2d 777, 780 (8th Cir. 1962); *Rosemont Enterprises v. Random House, Inc.*, 366 F.2d 303, 310 (2d Cir. 1966), cert. denied, 385 U.S. 1009 (1967); *Walt Disney Productions v. Air Pirates*, 581 F.2d 751, 756 (9th Cir. 1978), cert. denied, 439 U.S. 1132 (1979). The one case possibly to the contrary was the anomalous *Williams & Wilkins*. See n.8, supra.

Effect on Potential Market. This factor should not be confused with provable damages to the copyright holder from any particular copyist's infringement:

This factor rather poses the issue of whether unrestricted and widespread conduct of the sort engaged in by the defendant (whether in fact engaged in by the defendant or by others) would result in a substantially adverse impact on the potential market for or value of the plaintiff's work.

3 *Nimmer on Copyright* § 13.05[A] at 13-62 (1981). With exceptions not applicable here, "a use that supplants any part of the normal market for a copyrighted work" is an infringement. S. Rep. 65.

Amicus has filed this brief because it believes that, due to VTRs, the works of its members have become "so easy of replication" that incentive to produce would be depressed "by the prospect of rampant reproduction by free-loaders." Cf. Kaplan 74. The person who makes a videocopy (whether for time-shifting or for librarying) has a demand for a copy for subsequent viewing. In the case of many copyrighted works, that demand could be satisfied by renting or buying a pre-recorded cassette. Time-shifting is competitive with renting; librarying, with buying. n14 From such rentals or sales, film-makers would derive copyright revenues, n15 which would be a stimulus to further productive labors. n16

n14 The demand of the person unable to watch his television set when a work was being broadcast might also be satisfied by subsequent network re-broadcast, by syndicated broadcast by local stations, by a subsequent cable or pay-per-view broadcast, or by theatrical re-issue.

n15 These revenues would exceed the increment they would receive from the payments by television advertisers for reaching the viewers who see video copies. The amounts the advertisers would be willing to pay would be discounted because (i) people who view videocopies may not have the demographic characteristics the advertisers are willing to pay for; (ii) subsequent viewing may be less beneficial to the advertisers' marketing strategy; (iii) the videocopiers make possible the deletion

of commercials.

n16 In recent congressional testimony, the Register of Copyrights presented a review of studies of the impact of home videorecording on the ancillary markets for motion pictures. Ladd Testimony 26-33. His conclusion was: "Both the television and the motion picture production industries are in turbulent waters already. Necessarily, they have been increasingly relying on subsidiary markets to survive, and that trend will continue. Home taping threatens a new, but nevertheless major, and growingly important, subsidiary market." Id. 33.

In sum, under all the factors listed in § 107, the videocopying of motion pictures is not a fair use.

The fair use doctrine addresses the issue that "is the most troublesome in the whole law of copyright...." *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir. 1939) (L. Hand, A. Hand, & Patterson, JJ.) The doctrine consists of a coherent rationale and a consistent set of subsidiary rules carrying it out. It reflects studious attention to the ways in which the claims of primary and secondary authors are to be reconciled so that the progress of knowledge and culture may be encouraged. The doctrine has served its constitutional purpose of promoting the flowering of our national creative genius. It should not be subjected to the extreme distortions that would be required for it to embrace the non-creative videocopying at issue here.
n17

n17 Such distortion of the fair use doctrine would violate Congressional intent. In the 1976 Copyright Act Congress created numerous exemptions to deal with specific problems outside the scope of traditional fair use. See 17 U.S.C. §§ 108-118 (Supp. IV 1980). Congress did not create a similar exemption for home videocopying. Therefore, this Court should not create such an exemption of its own authority.

Petitioners argue, however, that the doctrine of fair use should be stretched to reach home videocopying in order to advance First Amendment interests in broad public consumption of ideas. It has generally been thought, however, that the law of copyright creates no issue under the First Amendment because it does not restrain the circulation of ideas (as distinct from particular forms of expression), n18 and because, in any event, the doctrine of fair use properly reconciles the interests in protection of works with the interests in subsequent use. n19 Amicus submits that, in this case, the Court need not decide whether a particular rule of copyright law could conceivably offend the First Amendment. This case not only does not involve the suppression of ideas; it does not involve any suppression of expression by anyone.

n18 See, e.g., *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 577 n.13 (1977).

n19 See, e.g., *Triangle Publications, Inc. v. Knight-Ridder Newspapers*, 626 F.2d 1171 (5th Cir. 1980).

Where the First Amendment recognizes a right to receive communications, it "presupposes a willing speaker." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 756 (1976). *Stanley v. Georgia*, 394 U.S. 557 (1969), was such a case: the publisher of the materials involved certainly desired that people be permitted to read them in their homes; the objection was made not by the "speaker" but by the State of Georgia. Here, the objection is by the "speakers" -- respondents, various amici, and other copyright holders. The First Amendment interest is in dissemination in accordance with the speaker's wishes and free from unjustified interference by government; there is no First Amendment interest in dissemination contrary to a speaker's wishes.

If home videocopying is viewed as speech, the First Amendment interest in it is non-existent or de minimis. In duplicating and privately re-playing previously televised works, the owner of the VTR brings nothing to the community's marketplace of ideas. Nor does he serve the First Amendment interest in self-expression, for he is merely copying the expressions of others. Indeed, he is not even practicing personal skill as a copyist -- he merely turns on Sony's machine, and the machine does the copying for him. Whatever may be said for such passive, non-creative copying, any tenuous First Amendment interest in its protection is sufficiently outweighed by the purposes of protecting copyrights.

Petitioners also rely on the Communications Act of 1934, 47 U.S.C. §§ 301 et seq. (1976, Supp. IV 1980, and West Supp. 1982), and the national policy "encourag[ing] the larger and more effective use of radio [and television] in the public interest." Pet. Brief 24-27. The national policy is satisfied, however, when works are broadcast. Effective use of broadcast technology does not require the use of a quite distinct technology for making and replaying copies of broadcast programs. Unlike CATV in *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968), and *Teleprompter Corp. v. CBS*, 415 U.S. 394 (1974), video recorders do not merely "enhance the viewer's capacity to receive the broadcaster's signals..." 392 U.S. at 399. Rather, they enable the viewer (i) to view the program at a different time, (ii) to view it repeatedly at unlimited times after the broadcast, (iii) to make one or more separate and distinct copies of it, and (iv) to alter those copies by deleting commercials and in other ways. The VTR owner does not use his VTR merely to receive the broadcast signal. Having already received it by means of his television set, he replays it, perhaps over and over again. That is a matter outside the scope or purpose of the Communications Act and within the scope and purpose of the Copyright Act. n20 Moreover, a reduction in copyright protection in this context might well lead to a corresponding reduction (or delay) in the availability of copyrighted works for licensure to television. The result would be that the copying by some viewers would result in a loss of programming desired by others.

n20 It has been national policy since 1789 that the dissemination of copyrighted works should be left to the control of the copyright holder (and not to other private parties or to the government). See L. Seltzer, *Exemptions and Fair Use in Copyright* 11-12 (1978).

The District Court in this case gave rein to a perhaps natural inclination to approve large scale recording of copyrighted works in private homes. It disregarded the considerations raised in the recent testimony of the Register of Copyrights: n21

n21 Ladd Testimony 5.

Authors and copyright owners are, because of their creative and entrepreneurial talents, a unique group. They are a minority that cannot readily mobilize vast popular support on legislative issues, particularly copyright ones, which affect their interests directly and, ultimately, ours as well. That is true especially when the public is offered the choice of using copyright property for free -- or ostensibly for free. But because their contributions to the nation's welfare, culture, and economy are great, the protection of their interests lies on our conscience not only as a matter of sound policy but of equity.

II. PETITIONERS ARE LIABLE AS DIRECT OR CONTRIBUTORY INFRINGERS.

A. Petitioners are Liable as Direct and Contributory Infringers.

Copyright infringement is in the nature of a tort. *Screen Gems-Columbia Music, Inc. v. Mark-Fi Records, Inc.*, 256 F. Supp. 399, 403 (S.D.N.Y. 1966) (Weinfeld, J.). Familiar principles of joint tort liability apply. *Id.* n22 Where there is a concert of action -- a common scheme or plan, the provision by one party to another of assistance or encouragement, or mutual intent to co-operate -- all those participating in the infringement are jointly and severally liable. n23 Express agreement is not necessary. Prosser § 46 at 392.

n22 See also, e.g., *Screen Gems-Columbia Music, Inc. v. Metlis & Lebow Corp.*, 453 F.2d 552, 554 (2d Cir. 1972).

n23 See generally, W. Prosser, *Handbook of the Law of Torts*, § 46 (4th ed. 1971) (hereinafter cited as "Prosser").

An additional basis for ancillary liability for copyright infringement is contributory infringement. In theory, the distinction between joint liability for direct infringement and liability for contributory infringement is that the latter does not require concert of action, but is satisfied by material contribution to infringement n24 plus knowledge that infringement is likely to occur. The cases do not always distinguish between the two bases of liability. n25

n24 Materiality is determined not by a merely quantitative analysis but by a functional analysis of the actions of the party alleged to be a contributory infringer. The Court of Appeals relied on such a functional analysis in this case.

n25 Similar doctrines exist in the fields of unfair competition and trademark infringement. See, e.g., *Coca-Cola Bottling Co. v. Snow Crest Beverages, Inc.*, 64 F. Supp. 980, 989 (D. Mass. 1946) (Wyzanski, J.), *aff'd*, 162 F.2d 280 (1st Cir.), *cert. denied*, 332 U.S. 809 (1947) (for unfair competition, "one who supplies another with the instruments by which that other commits a tort, must be shown to have knowledge that the other will or can reasonably be expected to commit a tort with the supplied instrument... The test is whether wrongdoing by the purchaser 'might well have been anticipated by the defendant.'"); *Inwood Laboratories v. Ives*

Laboratories, 50 USLW 4592, 4595 (June 1, 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...").

Liability for joint direct infringement and for contributory infringement has been recognized for many years. See *Harper v. Shoppell*, 28 F. 613 (C.C.S.D.N.Y. 1886); *Fishel v. Lueckel*, 53 F. 499 (C.C.S.D.N.Y. 1892); *Gross v. Van Dyk Gravure Co.*, 230 F. 412, 414 (2d Cir. 1916).

In *Kalem Co. v. Harper Bros.*, 222 U.S. 55 (1911), the defendant, maker of an infringing film, had not publicly shown the film, but had distributed prints to jobbers. Justice Holmes, speaking for a unanimous Court, easily disposed of that defense:

The defendant not only expected but invoked by advertisements 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. It is liable on principles recognized in every part of the law.
222 U.S. at 64.

The more recent cases are variations on the theme. See e.g., *Universal Pictures Co. v. Harold Lloyd Corp.*, 162 F.2d 354, 365 (9th Cir. 1947); *Gershwin Pub. Corp. v. Columbia Artists Management*, 443 F.2d 1159 (2d Cir. 1971); *Screen Gems-Columbia Music, Inc. v. Mark-Fi Records, Inc.*, supra; *Elektra Records Co. v. Gem Electronic Distributors*, 360 F. Supp. 821 (E.D.N.Y. 1973).

In *Elektra*, the defendants operated stores in which a prime attraction was a coin-operated machine called "Make-A-Tape," which could duplicate pre-recorded tapes. The defendants sold blank tapes to their customers and allowed them to borrow copyrighted tapes for the purpose of duplicating them in the Make-A-Tape machines. The facts strikingly resemble those in the instant case: (i) the defendants supplied the machines and tapes necessary to do the copying; (ii) the copying was done by private individuals presumably for subsequent private, non-commercial use in their homes; (iii) the private individuals selected the works to be copied without control by the defendants (and presumably were not limited to the works available from the defendants).

In *Elektra* the copyright holders could not feasibly identify and proceed against the primary infringers, the individual users of the Make-A-Tape machines. Similarly here, the copyright holders cannot feasibly identify and proceed against the individuals who use VTRs to record copyrighted works. In both situations, liability for joint direct infringement or contributory infringement is needed to carry out the system of incentives established by the Copyright Act pursuant to the constitutional mandate. See *Mazer v. Stein*, 347 U.S. 201, 219 (1954).

The *Elektra* facts differ from those in the instant case in two respects: (i) the defendants there provided a library of works available for copying, whereas petitioners provide a mechanism for receiving a "library" of television signals as the first stage of copying; (ii) the copying there took place in a store, whereas here it takes place in homes. n26 The first difference ought not to matter: petitioners have

no occasion to provide the material to be copied because it is provided free by television. Petitioners' supplying of the necessary machine and tapes in circumstances where they know that the leading use is to duplicate copyrighted works available free off-the-air is a contribution sufficient for liability. Nor should the second difference change the result: no invasion of homes is necessary to establish the liability of these corporate petitioners. n27

n26 Not all the copying, of course, takes place in homes, for VTRs can operate as readily in offices, stores, hotel lounges, bars, and restaurants. Some of the petitioners operated VTRs in their stores.

n27 The District Court below thought Elektra distinguishable on the ground that the Make-A-Tape machine was suitable only for infringing uses. This point will be discussed at pp. 19-23, *infra*.

The District Court, 480 F. Supp. at 458, also relied on the fact that the court in Elektra refused to find that the use of the Make-A-Tape machine was within the congressionally created exemption for home copying of sound recordings. See 360 F. Supp. at 824-25. The two situations are not comparable, however. In Elektra, the court refused to extend a narrowly defined express congressional exemption to circumstances outside its scope, where the effect of the extension would be to permit what the court characterized as "mass piracy on a custom basis," 360 F. Supp. at 825. The question in this case is not whether to extend a limited congressional exemption, but whether to immunize, without any support in the statute or committee reports, a different practice that would also lead to "mass piracy on a custom basis." Elektra's concern to prevent that kind of result supports, rather than impedes, a finding of liability in this case.

Under the legal standards for joint direct infringement and contributory infringement, the facts stipulated by petitioners, found by the District Court, or suitable for judicial notice, are sufficient to establish liability:

1. Sony designs and markets to the public VTRs whose primary purpose is to record television programs off the air. Trial Tr. 1778-79 (Stipulation).
2. Sony designs and markets tapes for use in its VTRs. 480 F. Supp. at 435. As the copying of television programs (including copyrighted programs) increases, Sony's sales of tapes and its revenues from such sales will also increase. Thereby, Sony profits from infringement by its ultimate customers.
3. Sony also designs and markets equipment that does not record off-the-air television programs, but only plays back prerecorded cassettes. Pl. Ex. 552.
4. All or most of the motion pictures shown on television and the most popular programs shown on television (i.e., prime time entertainment) are protected by copyright. n28

n28 An original work is protected by copyright from the moment it is fixed in a tangible medium, whether or not it is ever registered. 17 U.S.C. § 302(a) (1976); 2 Nimmer on Copyright, § 7.16[A][1], at 7-111. A live performance that is not

simultaneously fixed is protected under state law. See, e.g., *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977).

5. Petitioners' promotional campaign for VTRs encouraged the public to "build libraries," and to record "favorite shows," "novels for television," "movies," "classic movies," and the like. 480 F. Supp. at 436, 460.

6. Owners of VTRs have, on average, numerous tapes containing materials recorded from television, 480 F. Supp. at 438. Obviously, people having such extensive collections of recorded tapes are not using their VTRs merely for time-shifting. Ladd Testimony 9, 32.

Joint Direct Infringement. Petitioners' advertisements were an inducement to infringe: movies, novels for television, and favorite shows -- the kinds of works the advertisements encouraged their customers to copy -- are almost all protected by copyright. That the use of VTRs would largely consist of recording popular, copyrighted works was not merely probable; it was morally certain.

The District Court refused to find inducement to infringe because the specific VTR owners involved in the suit had not been influenced by the advertisements. 480 F. Supp. at 460. That ground of decision is insufficient. Petitioners ought to be held to the natural tendency of their professionally designed advertisements to achieve their desired effects. No evidence of effect on specific primary infringers is necessary. Such evidence was not required in *Kalem*.

Contributory Infringement. The District Court's findings demonstrate guilty knowledge, or at least recklessness, with respect both to the fact that VTRs would be used to copy copyrighted works, and that such copying was unlawful:

1. "The Betamax operating instructions... include a warning about possible copyright infringement. On page 17 of the instruction booklet, the following language appears: "Television programs, films, videotapes and other materials may be copyrighted. Unauthorized recording of such material may be contrary to the provisions of the United States copyright laws.'" 480 F. Supp. at 436.

2. "The Betamax warranty states that there shall be no liability on the part of the manufacturer, distributor or seller for any loss or damage arising directly or indirectly from the use of the Betamax." *Id.*

3. In November, 1975, Sonam [the distributor of the Betamax] agreed to indemnify DDBI [its advertising agency] for any liability arising from this advertising campaign." *Id.*

The District Court considered even "'constructive knowledge' of the recording of copyrighted works," insufficient for liability as a matter of law. 480 F. Supp. at 460. It held that petitioners had to know not only that their customers would copy copyrighted works, but also that such copying would be infringement, and that such knowledge was lacking because there had been no prior judicial decision so holding. That should not be the law.

Home recording is copying prohibited by § 106, and nothing in §§ 107-118 exempts home recording from the prohibitions of § 106. These sophisticated

petitioners were aware of the legal risks they created by the sale of VTRs and tapes. They were willing to run those risks, at the expense of copyright holders, in order to obtain profits from the sale of VTRs and tapes. They cannot plausibly claim innocence or ignorance of the intended consequences of their acts. They knew as much as the Make-A-Tape defendants. There is no unfairness in holding that they had sufficient notice from the statute to satisfy whatever requirement of knowledge is imposed by the doctrine of contributory copyright infringement.

B. The "Staple Article of Commerce" Doctrine Provides No Defense in This Case.

The "staple article of commerce" doctrine is part of the law of contributory patent infringement. The Patent Act of 1952, 35 U.S.C. § 271(c) (1976) provides:

Whoever sells a component of a patented machine, manufacture, combination or composition, or a material or apparatus for use in practicing a patented process, constituting a material part of the invention, knowing the same to be especially made or especially adopted for use in an infringement of such patent, and not a staple article or commodity of commerce suitable for substantial non-infringing use, shall be liable as a contributory infringer.

In the field of copyright, cases of parasitical production (where there has been some copying, but less than wholesale appropriation) have generally been decided under the "fair use" doctrine. There is no such doctrine in the patent field: any unauthorized "use" of a patented invention is an infringement. 35 U.S.C. § 271(a). In the patent field, one class of cases of parasitical production has involved the manufacture of components for a patented invention or the manufacture of other articles that are used with it. The question has been whether such manufacture violates the patent.

As recounted in *Dawson Chemical Co. v. Rohm & Haas Co.*, 448 U.S. 176, 187-97 (1980), the doctrine of contributory patent infringement has a long and checkered history. In early decisions, the Court expanded the doctrine to the point where it threatened to extend patent monopolies to unjustifiable dimensions; in later decisions, the Court nearly eliminated the doctrine altogether.

Congress then enacted 35 U.S.C. § 271(c) and (d). The compromise expressed in § 271(c) was that contributory patent infringement could be based on the selling of components (and, in the case of process patents, materials and apparatuses for use in practicing the process) where the articles sold are non-staples, but not where they are staples. The rationale is an obvious one: to prevent the undue expansion of the patent monopoly to general articles of commerce, while preserving to the patentee the monopoly over components whose predominant use is in connection with the patented invention.

The "staple article" doctrine is a limitation on contributory infringement under § 271(c). The doctrine does not apply to § 271(b), which provides in its entirety:

"Whoever actively induces infringement of a patent shall be liable as an infringer."

Fromberg, Inc. v. Thornhill, 315 F.2d 407, 411 (5th Cir. 1963) provides an oft-cited summary of the range of activities constituting contributory infringement and codified as "active inducement" in the Patent Act:

Of course inducement has connotations of active steps knowingly taken -- knowingly in the sense of purposeful, intentional, as distinguished from accidental or inadvertent. But with that qualifying approach, the term is as broad as the range of actions by which one in fact causes, or urges, or encourages, or aids another to infringe a patent. 315 F.2d at 411. (Emphasis supplied.)

Thus, as the District Court failed to recognize, 480 F. Supp. at 461, even in the patent field the "staple article" doctrine is no defense for a seller of a staple article who has induced an infringement. The social interest in competition justifies independent selling of staple articles for use in patented inventions, but there is no justification for inducement to infringe. Therefore, even if the "staple article of commerce" doctrine were to be transplanted from patent law into copyright law, it would provide no defense to petitioners if, as argued at pp. 13-18, supra, they induced copyright infringement.

The District Court failed also to consider that the "staple article" doctrine reflects features unique to patent law, and addresses problems that do not arise in copyright law. In patent law, the doctrine serves as a necessary limitation on the absolute monopoly of use of a patented invention given by law to the patentee. No such absolute monopoly of use exists in the copyright law: ideas, as distinct from expressions, are uncopyrightable, n29 and the fair use doctrine substantially limits even the monopoly over use of the copyrighted expression. The "staple article" doctrine addresses the peculiar problem in patent law of control over components of a patented invention, or articles used with a process patent. No similar problem arises in copyright law: uses of "components" of a copyrighted work are governed by the fair use doctrine, and there is no problem of sales of components of a copyrighted work for use with it. Nor is there in copyright law anything analogous to a process patent: though expressions of an original business procedure, for example, may be copyrighted, the procedure itself is not subject to copyright. n30

n29 *Mazer v. Stein*, 347 U.S. 1, 217 (1954); *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49 (2d Cir.) (L.Hand, J.), cert. denied, 298 U.S. 669 (1936).

n30 *Bricker v. Selden*, 101 U.S. 99 (1879); *Continental Casualty Co. v. Beardsley*, 253 F.2d 702 (2d Cir.), cert. denied, 358 U.S. 816 (1958).

VTRs are not staple articles of commerce. They were designed and marketed for the specific purpose of allowing users to record off-the-air. Because so much of television programming, and virtually all of "prime-time" programming, is protected by copyright, see n.28, supra, it is beyond dispute that the predominant use of the VTR is to reproduce copyrighted works; or, in the language of Kalem, such is its most "conspicuous" use. In view of the way petitioners have designed and promoted VTRs, it is fair to presume that their use in applications not involving the recording of copyrighted works -- though theoretically possible -- is, in fact, insubstantial.

C. A Finding of Liability Would Not Doom the VTR.

Petitioners express the fear that, if they are found liable as joint direct infringers or contributory infringers, "then the supply of home VTRs (and home VTR reception) will terminate." Pet. Brief 40. There is no reason to expect such a dire ultimate result.

Licensors of copyrighted works to television have no interest in suppressing VTR technology. Their interest is in suppressing unauthorized copying (i.e. infringement) and putting in its place arrangements under which copyright holders will be fairly compensated for VTR copying. Both petitioners and copyright holders have an interest in the continued marketing, at affordable prices, of VTRs and tapes. In our free market economy, ordinary economic motivations and rational calculation can be relied on to lead to arrangements in which the interests of all concerned will be advanced. The arrangements for exploitation of copyrighted musical compositions (e.g., ASCAP, BMI) provide an analogy. If difficulties are encountered in structuring private arrangements, then resort may be had to the courts or to the Congress. The precise nature of the relief that might be provided by a court or by the Congress has not been determined and is not before this Court for review.

III. THE MPAA HAS CONSISTENTLY MAINTAINED THAT HOME VIDEOCOPYING OF COPYRIGHTED WORKS IS AN INFRINGEMENT.

The MPAA has consistently maintained that home videorecording of copyrighted works is an infringement under both the old and new Copyright Acts. There is no basis for the argument made in the amici curiae Brief filed by the five advertising agencies (the "advertising agencies")ⁿ³¹ that the motion picture industry accepted home videocopying as a fair use. Adv. Amici Brief 9.

ⁿ³¹ The amici curiae include McCann-Erickson, Inc.; Batten, Barton, Durstine & Osborn, Inc.; Backer & Spielvogel, Inc.; Waring & LaRosa, Inc.; and Ammirati & Puris, Inc.

In 1962, in its comments on the 1961 Report of the Register of Copyrights, the MPAA stated plainly that the home videotaping of copyrighted works violated the copyright owner's exclusive right to reproduce the copyrighted work.

Obviously we must control the right to make duplications of our copyrighted motion pictures, regardless of the technological forms in which fixed, or in which duplicated. Present section 1(a) of title 17, from which this right would be derived, has no limitations on the copyright right, such as being "for profit" or "public", and there should be no future limitations. We do not think our copyrighted motion pictures, in whole or in part, should be physically copied in homes, in libraries, for private research, entertainment, or otherwise, without our permission, if new technologies were to permit the easy duplication of our works by taking the same off a television screen onto a tape or wire recorder, or by duplicating a rented film, tape, or wire.

House Comm. on the Judiciary, 88th Cong., 1st Sess., Copyright Law Revision, Part 2, Discussion and Comments on Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law 345 (Comm. Print 1963) (Statement of Edward A. Sargoy, of Counsel, The Copyright Committee of Motion Picture Association of America, Inc).ⁿ³²

ⁿ³² In 1965 the Register of Copyrights also took the position that the videotaping of copyrighted material constituted a reproduction within the meaning of what is now § 106(1). See House Comm. on the Judiciary, 89th Cong., 1st Sess., Copyright Law

Revision, Part 6, Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law: 1965 Revision Bill, 89th Cong., 1st Sess. 17 (Comm. Print 1965).

The advertising agencies ignore that statement. They resort to comments made by the MPAA in 1962 and 1965, which they take out of context, and which have no relevance to the issue before this Court. See Adv. Amici Brief 6-9.

The advertising agencies refer to the MPAA's position on the copyright owner's performance right, incorporated in § 106(4), in an attempt to obscure the MPAA's position with respect to the reproduction right provided for in § 106(1). See Adv. Amici Brief 6-7 and App. C to their Brief. In arguing that the MPAA "acquiesced" in limiting the performance right in § 106(4) to public performances, however, the advertising agencies fail to note that § 106(1) contains no such limitation or qualification. Moreover, the MPAA's position as quoted in App. C was not one of acquiescence: the MPAA acknowledged that the problem it was concerned about had been reduced, not that it had been eliminated. n33

n33 As is clear from the MPAA's comments in 1962 and 1965 regarding the copyright owner's performance right, 17 U.S.C. § 106(4) (Supp. IV 1980), the MPAA was initially opposed to the Register's proposal to qualify the performance right by requiring that the motion picture be performed "publicly." The MPAA's opposition was a result of its concern that there would be no remedy for the nonpublic exhibition of copyrighted films by unauthorized distributors or renters, not because of any concern about unauthorized home copying of films, which was, in the MPAA's view, clearly prohibited by the unqualified exclusive right to reproduce provided for in § 106(1). Moreover, the MPAA's concern regarding the public performance right was largely alleviated by the safeguards that were incorporated into the Register's proposed 1965 bill, including an express right to distribute "by rental, lease or lending" (§ 106(3)), and an expansive definition of the term "publicly", 17 U.S.C. (§ 101) (Supp. IV 1980). See House Comm. on the Judiciary, 88th Cong., 1st Sess., Copyright Law Revision, Part 2, Discussion and Comments on Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law 345-50 (Comm. Print 1963); House Comm. on the Judiciary, 89th Cong., 1st Sess., Copyright Law Revision, Part 5, 1964 Revision Bill with Discussions and Comments 302-03 (Comm. Print 1965).

In addition, the advertising agencies foster the misimpression that the MPAA did not consider home videocopying to be an infringement because the MPAA, in its statement before the House Judiciary Committee in 1965, referred to the fact that the Sony VTR would soon be available to consumers without simultaneously asserting that the use of such a machine to reproduce copyrighted movies would be an infringement. Adv. Amici Brief 8-9. n34 Once again the advertising agencies have extracted the MPAA's comments from their context in an effort to attribute to the MPAA a position it did not take. The MPAA was already on record as clearly opposing any type of exemption or defense for home-use copying by means of a VTR. When it referred to the Sony VTR, the MPAA was addressing only the issue of the Register's proposal to exempt ephemeral recordings by authorized transmitters (§ 112) (see Copyright Law Revision -- Part 2: Hearings before Subcomm. No. 3 of the Committee on the Judiciary of the House of Representatives, H.R. 4347, H.R.

5680, H.R. 6831 and H.R. 6835, 89th Cong., 1st Sess., Ser. No. 8, pt. 2, 1029-33 (June 16, 1965)), n35 and the MPAA did not concede in any way that home videorecording of copyrighted films would not constitute an infringement.

n34 The petitioners also make this same argument in their Brief at 34.

n35 The MPAA's point was that the problem of film bootlegging that would occur with the advent of videotape recorders was not a reason to dismiss out of hand the problem of bootlegging caused by permitting the retention of ephemeral recordings. Pet. Brief at 34.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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