

**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 CREATORS AND DISTRIBUTORS OF PROGRAMS IN  
SUPPORT OF RESPONDENTS

STUART ROBINOWITZ, (Counsel of Record), PAUL, WEISS, RIFKIND, WHARTON &  
GARRISON, (A partnership including professional corporations), 345 Park Avenue,  
New York, New York 10154, (212) 644-8000, Attorneys for Amici Curiae

Of Counsel: STEPHEN D. D. HAMILTON, ANDREW J. PECK

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#### INTERESTS OF AMICI CURIAE

This brief is filed in support of respondents by the 73 amici listed in Appendix A hereto. n1 Amici create or distribute feature films, weekly entertainment series, children's programs, dramas and comedies, documentaries, operas and ballets. Amici and respondents produce or distribute most of the programs that appear on television today. They create or distribute more than 90% of the prime-time programs on the commercial networks, 18 of the top 20 syndicated shows for individual television stations, approximately 60% of the PBS National Program Service and almost 100% of PBS' children's programs. n2 Amici 's programs cover a broad cross section of copyrighted material ranging from Masterpiece Theatre to National Geographic Specials to Sesame Street to The Paper Chase to Dallas to Chariots of Fire.

n1 The consents of the parties are on file with the Clerk of the Court.

n2 See Appendices A, B and C hereto.

Sony threatens to erode the value of amici 's property rights in those programs by marketing a videotape machine (or "VTR") called Betamax, which makes millions of

unauthorized copies of amici 's intellectual property. Amici 's copyrights are the sine qua non of the multi-billion dollar VTR industry.

At the time of trial, there were only about 130,000 Betamax VTRs. Today, there are about 4,500,000 VTRs. By the end of the decade, it is estimated that there will be 30,000,000 to 40,000,000 VTRs. Wholesale copying of Amici 's programs by millions of VTRs will pre-empt critical ancillary markets and seriously jeopardize amici 's legitimate property rights.

#### BACKGROUND FACTS

##### Production and Distribution of Cultural Programs for Public Television

Amici include some of the leading creators and distributors of programming for public television -- stations that are among the major production centers for PBS, The Children's Television Workshop, and significant outside sources of cultural material (e.g., The British Broadcasting Corporation, Lincoln Center and the Metropolitan Opera). Amici 's productions, described in Appendix A, require the creative efforts of the world's outstanding talent and are extremely expensive to produce. Creators of such programs cannot hope to recoup their high production costs from public television, but must look to grants from the public and private sectors -- funding which is rapidly drying up. n3

n3 See H.R. Rep. No. 82, 97th Cong., 1st Sess. 7, 9 (1981); Budget Seen Imperiling Public Broadcasting, N.Y. Times, Feb. 11, 1982, at C36, col. 1.

As a result, producers increasingly depend on the opportunity to exploit their works in ancillary markets such as prerecorded cassettes and discs, cable television and emerging technologies. A recent study by The Carnegie Corporation concluded: "Many of public television's greatest successes are programs that have great shelf life and that consumers may wish to own. That is particularly true with musical performances, children's programs, 'how to' programs, some documentary and informational shows." n4 In reducing federal funding for public television, Congress stressed "the extreme importance of alternative sources of financing to the long-term health of public telecommunications." n5

n4 S. Mahoney, N. Demartino & R. Stengel, Keeping Pace With the New Television 182 (1980); see also id. at 177-85.

n5 H.R. Rep. No. 82, 97th Cong., 1st Sess. 15 (1981).

But alternative sources of financing and ancillary markets are increasingly pre-empted as VTRs proliferate. For example, a taper who copied the recent performance of Madama Butterfly by the New York City Opera on Great Performances, "Live From Lincoln Center," or a stellar performance by the Metropolitan Opera or Pavarotti will have a treasured copy for his or her library and little incentive to purchase or rent a prerecorded videocassette or to buy a record of that performance. For some, taping may replace live attendance. Similarly, those who tape Brideshead Revisited or Cosmos or great performances of Shakespeare's plays, will have little motivation to purchase or rent prerecorded videocassettes.

The growth of VTRs -- from 4.5 to 40 million -- will exacerbate the serious budgetary problems already faced by public television and by amici and other creators of programming for that medium. Free marketplace alternatives are being destroyed by wholesale taping.

#### Production and Distribution of Theatrical Motion Pictures

Theatrical feature films are the most complex and expensive form of copyrighted material that exists today. The average investment in a motion picture ranges from \$10,000,000 to \$20,000,000. Production of features is a high risk affair. Only about two out of ten films recoup their investment from theatrical exhibition. Accordingly, post-theatrical or ancillary markets -- the markets most directly threatened by VTRs -- are critical to the vitality of the creative community.

After initial theatrical exhibition, motion pictures are generally licensed to pay cable or over-the-air pay television for exhibitions over several months or more. Thereafter, popular films are licensed to the television networks for two or more exhibitions for a period of several years. Then, films are typically syndicated to individual television stations across the nation for many exhibitions under multi-year licenses. In addition, feature films have recently been sold or rented to consumers in the form of prerecorded discs or videotapes -- an emerging market with significant growth potential. Feature films are also licensed for performances in the home-rental or 16 mm market, on college campuses, at other institutions and in various other non-theatrical forums. Finally, some successful films are reissued for theatrical exhibition.

Today, television critics are already recommending the best movies to tape when publishing weekly broadcast schedules. n6 Massive videocopying of feature films by millions of VTRs threatens all ancillary markets. For example, a VTR can duplicate a popular new motion picture when it is exhibited on pay cable or pay TV in its complete unedited form without commercials; or it can make a copy of a recent film on its network debut and erase the commercials. Such widespread copying by millions of VTRs will undermine the value of a motion picture on its network run because the commercials are typically deleted. Wholesale duplication will also have a negative impact on the sale or rental of prerecorded tapes and discs of films that are copied, the subsequent exhibitions of those films on television or in theatrical re-releases, and home and other non-theatrical 16 mm rentals. If a VTR owner copies *On Golden Pond* or *Star Wars* or *Kramer vs. Kramer* or *Superman*, that taper will have little incentive to purchase or rent a prerecorded tape or disc of that film, or to view the film when it later appears on television networks or individual stations, or to attend a theatrical re-release.

n6 See, e.g., *Chicago Tribune (TV Week)*, Mar. 14, 1982, at 32; Mar. 28, 1982, at 36; Apr. 18, 1982, at 32.

By pre-empting vital ancillary markets, massive videocopying will erode the producers' ability to undertake the heavy investments and high risks necessary to create new and innovative motion pictures. That will lead to a curtailment in the diversity of films available to the public, contrary to the copyright law's basic goals.

#### Production and Distribution of Television Programs

Like theatrical motion pictures, television series are a highly complex and expensive form of copyrighted material. Today, a made-for-TV movie may cost \$2,500,000 to \$3,000,000 to produce; a one-hour series, \$700,000 to \$1,000,000 per episode; and a regular half-hour TV series, \$300,000 to \$400,000 per episode. Television production is an extremely risky venture. Programs, even the hits, rarely recoup their large investments from network runs and, as a result, producers depend for survival on post-network exhibitions on individual stations in the syndication market and other ancillary markets (Pet. App. 37). n7

n7 "A syndication requires approximately 60-120 episodes, which means 3-5 years of successful first run network exhibitions if the package is all of one series." (Pet. App. 37.) Very few series survive that long today because the networks make frequent scheduling changes in the race for high ratings. See Grover, *Delayed Payoff TV Series Only Become Profitable for Producers Upon Syndication, Years After They Are Made*, Wall St. J., Dec. 27, 1977, at 26, col. 1.

Wholesale copying of new television programs directly threatens the syndication and other ancillary markets that are so critical to television producers. A Betamax owner who makes (or borrows) a taped copy of Hill Street Blues or a musical special or a made-for-TV movie such as Brian's Song or The Autobiography of Miss Jane Pittman will have no incentive to watch that program when it is later telecast by local stations across the nation; and tapers will also have no incentive to buy or rent prerecorded tapes or discs of those highly-acclaimed television programs (such as Roots ) that are offered in those formats.

By undermining ancillary markets, widespread off-air taping will make creators of television programs reluctant to take the substantial risks necessary for the production of new and innovative programs. That will mean fewer programs, less experimentation and a decrease in diversity of choices for the public. The Destructive Impact of Unauthorized Vidcopying on the Private Property Rights of Creators of Programs

As noted above, today's population of 4.5 million VTRs n8 is projected to increase to 30 to 40 million by 1990. n9 Sales are increasing at an explosive rate: 1980 (800,000), 1981 (1,400,000), 1982 (2,100,000). n10 VTRs "are selling at a two-million a year clip" and are "now Japan's most important consumer electronics export, eclipsing even color television as a revenue producer." n11

n8 Brief of General Electric Co., Matsushita Electric Corp., et al. as Amici Curiae at 20.

n9 National Economic Research Associates, *Will Cable Save The Arts?*, at Table 2 (1981); Robert N. Nathan Associates, *An Assessment of the Impact to Consumers from a Royalty Fee on Videocassette Recorders and Blank Tape* 26 (1982); see also Crooks, *Just Who's Right On The Home Taping Issue?*, L.A. Times, Apr. 12, 1982, at 8, col. 1; Brief of Amici Curiae Minnesota Mining et al. at 2; Brief of Amici Curiae Virginia Citizen's Consumer Council, Inc. et al. at 24.

n10 1982 -- Year of the Big Dump, 22 Television Dig., Jan. 4, 1982, at 9; VCR Sets Weekly Sales Record, 22 Television Dig., Sept. 20, 1982, at 9.

n11 Lachenbruch, *The Wide World of Video*, N.Y. Times, Sept. 26, 1982, § 6 (Magazinc), pt. 2 at 42, 46.

The average Betamax owner has 25 or more tapes (Pet. App. 39, 47). Today there are approximately 112.5 million tapes to appropriate amici 's intellectual property. n12 If there are 40 million VTRs by the decade's end and a typical owner has 25 tapes, then there will be 1 billion tapes capable of piracy -- tapes that could, for example, make 4 billion copies of full-length motion pictures. One billion 8-hour cassettes would have enough magnetic tape to circle the globe 16,000 times. As prices for VTRs continue to decline with mass production, n13 the nation will be swamped with this technology and vulnerable copyrighted material will fall prey to easy and relatively inexpensive home duplication on a wholesale basis.

n12 I.e., 25 tapes X 4,500,000 VTRs.

n13 Retail prices of VTRs have dropped from approximately \$1,000 to \$400 for economy models in only about four years. N.Y. Times, Oct. 14, 1982, at A29, col. 5, and Oct. 20, 1982, at B, col. 6 (videorecorder advertisements).

These are not imaginary fears. Because of home audiotaping of records, which began earlier and is more widespread than videotaping, the record industry in losing sales of \$1 billion per year according to a recent economic study by Dr. Alan Greenspan. n14 Beverly Sills, General Director of the New York City Opera, recently testified that taping has caused a one-third decline in the number of new records released in the past several years, thereby decreasing the diversity of choices available to the public. n15 Widespread videocopying will have a pernicious impact on the creative community -- on authors, performers, directors, producers and other talent.

n14 Statement of Alan Greenspan 5 (Apr. 21, 1982), to be reprinted in Hearings on S. 1758 before the Senate Comm. on the Judiciary, 97th Cong., 2d Sess. (1982).

n15 Statement of Beverly Sills, Chairperson, Coalition to Save America's Music 3 (Apr. 21, 1982), to be reprinted in Hearings on S. 1758 before the Senate Comm. on the Judiciary, 97th Cong., 2d Sess. (1982).

In passing the 1976 Copyright Act, Congress warned: "Isolated instances of minor infringements, when multiplied many times, become in the aggregate a major inroad on copyright that must be prevented." n16 Similarly, the Register of Copyrights recently declared that massive videocopying will "prejudice the integrity of... emerging markets." n17 And a British report predicted that "there will be a free-for-all with copyright owners getting no benefit." n18 That is the issue at stake in this test case.

n16 S. Rep. No. 473, 94th Cong., 1st Sess. 65 (1975) [hereinafter cited as "Senate Report"]. To same effect, see H. Rep. No. 83, 90th Cong., 1st Sess. 35

(1967).

n17 Statement of David Ladd, Register of Copyrights, before the American Bar Association, Section of Patent, Trademark and Copyright Law 5 (Aug. 10, 1982) [hereinafter cited as "Register's 1982 ABA Statement"].

n18 Report of the Committee to Consider the Law on Copyright and Design, Cmd. 6732 at 81 (1977) [hereinafter cited as "Whitford Report"].

Sony reportedly believes -- and understandably so -- that "it has a razor-and-blades situation with the Betamax machine and the profitable tapes it requires." n19 Sony apparently looks to the continuous sales of large quantities of blank tapes as a major source of profits over the long run. n20 But the razor and the blades -- the VTRs and tapes -- function only by appropriating the intellectual property of amici and other creators. As the Ninth Circuit observed:

n19 Why Sony's Betamax Has MCA Seething, *Bus. Wk.*, Nov. 29, 1976, at 29.

n20 More than 30 million blank videotapes will be sold this year. *Video Bootleggers: Bane of Film Studios*, *N.Y. Times*, Oct. 23, 1982, at 41, col. 4. Sales of blank tapes, which rose 60% in the last year, are expected to reach \$5 billion by 1985. Greenberg, *Home Entertainment's Software Payoff*, *Forbes*, Mar. 1, 1982, at 109, 110.

Videotape recorders are manufactured, advertised, and sold for the primary purpose of reproducing television programming. Virtually all television programming is copyrighted material. (Pet. App. 25-26 (footnote omitted).)

To obscure those facts, Sony claims (Br. 4-5) that Betamax is merely a "time-shifting" machine that allows viewers to adjust to the scheduling practices of broadcasters. But Betamax is far more. It has also been designed and advertised to "build a library" of popular films, outstanding television programs and classic performances (Pet. App. 41-42 (emphasis added)). If Betamax were merely a "time-shifting" device, consumers would need only a handful of tapes because they are erasable and reusable. But VTR owners typically own about 25 or more tapes costing a total of approximately \$500 (Pet. App. 39, 47). The three Betamax owners who were defendants or witnesses in this case had collections of 340, 170 and 100 tapes (Pet. App. 43-46).

Viewers would not be buying so many blank tapes at such great expense if VTRs were simply "time-shifting" machines. Those tapes (the blades for Sony's razors) are being sold by Sony -- at substantial profit -- to create libraries of outstanding programs. For example, all Betamax tapes were sold out on the eve of the television debut of *Gone With The Wind*. n21

n21 Why Sony's Betamax Has MCA Seething, *supra*, at 29.

After reviewing surveys in the field conducted by Sony and others, the Register of

Copyrights recently concluded that "[by] any calculation... substantial librarying is occurring." n22 Sony seeks to gloss over this fact because Sony n23 and its amici supporters virtually concede that "librarying" violates the copyright laws. Sony's allies call librarying a "noxious" practice that "must be tolerated" n24 and a "complex question." n25 The VTR industry wants to avoid the librarying issue, but its advertisements urge consumers to "build a library" (Pet. App. 41-42 (emphasis added)).

n22 Statement of David Ladd, Register of Copyrights and Assistant Librarian of Congress for Copyright Services 9 (Apr. 21, 1982), to be reprinted in Hearings on S. 1758 before the Senate Comm. on the Judiciary, 97th Cong., 2d Sess. (1982) [hereinafter cited as "Register's Statement before the Senate Judiciary Comm."].

n23 Pet. 17, 19 n.19; see also Sony Br. 29, 31 n.32.

n24 Brief of Amici Curiae Minnesota Mining et al. at 29.

n25 Brief of Amicus Curiae Sanyo Electric, Inc. at 2 n.2.

In any event, even when a viewer "time-shifts," he is making a tangible and fixed copy of an author's intellectual property in violation of the Copyright Act. When time-shifting, a viewer is using the creative property of amici for his own benefit without the payment of any compensation.

Beyond this, time-shifting by millions of VTRs threatens serious injury to copyright owners as VTRs multiply. When time-shifting, viewers generally delete commercials by pressing the remote control "pause switch" when recording or the "fast-forward" button when playing back the tape. According to Sony's own interpretation of the various surveys in evidence, about 40% of playbacks had commercials deleted (Sony Br. 14 n.19). An up-to-date survey submitted to Congress indicates that today more than 80% of VTR owners delete commercials. n26 Devices are being advertised that allegedly eliminate commercials automatically. n27 Advertisers will not pay for audiences that do not see commercials and, as Congress has stressed, this "harms" the copyright proprietor "whose compensation for [his] work is directly related to the size of the audience that the advertiser's message is calculated to reach." n28

n26 Media Statistics, Inc., Third Annual Diary Study of VCR Homes, Fall 1981, B-20.

n27 Videophile, Dec., 1979, at 71, 75.

n28 H.R. Rep. No. 1476, 94th Cong., 2d Sess. 94 (1976) [hereinafter cited as "House Report"], reprinted in 1976 U.S. Code Cong. & Ad. News 5659, 5708.

Time-shifting also means that programs often do not reach the particular audiences or specific time periods for which the programs were targeted. Advertisers, for example, will not pay for useless exposure such as snow tire commercials in videotapes recorded in the winter and played back in April.

Thus, whether VTRs are used for "time-shifting" or "librarying," the value of the creator's intellectual property is being eroded without compensation. The foregoing factors -- wholesale copying, the pre-emption of ancillary markets, and the deletion of commercials -- all undermine the economic basis for the creation of programs for television.

While Sony and its allies now claim *carte blanche* to reap a windfall from the creative property of others, Sony previously paid lip service to copyright principles and to normal marketplace obligations to pay for what it was taking. Thus, when it was launching the Betamax business, Sony reportedly suggested paying royalties on blank tapes. n29 Moreover, for approximately ten years until about 1975, Sony placed warnings on its recording devices, such as: "THIS VIDEOTAPE RECORDER IS NOT TO BE USED TO RECORD COPYRIGHTED WORKS." n30

n29 Schein of Sony Says Tax on Blank Cassettes May Be Answer for Copyright Holders, 11 ETV Newsletter, Apr. 11, 1977, at 1.

n30 Pet. App. 42, 94; see also PX 166, 167, 170; R. 638-44; Sony Br. 3 n.4.

#### Summary of Argument

The Copyright Act prohibits the copying of amici 's property -- their motion pictures, television programs and taped live performances. Although fully aware of VTRs when it passed the new statute in 1976, Congress significantly did not include home off-air taping in the more than thirty exemptions in the new Act.

Wholesale videocopying is not "fair use." That doctrine was designed to stimulate creativity by allowing a second author to borrow an excerpt from the work of an earlier author to further his own creative efforts.

Sony is guilty of contributory copyright infringement because it designed and advertises VTRs to copy the most popular copyrighted programs on television. That is Sony's main sales pitch.

There is no basis for Sony's request for an advisory opinion as to whether the district court has the power to order Sony to pay a reasonable continuing royalty in lieu of the usual injunction. That issue is not ripe for review because the district court has not yet considered the question of a remedy. In any event, a reasonable and continuing royalty would be a pragmatic remedy because copyright proprietors cannot -- and do not wish to -- pursue millions of VTR owners. Sony opposes this remedy because it is practical.

The Ninth Circuit's opinion is in accord, not only with the equities and the law, but also with the universal views of leading copyright experts here and abroad -- including David Ladd, the present Register of Copyrights; n31 Professor Melville Nimmer, the nation's foremost copyright scholar; n32 leading authorities in the international copyright community; n33 and law journal commentators. n34

n31 See Register's Statement before the Senate Judiciary Comm., *supra*; Register's 1982 ABA Statement, *supra*; and 127 Cong. Rec. H5148-49 (1981)

(remarks of David Ladd, Register of Copyrights).

n32 See 3 Nimmer on Copyright, § 13.05[F][5] at 13-93 to -102, § 12.04[A] at 12-40 to -41 (1982 ed.).

n33 See Report of Berne Union Working Group on the Legal Problems Arising from the Use of Videocassettes and Audiovisual Discs, reprinted in Copyright, April, 1977, at 87, PP32-34; Whitford Report, *supra*, at 75.

n34 See, e.g., Marsh, *Betamax and Fair Use: A Shotgun Marriage*, 21 Santa Clara L. Rev. 49 (1981); Note, *The Betamax Case: Accommodating Public Access and Economic Incentive in Copyright Law*, 31 Stan. L. Rev. 243 (1979); Note, *Universal City Studios, Inc. v. Sony Corp.: "Fair Use" Looks Different on Videotape*, 66 Va. L. Rev. 1005 (1980); Note, *Copyright -- Fair Use -- Recording of Televised Copyrighted Work in the Home*, 55 Tulane L. Rev. 1295 (1981); Note, *Copyright: Gone With the Betamax?*, 8 Rev. L. & Soc'l Change 45 (1978).

TEXT: I.

VIDECOPYING OF MOTION PICTURES AND TELEVISION PROGRAMS VIOLATES AMICI'S INTELLECTUAL PROPERTY RIGHTS PROTECTED BY THE COPYRIGHT LAW.

Copyright is a property right. From its earliest origins in Anglo-American law, copyright has protected the intellectual property of authors and other creators in order to stimulate intellectual creativity. n35 Thus, the Constitution gives Congress the Power: "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." n36

n35 See generally *Millar v. Taylor*, 4 Burr. 2303, 98 Eng. Rep. 201 (1769); *Donaldsons v. Becket*, 4 Burr. 2408, 98 Eng. Rep. 257 (1774); *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834); *The Federalist No. 43* (J. Madison). Also see 1 Nimmer *On Copyright* § 1.03[A] at 1-30 to -30.2.

n36 U.S. Const. art. 1, § 8, cl. 8.

The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.' Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered. (*Mazer v. Stein*, 347 U.S. 201, 219 (1954).)

A. Videocopying Violates the Copyright Act's Absolute Ban Against Copying and Does Not Come Within Any of the Act's Special Exemptions

Videocopying violates the exclusive property right of a copyright owner to make copies of his audiovisual work under Section 1 of the 1909 Copyright Act (former 17 U.S.C. § 1) and under Section 106(1) of the 1976 Act (17 U.S.C. § 106(1)). n37

n37 There is no merit to Sony's claim that taping is not copying but a mechanical

and temporary step for later viewing. "Librarying" involves the making of permanent copies. Even when time-shifting, Betamax owners make copies under the Act, which defines copies as "material objects... in which a work is fixed... and from which the work can be perceived... with the aid of a machine" (17 U.S.C. § 101).

"[R]eproduction on magnetic tape" is copying "even though the tape is later erased." Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law: 1965 Revision Bill, in Copyright Law Revision, Part 6, 89th Cong., 1st Sess. 17 (Comm. Print 1965) [hereinafter cited as "Register's 1965 Report"]; see also *Encyclopaedia Britannica Educational Corp. v. Crooks*, 542 F. Supp. 1156 (W.D.N.Y. 1982) (old and new Copyright Acts prohibit off-air videotaping of educational programs even for time-shifting); *Walt Disney Productions v. Alaska Television Network, Inc.*, 310 F. Supp. 1073 (W.D. Wash. 1969).

After setting forth the copyright proprietor's exclusive property rights in absolute terms in Section 106, the new Act carves out a series of exemptions designed primarily to accommodate new technologies (Sections 108 through 118). n38 There are more than thirty exemptions. n39 Not a single one of those exemptions permits home off-air copying, although Congress was fully aware of VTRs. The new Act's creation of more than thirty exemptions negates the notion of a sub silentio exemption for videocopying. *Diamond v. Chakrabarty*, 447 U.S. 303, 308 (1980); *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 173 n.18, 188 (1978). That should be dispositive.

n38 This is the first time in almost two centuries that the copyright law has set forth a long list of exemptions. See L. Seltzer, *Exemptions and Fair Use in Copyright* 11-12 (1978).

n39 *Id.* at 52 & n.123.

## B. The Fair Use Defense Is Not Applicable

Sony seeks refuge under the fair use doctrine. But it is not germane here.

Fair use -- devised by the courts more than 110 years ago n40 and now codified in Section 107 of the new Act -- is designed to serve the constitutional goals of copyright by allowing scholars, critics and others to use limited excerpts from prior copyrighted material in order to further their own creative endeavors. The courts established the defense "to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which the law is designed to foster." *Iowa State University Research Foundation, Inc. v. American Broadcasting Cos.*, 621 F.2d 57, 60 (2d Cir. 1980). n41

n40 See *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4,901) (Story, J.); *Lawrence v. Dana*, 15 F. Cas. 26 (C.C.D. Mass. 1869) (No. 8,136); see also B. Kaplan, *An Unhurried View of COPYRIGHT* 67 & n.90 (1967).

n41 See also *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303, 307 (2d Cir. 1966), cert. denied, 385 U.S. 1009 (1967); *Wainwright Securities Inc. v. Wall Street Transcript Corp.*, 558 F.2d 91 (2d Cir. 1977), cert. denied, 434 U.S. 1014 (1978); *Benny v. Loew's Inc.*, 239 F.2d 532, 536 (9th Cir. 1956), aff'd by an

equally divided Court sub nom. *Columbia Broadcasting System v. Loew's Inc.*, 356 U.S. 43 (1958); *Rubin v. Boston Magazine Co.*, 645 F.2d 80 (1st Cir. 1981); Seltzer, supra, at 24; 3 Nimmer On Copyright § 13.05 at 13-54, § 13.05[A] at 13-58 to -63 & n.23.3, § 13.05[B] at 13-65 to -71.

Thus, Section 107 characterizes fair use as involving "purposes such as criticism, comment, news reporting, teaching..., scholarship, or research." n42 Those activities bear no resemblance to VTRs' duplication of *Jaws* or *M\*A\*S\*H* or *Julia Child* for entertainment and convenience. Since VTR copying has nothing to do with creativity -- the *raison d'etre* for fair use -- the concept is not relevant here. If it were, Sony could not satisfy a single one of the four criteria set forth in Section 107.

n42 The House and Senate Reports accompanying the new Act give examples: "quotation of excerpts in a review or criticism for purposes of illustration or comment; quotation of short passages in a scholarly or technical work, for illustration or clarification of the author's observations; use in a parody of some of the content of the work parodied; summary of an address or article, with brief quotations, in a news report; reproduction by a library of a portion of a work to replace part of a damaged copy; reproduction by a teacher or student of a small part of a work to illustrate a lesson; reproduction of a work in legislative or judicial proceedings or reports; incidental and fortuitous reproduction, in a newsreel or broadcast, of a work located in the scene of an event being reported." Senate Report 61-62; House Report 65.

(1) Purpose and character of use: Home videocopying is not designed "for nonprofit educational purposes" or other scholarly pursuits within the meaning of Section 107. It is designed for librarying or convenience. Nobody defends librarying; and the 1975 Senate Report declares "[t]he committee does not intend to suggest... that off-the-air recording for convenience would under any circumstances, be considered 'fair use.'" n43

n43 Senate Report 66 (emphasis added).

(2) The amount and substantiality of the portion used in relation to the copyrighted work as a whole: This factor is also fatal. Fair use permits copying of small excerpts, not complete works verbatim. n44 For example, even in the case of educational copying of works -- which merits more hospitable treatment than home VTR copying under the fair use defense -- there is no privilege to reproduce "a sizable integrated work published as an entity (a novel, treatise, monograph, and so forth)." (Senate Report 64.)

n44 See 3 Nimmer On Copyright § 13.05[A] at 13-64, § 13.05[D] at 13-72.5 to -72.6; *Meeropol v. Nizer*, 560 F.2d 1061, 1069-71 (2d Cir. 1977), cert. denied, 434 U.S. 1013 (1978); *Rosemont*, 366 F.2d at 310; *Walt Disney Productions v. Air Pirates*, 581 F.2d 751, 756-58 (9th Cir. 1978), cert. denied, 439 U.S. 1132 (1979); *Wihtol v. Crow*, 309 F.2d 777 (8th Cir. 1962); *Leon v. Pacific Telephone & Telegraph Co.*, 91 F.2d 484, 486 (9th Cir. 1937); *Benny*, 239 F.2d at 536; *Iowa State*, 621 F.2d

at 61; Encyclopaedia Britannica, 542 F. Supp. at 1156; Marvin Worth Productions v. Superior Films Corp., 319 F. Supp. 1269 (S.D.N.Y. 1970); cf. Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 575-76 (1977) ("The broadcast of a film of petitioner's entire act poses a substantial threat to the economic value of that performance.").

(3) Nature of the copyrighted work: This factor also weighs heavily against Sony. First, fair use is generally less applicable to creative and imaginative works (such as movies and TV shows) than to scientific or informational studies. n45 Second, the more that a work such as a feature film or television program depends on revenues from subsequent uses, the narrower the scope of permissible fair use. n46 Finally, Congress has shown "special solicitude for" (Pet. App. 8), and given a particularly high level of protection to, audiovisual works such as movies and television programs because they are "exceptionally vulnerable to copyright impairment." n47 Thus, audiovisual works are generally not included in the exemptions in Sections 108-118. n48

n45 3 Nimmer on Copyright § 13.05[A][2] at 13-63; Seltzer, supra, at 33-34. Compare, e.g., Iowa State, 621 F.2d at 57, and Benny, 239 F.2d at 536, with, e.g., New York Times v. Roxbury Data Interface, Inc., 434 F. Supp. 217 (D.N.J. 1977).

n46 See Senate Report 64.

n47 H.R. Rep. No. 83, 90th Cong., 1st Sess. 61 (1967). "This is so because the capital investment is high, the risk of loss on any given work is large, and unauthorized copies tend to satisfy fully the demand for the lawful copy." Register's Statement before Senate Judiciary Comm., supra, at 25.

n48 See, e.g., Sections 108, 110, 112, 118.

(4) The effect of the use upon the potential market for or value of the copyrighted work: The test is whether the unauthorized use of the copyright work tends to threaten injury to potential markets for the work. n49 Since fair use is a defense to infringement, the defendant has the burden of proof in negating this factor. n50

n49 3 Nimmer On Copyright § 13.05[E][4][c] at 13-84; Iowa State, 621 F.2d at 62; Encyclopaedia Britannica, 542 F. Supp. at 1169; Roy Export Co. v. Columbia Broadcasting System, 503 F. Supp. 1137, 1145-46 (S.D.N.Y. 1980), aff'd, 672 F.2d 1095 (2d Cir. 1982), cert. denied, 51 U.S.L.W. 3254 (Oct. 4, 1982); Meeropol, 560 F.2d at 1070; Meredith Corp. v. Harper & Row Publishers, Inc., 378 F. Supp. 686, 689 (S.D.N.Y.), aff'd, 500 F.2d 1221 (2d Cir. 1974).

n50 Encyclopaedia Britannica, 542 F. Supp. at 1170 & n.12; Metro-Goldwyn-Mayer v. Showcase Atlanta Cooperative Productions, Inc., 479 F. Supp. 351, 360,61 (N.D. Ga. 1979); 3 Nimmer on Copyright § 13.05[E][4][a] at 13-84.

Copying by 4.5 million VTRs (with 112.5 million tapes) today and by 40 million VTRs (with 1 billion tapes) by the decade's end clearly threatens potential injury to

amici. To repeat, Congress has warned:

Isolated instances of minor infringements, when multiplied many times, become in the aggregate a major inroad on copyright that must be prevented. n51

n51 Senate Report 65.

Congress has also declared:

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. n52

n52 Senate Report 65 (emphasis added).

As the Ninth Circuit observed, VTR copies "are used for the same purpose as the original." n53

n53 Pet. App. 23 (emphasis added).

The Register of Copyrights, stressing Section 107's specific reference to the impact on potential markets, recently declared that this language "underscores the need to secure future markets from pre-emption" in a period of rapid technological change; that Congress, in passing the new Act, "sought to avoid unanticipated, future, erosions of authors' rights, as had occurred under the 1909 Act;" and that [u]nauthorized off-air taping prejudices the integrity of other emerging markets." n54

n54 Register's 1982 ABA Statement, *supra*, at 3, 5 (emphasis added). Similarly, the Register's 1965 Report, *supra*, at 17, stated:

A real danger to be guarded against is that of confining the scope of an author's rights on the basis of the present technology so that, as the years go by, his copyright loses much of its value because of unforeseen technical advances.

In short, the reasons for rejecting Sony's fair use defense are overwhelming. Indeed, a recent decision rejected a school's defense of fair use in connection with off-air taping of instructional films from an educational station (including claims of "time-shifting"). *Encyclopaedia Britannica Educational Corp. v. Crooks*, 542 F. Supp. 1156 (W.D.N.Y. 1982). This case is a fortiori. Here, the copying is primarily for purposes of amusement, not education, and the scope of the copying is much more extensive, involving millions of copies across the entire county.

C. Sony's Claims as to Legislative Intent Are Specious

Although Section 107 was "intended to restate the present judicial doctrine of fair use" n55 and Sony cannot find a single case to support its position, n56 Sony

inexplicably argues that Congress really wanted home videotaping to be treated as if it were fair use. Sony stakes its entire case (Br. 35-37 & nn. 39-42) on an isolated paragraph in the 1971 House Report on the record piracy amendment, and some related colloquy, n57 to the effect that the amendment was not intended to reach private home audio taping of phonograph records. Sony's reliance is misplaced.

n55 Senate Report 62; House Report 66.

n56 Sony and its colleagues rely on *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) (per curiam). But even the district court recognized that *Williams & Wilkins* "has little precedential value" (Pet. App. 73). There, the Court of Claims permitted government libraries to copy medical articles from learned journals for critical medical research. That is a far cry from massive copying of television shows for "librarying" and convenience. Moreover, the court in *Williams & Wilkins* stated that its decision was merely "a 'holding operation' until Congress" acted on the pending revision of the Copyright Act (487 F.2d at 1363). Shortly thereafter, Congress did act. It sharply limited library copying for scholarly purposes and, significantly, did not authorize copying of movies or TV shows (Section 108). The Senate Report, after explaining Section 108's strict limitations on library copying, stated that *Williams & Wilkins* "failed to significantly illuminate the application of the fair use doctrine." Senate Report 71. To same effect, see 3 Nimmer On Copyright § 13.05[E][4][c ] at 13-83 to -87.

n57 The colloquy cited by Sony (Br. 35-37 & nn. 39-42) focused on two points -- the difficulty of detecting record taping in individual homes and concern about privacy rights. But, as explained by Professor Nimmer, those considerations are not present if, as has been suggested, a royalty is imposed on Sony and the other importers and manufacturers of VTRs and tapes. 3 Nimmer On Copyright § 13.05(F) at 13-101 to -02. Sony's quote from Ms. Ringer (Br. 35 n.39) is highly selective. On the pages cited, she also warned Congress of the "crunch" that would occur in the future and of the "quantum increase [in bootlegged movies] when video cassette recorders are freely available." In any event, the isolated 1971 remarks quoted by Sony -- as opposed to the more than 400 pages of considered Congressional Reports on the 1976 Act -- are not entitled to weight in determining legislative intent as to the 1976 Act. See *Zuber v. Allen*, 396 U.S. 168, 186 (1969); *American Trucking Association, Inc. v. Atchison, Topeka & Sante Fe Railway*, 387 U.S. 397, 418 (1967); *Gemsco v. Walling*, 324 U.S. 244, 260 (1945).

First, the amendment was an interim measure aimed at stopping commercial piracy, which had reached crisis proportions. The amendment did not purport to deal with home taping. An isolated remark in the House -- but not the Senate -- Report did not carve out a major exemption in the statutory scheme. In any event, the 1971 legislation n58 and the House and Senate Reports specifically recognized that the amendment had no impact whatsoever on motion pictures. n59

n58 See Sony Br., Appendix E.

n59 H.R. Rep. No. 487, 92d Cong., 1st Sess. 5-6 (1971); S. Rep. No. 72, 92nd Cong. 1st Sess. 5 (1971) ("the reproduction of the sound accompanying a

copyrighted motion picture is an infringement of copyright in the motion picture").

Second, assuming *arguendo* that the 1971 amendment *sub silentio* created a home recording exemption, it was not carried over into the 1976 Act. On the contrary, the 1976 Act gives records broader protection than the interim piracy amendment did. Moreover, when passing the 1976 Act, Congress did not repeat the 1971 House Report's paragraph cited by Sony in any of its Reports, although other portions of the 1971 House Report were repeated verbatim.

The 1971 amendment merely gave the proprietor of a record the exclusive right "[t]o reproduce and distribute to the public." See *Sony Br.*, Appendix E, quoting 17 U.S.C. § 1(f) (emphasis added). In contrast, subdivision 1 of Section 106 of the new Act gives a record proprietor the exclusive right "to reproduce;" and subdivision 3 of Section 106 gives him the right "to distribute." Each of those rights is separate and "independent." House Report 61; Senate Report 57. Thus, mere reproduction of sound records and tapes, without distribution, now creates copyright liability. In contrast, the 1971 amendment required both copying and distribution, because it was aimed at commercial piracy.

Third, assuming *arguendo* that the 1976 Act *sub silentio* adopted an implied 1971 exemption for audio taping, Sony does not explain how that exemption was extended to videotaping of motion pictures and television programs.

Fourth, Sony's claim (*Br.* 38) that the videotaping question "had been resolved" in its favor by the 1971 piracy statute has a hollow ring because after that date Sony continued to place warnings on its VTRs that they were "not to be used to record copyrighted works." n61

n61 PX 166, 167, 170; R. 638-44; see also *Pet. App.* 42, 94; *Sony Br.* 3 n.4.

The reality, as noted by Professor Nimmer, is that "[t]here is not and has never been an exemption from copyright liability for audio recording." n62 And the claim that the 1971 amendment sanctioned "videotape copying practices is without authority." *Encyclopaedia Britannica*, 542 F. Supp. at 1182.

n62 M. Nimmer, "The Legal Status of Home Audio Recording of Copyrighted Works" 1, 19 (Apr. 21, 1982), to be reprinted in *Hearings on S. 1758* before the Senate Comm. on the Judiciary, 97th Cong., 2d Sess. (1982); see also 3 Nimmer On Copyright § 1305[F][5] at 13-96 n.159.

In contrast to Sony's bits and pieces of outdated and irrelevant "history," the more than 400 pages of Committee Reports accompanying the 1976 Act are entitled to great weight in determining Congressional intent. See *Zuber v. Allen*, 396 U.S. 168, 186 (1969); *United States v. UAW-CIO*, 352 U.S. 567, 585 (1957). Those Reports -- ignored by Sony -- show that Congress was not willing to permit massive home videocopying. On the contrary, it allowed extremely limited off-air taping by schools,

libraries and certain other institutions, and then only under tight restrictions.

Schools: The House Report states (at 71-72):

The problem of off-the-air taping for nonprofit classroom use of copyrighted audiovisual works incorporated in radio or television broadcasts has proved to be difficult to resolve. The Committee believes that the fair use doctrine has some limited application in this area... [Emphasis added.] n63

n63 The Report recommended further study by the interested parties. Subsequently, "Guidelines for Off-Air Recording of Broadcast Programming for Educational Purposes" were published, sanctioning off-air recording by nonprofit educational institutions under narrow limitations (127 Cong. Rec. E4750-52 (1981) (remarks and insertion by Rep. Kastenmeier)).

The Senate Report also discussed "the special problems involved in the reception of instructional television programs in remote areas," particularly "when such transmissions extend over several time zones within the same state, such as in Alaska."

Unless individual schools in such states may make an off-air recording of such transmissions, the programs may not be received by the students during the school's daily schedule. The committee believes that the making by a school located in such a remote area of an off-the-air recording of an instructional television transmission for the purpose of a delayed viewing of the program by students for the same school constitutes a 'fair use.' The committee does not intend to suggest however, that off-the-air recording for convenience would under any circumstances, be considered 'fair use.' n64

n64 Senate Report 65-66 (emphasis added).

Libraries: While libraries may not copy audiovisual materials, Congress made a limited exception for off-air taping of news programs for scholars (Section 108(f)(3) and (h)).

It is intended to permit libraries and archives, subject to the general conditions of this section, to make off-the-air videotape recordings of daily network newscasts for limited distribution to scholars and researchers for use in research purposes. n65

n65 House Report 77 (emphasis added).

Because of the important copyright policy issues inherent in this issue, the exemption has been narrowly drafted. n66

n66 Senate Report 69 (emphasis added).

Other exceptions: Off-shore cable systems may videotape off-air under certain circumstances provided, *inter alia*, commercials are not deleted and statutory royalties are paid (Sections 111(e), (f)). And, finally, the Conference Committee indicated that limited taping by non-profit institutions for the deaf and hearing impaired would be "fair use" subject to various restrictions. n67

n67 H.R. Rep. No. 1733, 94th Cong., 2d Sess. 70 (1976) [hereinafter cited as "Conference Report"].

In addition to the foregoing statements dealing specifically with off-air taping, the Committee Reports contain many other general statements undercutting the notion of an open-ended fair use privilege for massive copying. n68

n68 The Reports state that language in Section 107 "is not intended to give" taping "any special status under the fair use provision or to sanction any reproduction beyond the normal and reasonable limits of fair use" (House Report 66; see also Senate Report 62); "a copyrighted work would be infringed by reproducing it in whole or in any substantial part, and by duplicating it exactly;" (House Report 61; Senate Report 58); "Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way" (House Report 66; Senate Report 62); "[t]he availability of the fair use doctrine to educational broadcasters would be narrowly circumscribed in the case of motion pictures and other audiovisual works" (House Report 72; Senate Report 65); "[i]solated instances of minor infringements, when multiplied many times, become in the aggregate a major inroad on copyright that must be prevented" (Senate Report 65); "a use that supplants any part of the normal market for a copyrighted work would ordinarily be considered an infringement" under the fair use doctrine (Senate Report 65); "infringement takes place whenever all or any substantial portion of the actual sounds that go to make up a copyrighted sound recording are reproduced in phonorecords by... recapturing off the air, or any other method" (House Report 106).

Since Congress was unwilling to grant a blanket fair use exemption for educational, scholarly and philanthropic purposes, it surely did not intend to create a blanket exemption for Sony. It is absurd to suggest that Congress -- which spent two decades debating the 1976 Act -- carved out a major exemption in the statutory framework without a single hearing on the subject.

D. Sony's First Amendment and Related Claims Are Specious

Sony's First Amendment argument (Br. 24-27 & n.26) "is wholly without merit" (Pet. App. 19). There is no separate First Amendment defense apart from fair use. n69 The "first amendment is not a license to trammel on legally recognized rights in intellectual property." *Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc.*, 600 F.2d 1184, 1188 (5th Cir. 1979).

n69 "Conflicts between interests protected by the first amendment and the copyright laws thus far have been resolved by application of the fair use doctrine." *Wainwright Securities, Inc. v. Wall Street Transcript Corp.*, 558 F.2d 91, 95 (2d Cir. 1977), cert. denied, 434 U.S. 1014 (1978); see also *Roy Export*, 672 F.2d at 1095;

Iowa State, 621 F.2d at 61 n.6; Air Pirates, 581 F.2d at 758-59; Sid & Marty Kroft Television v. McDonald's Corp., 562 F.2d 1157, 1169-71 (9th Cir. 1977); cf. Zacchini, 433 U.S. at 577 n.13.

Sony's stress on "privacy" rights (Br. 18, 25 & n.26, 28 n.29, 46) is also misplaced. While Congress limited certain rights of a copyright proprietor to public performances, displays or distribution ( § 106(3)(4)(5)), it did not do so in the case of copying ( § 106(1)). Thus, private copying is proscribed. In any event, amici do not seek to invade the privacy of anybody's home. While privacy rights may be relevant in fashioning a remedy, they do not absolve Sony from liability.

There is also no merit to Sony's claim (Br. 24-27) that fair use should be abandoned because the Communications Act of 1934 is designed to give the public maximum access to diverse programming. n70 Amici do not seek to limit the public's access to programs, so long as they receive fair compensation for the use of their property. The Copyright and the Communications Acts are in harmony. The Copyright Act does not allow off-air copying without fair compensation; and the Communications Act does not diminish the scope of copyright protection. n71

n70 Identical arguments were rejected as "farfetched" in Encyclopaedia Britannica, 542 F. Supp. at 1180.

n71 Teleprompter Corp. v. Columbia Broadcasting System, 415 U.S. 394, 406 n.11 (1974). The fact that amici 's programs are broadcast over the public airwaves does not, contrary to Sony's claims, constitute an abandonment of rights or create a license to copy. Roy Export, 672 F.2d at 1104; Encyclopaedia Britannica, 542 F. Supp. at 1180.

Congress and this Court have recently rejected similar claims that increasing the public's access to television justifies taking somebody else's property without compensation. Thus, in the new Act, Congress has required cable television to pay royalties when it uses copyrighted material (Section 111). And in *Loretto v. Teleprompter Manhattan CATV Corp.*, 50 U.S.L.W. 4988 (U.S. June 30, 1982), this Court recently held that increasing the public's access to television programs transmitted via cable does not justify "taking" an apartment owner's "property" by installing wires on his premises without fair compensation, even though the cables occupied only a small and unusable space under a roof parapet. If that de minimis empty space merited protection, so does amici 's intellectual property.

E. Sony's Effort To Analogize VTRs to Cable Is Specious

Sony and its amici place heavy reliance on *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968), and *Teleprompter Corp. v. Columbia Broadcasting System*, 415 U.S. 394 (1974). But those cases, which did not involve fair use, are wholly inapposite. The issue there was one of statutory interpretation -- whether the term "performance" in the 1909 Act covered retransmission of TV signals by cable, a medium not contemplated when the 1909 Act was passed. Here there is no statutory ambiguity. Betamax admittedly makes "reproductions" under the 1976 Act, and Congress was fully aware of VTR technology.

There is no basis for Sony and its amici 's tortured efforts to analogize VTRs and

cable television for copyright purposes. First, Congress debated cable's status under the copyright laws for ten years; it did not hold a single hearing on VTRs. Second, cable pays statutory royalties; Sony wants a free ride. Third, cable makes ephemeral transmissions; VTRs make tangible (and often permanent) copies. Fourth, the 1976 Act includes cable in its list of exemptions (subject to a compulsory license -- Section 111); there is no exemption for VTRs. Fifth, cable may not delete commercials because of "harm" to copyright owners; n72 VTRs generally do delete commercials. If cable incurs copyright liability for ephemeral transmissions of TV signals with commercials intact, Betamax should incur liability for making tangible (and often permanent) copies with the commercials obliterated. n73

n72 House Report 89-90; Section 111(c), (e).

n73 Sony's amici (e.g., Brief of Amici Curiae Toshiba Corp., et al. at 11) cite Teleprompter's statement that cable will expand the audience for television programs and that therefore broadcasters should be willing to pay copyright owners higher fees as the marketplace adjusts to the new technology (415 U.S. at 412-13). But cable carries the advertiser's messages (Section 111). VTRs typically erase commercials. Advertisers will pay less, not more, because VTRs obliterate their messages. As Sony previously recognized (Pet. 4), advertisers "pay to have their commercials interspersed and broadcast with their programming."

Sony's hedged claim (Br. 13, 31) that Nielsen and other audience surveys could count VTR usage is nonsensical. If the size of the audience could be counted, the deletion of commercials could not. Moreover, while meters used for audience measurement can determine when a set is tuned to a particular program, they cannot tell when or whether a tape is ever played back. The amicus brief of Sony's advertising agency, McCann-Erickson, does not disagree.

## II.

### SONY IS LIABLE AS A CONTRIBUTORY COPYRIGHT INFRINGER.

Sony correctly states the law when it says (Pet. 24): "One 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." n74 That is exactly what Sony does. It manufactures, advertises and sells the Betamax machines and tapes for "the primary purpose of reproducing television programs" (Pet. App. 25-26).

n74 Quoted from *Gershwin Publishing Corp. v. Columbia Artists Management, Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971). See also *Kalem Co. v. Harper Brothers*, 222 U.S. 55, 62-63 (1911); *Universal Pictures Co. v. Harold Lloyd Corp.*, 162 F.2d 354, 365-66 (9th Cir. 1947); see generally *Screen Gems-Columbia Music, Inc. v. Metlis & Lebow Corp.*, 453 F.2d 552, 554 (2d Cir. 1972); *Screen Gems-Columbia Music, Inc. v. Mark-Fi Records, Inc.*, 256 F. Supp. 399, 403 n.9 (S.D.N.Y. 1966) (Weinfeld, J.).

Sony's main defense is that Betamax is a "staple item of commerce" like a typewriter or fountain pen because "the amount of programming available for

unchallenged home recording far exceeds that which is challenged" (Br. 4; see also id. at 29, 40). Sony says this is the "most crucial" and "most important" issue in the case (Br. 4, 39). It is nonsense, Sony's advertisements encourage Betamax purchasers to "record favorite shows," "classic movies," "movies," "films," "cartoons" and "novels for television" n75 -- all copyrighted material. Sony's own surveys show that 80% of videocopying consists of entertainment programs. n76 Such programs are copyrighted -- primarily by amici and respondents who produce or distribute most network programs, most syndicated programs, and most programs for the PBS National Program Service. Sony's claim that taping of popular copyrighted programs is a minor feature of Betamax is absurd. n77 Consumers obviously buy Betamax to copy their favorite programs, not unpopular material. n78

n75 Pet. App. 41-42; PX 454, 460, 461, 463, 466, 519, 546 (pp. 2-3), 548, 554 (p. 8); R.T. 692.

n76 DX OT, Tables 20 and 40.

n77 Sony suggests (Br. 7-8) that viewers are especially interested in taping religious, education and sports programs. But Sony's own survey shows that less than 9% of taping time is devoted to such programming (DX OT, Table 20). Moreover, even as to such programs, most of the parties which Sony claims consented to taping (Br. 7) do not even own the copyrights in those programs. For example, the religious and educational broadcasters referred to by Sony (Br. 7) do not own the copyrights in most of the programs they telecast. Cf. *Encyclopaedia Britannica*, 542 F.Supp. at 1158, 1164 (plaintiffs, not educational television station, owned copyrights of programs taped off-the-air). And the baseball, football and other professional teams, not the league officials cited by Sony (Br. 7), own the games and place warnings against making copies during each telecast.

As for Sony's claims about Betamax copying of local-live taped shows that are erased (Br. 9), Sony's survey does not even report the de minimis amount of taping of such materials. Local stations, in fact, produce less than 15% of their own programs, with almost one-half being news. Federal Communications Commission, *Annual Programming Report for Commercial Television Stations 1973-79*. There is little incentive to tape the local news, which grows stale overnight. Except for news, there is virtually no local programming in the evening -- the hours of heaviest taping according to Sony's survey (DX OT, Tables 14, 15).

Finally, while Sony claims (Br. 8) that NBC may not object to VTRs because its parent (RCA) manufactures them, NBC could not consent to videocopying of most popular programs on its network because it does not produce or own the copyrights in, more than a tiny fraction of its prime-time schedule. NBC can produce only 2-1/2 hours of prime-time programs under its antitrust consent decree. *United States v. National Broadcasting Co.*, 449 F. Supp. 1127, 1131 (C.D. Cal. 1978). This season, NBC produces only two hours. The other prime-time programs NBC broadcasts contain copyright notices of amici and respondents.

n78 As Professor Nimmer notes: "It is true that a very small percentage of the works broadcast on television, such as some old silent movies, are no longer in copyright, but this hardly represents a source for 'substantial' non-infringing use of videotape recorders." 3 Nimmer *On Copyright* § 12.04[A] at 12-41.

Sony also claims (Br. 3 n.4, 12, 43) that it cannot be a contributory infringer because it did not know that Betamax buyers would tape off-air; that it never encouraged them to do so or told them it was legal; and that Sony itself did not know it was illegal. These are specious claims. Betamax was made to copy off-air and, as noted above, Sony's advertisements urged the public to "build a library" and to "record favorite shows" and "classic movies" (Pet. App. 41-42). The claim that Sony did not realize that copying was an infringement is factually incorrect and legally irrelevant. For a decade, from the mid-1960s until the mid-1970s, Sony was advised as to potential copyright liability and put prominent warnings on its VTRs, such as: "THIS VIDEOTAPE RECORDER IS NOT TO BE USED TO RECORD COPYRIGHTED WORKS." (Pet. App. 42, 94.) But, in 1975, with the introduction of its new consumer-oriented and less expensive Betamax model, Sony took the warnings off its machines and out of its advertising and agreed to indemnify its advertising agency for liability arising from its advertising campaign for the Betamax model (Pet. App. 41-42, 94). n79

n79 In any case, a contributory infringer is liable if he knew of the anticipated activity ("build a library," copy your "favorite show" or "classic movies"), whether or not he knew it was illegal. See 3 Nimmer On Copyright § 12.04[A] at 12-34, 12-40 to -41; Famous Music Corp. v. Bay State Harness Horse Racing, 554 F.2d 1213, 1215 (1st Cir. 1977); Chess Music, Inc. v. Sipe, 442 F. Supp. 1184, 1185 (D. Minn. 1977).

The fact that Betamax purchasers rather than Sony perform the final act of copying does not immunize Sony. For example, in Kalem Co. v. Harper Brothers, 222 U.S. 55 (1911) -- the principal copyright precedent cited by Sony (Br. 42) -- the defendant Kalem had made an unauthorized motion picture of the plaintiff's copyrighted book Ben Hur and advertised the film for ultimate theatrical exhibition by third parties. Kalem was held to have infringed the plaintiff's exclusive right of performance, even though the film had actually been exhibited by independent theatres -- i.e., Kalem, like Sony, had not committed the final act of infringement. Justice Holmes wrote for a unanimous court:

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. It is liable on principles recognized in every part of the law. (222 U.S. at 62-63.)  
Betamax's most conspicuous use -- its main selling point in Sony's advertisements -- is to copy the favorite copyrighted feature films and other programs on television.

III.  
THE QUESTION OF RELIEF IS NOT RIPE FOR REVIEW. IN ANY EVENT, REQUIRING SONY TO PAY A REASONABLE AND CONTINUING ROYALTY WOULD BE A PROPER AND PRACTICAL REMEDY.

Sony asks this Court to render an advisory opinion as to whether the district court would have the power to order Sony to pay a reasonable and continuing royalty -- a possible remedy mentioned by the Ninth Circuit (Pet. App. 28-29). That question is

not ripe for review because the district court has not yet fashioned relief.

In any event, the courts have broad powers to devise equitable and pragmatic remedies when dealing with copyrights and new technologies -- including, for example, withholding the usual injunction if Sony pays reasonable royalties. n80 As Sony's amicus Matsushita concedes, a finding of direct infringement against VTR owners without a remedy against VTR manufacturers would be "an academic curiosity" because it would create "an uncontrollable situation from an enforcement viewpoint." n81 Sony opposes the remedy of imposing royalties because it is a pragmatic solution since copyright proprietors cannot, and do not wish to, monitor millions of viewers in this age of easy home duplication. Sony -- which originally offered to pay royalties on blank tapes n82 -- now claims there is no remedy for the wrong.

n80 Seen 3 Nimmer On Copyright § 13.05[E] at 13-91 to -92, § 13.05[F] at 13-101 to -02 and § 14.06[B] at 14-54 and sources cited therein.

n81 Brief of General Electric Co., Matsushita Electric Corp., et al. as Amici Curiae at 6-7. Professor Nimmer states that the "combination of contributory liability" and a continuing royalty would afford copyright proprietors an enforceable remedy (because infringement actions against each VTR owner "would be monumentally unenforceable and... pose unacceptable privacy problems") and would also "remove the threat that the machines themselves would be banned." 3 Nimmer On Copyright § 13.05(F) at 13-101 to -02 (footnotes omitted).

n82 Schein of Sony Says Tax on Blank Cassettes May Be Answer For Copyright Holders, supra, at 1.

## CONCLUSION

For the foregoing reasons, the Court should affirm the Ninth Circuit's opinion.

Respectfully submitted,

STUART ROBINOWITZ, (Counsel of Record), PAUL, WEISS, RIFKIND, WHARTON & GARRISON, (A partnership including professional corporations), 345 Park Avenue, New York, New York 10154, (212) 644-8000, Attorneys for Amici Curiae, Creators and Distributors of Programs

Of Counsel: STEPHEN D. D. HAMILTON, ANDREW J. PECK

Dated: October 27, 1982

## APPENDICES

### APPENDIX A

LIST OF AMICI WITH EXAMPLES OF TELEVISION PROGRAMS AND MOTION PICTURES I -- The following amici are involved in the creation, production and/or distribution of children's programming, opera, ballet, dramas and other programs for public television:

Children's Television Workshop (Sesame Street, The Electric Company, 3-2-1 Contact, The Lion, The Witch and the Wardrobe, Beauty and the Beast, Out to Lunch )

WGBH-Boston (provides approximately 30% of PBS regular prime-time schedule; programs it supplies include Masterpiece Theatre, Nova, Enterprise, Evening at Pops, The Victory Garden, World, This Old House, The Last Chance Garage, Julia Child )

WQED-Pittsburgh (provides approximately 100 hours of programming to PBS per year, including the National Geographic Series, Kennedy Center Tonight, Freedom to Speak with William Buckley (next season), Once Upon A Classic, The Hunter and Hunted )

WTTW-Chicago (Soundstage, Sneak Previews, John Callaway's Interviews, The Paper Chase, The Frugal Gourmet, The Merry Widow, Summer and Smoke )

WTVS-Detroit (PBS Latenight, Pavarotti Christmas Special, Chrysler -- Once Upon A Time And Now, The Wilmar Eight )

KCTA-Minneapolis/St. Paul (The Vikings, Tonight's Scandinavia with the Minnesota Orchestra, One Man on His Mountain, Garden Song )

KCET-Los Angeles (Cosmos, Why In The World, Hollywood Theatre, Visions, Sound Festival, Giuliani Concerts )

British Broadcasting Corporation (Alistair Cooke's America, Tinker Tailor Soldier Spy, The Flight of the Condor, The Magic of Dance, To Serve Them All My Days, The Forsyte Saga, Civilisation, The Pallisers, I, Claudius, The First Churchills, Jane Eyre, The Tales of Hoffman, Moll Flanders, Pickwick, Elizabeth R )

The Metropolitan Opera (Otello, La Boheme, Tosca, Der Rosenkavalier, Madama Butterfly, La Traviata, Cavalleria Rusticana, I Pagliacci, Elektra, The Bartered Bride, L'Elisir d'Amore )

Beverly Sills (Barber of Seville, Manon Lescaut, The Turk in Italy, Beverly! Farewell Performance, The Merry Widow, The Daughter of the Regiment )

Lincoln Center for the Performing Arts (the Live from Lincoln Center Series, many Great Performances including Recital at Avery Fisher Hall - Dame Joan Sutherland, Marilyn Horne and Luciano Pavarotti, An Evening With Itzhak Perlman and the New York Philharmonic, New York City Opera Lucia di Lammermoor, Two Philharmonics: Israel and New York - Zubin Mehta Conducts, James Galway Plays Mostly Mozart )

New York City Ballet (Dance In America: Choreography of Balanchine Parts 1-4, L'Enfant et Les Sortileges, Bournonville Dances, Genius Celebrates A Birthday; Live From Lincoln Center: Cappelia )

The Foundation for the Joffrey Ballet, Inc. (Conversations on the Dance, Tribute to Nijinsky, The Green Table )

Thames Television International (Rumpole of the Bailey, Edward and Mrs. Simpson, Flame Trees of Thika, The Naked Civil Servant )

London Weekend Television International (Upstairs, Downstairs, Lillie, Love for Lydia, Between the Wars, Seven Dials Mystery, Why Didn't They Ask Evans? )

Lionheart Distributors (syndicates programs appearing on PBS, including Alistair Cooke's America, Search for the Nile, Civilisation, War and Peace, The Ascent of Man, The Duchess of Duke Street, Madame Bovary, Ireland: A Television History )

Dorck Grainger (producer of Brideshead Revisited )

Alvin H. Perlmutter, Inc. (All Things Considered On Main Street, The Dresden Exhibition )

II -- The following amici create documentary programs for public or commercial television:

Peter Davis (Middletown, U.S.A., Hearts and Minds, Selling of The Pentagon )

Professor Richard Leacock (MIT, Chairman Film/Video Section) (Community of Praise, Isabella Stuart Gardner, Stravinsky )

Maysles Films, Inc. (Grey Gardens, Gimme Shelter, Salesman, Running Fence )

Donn Pennebaker (Energy War, Don't Look Back, Monterey Pop, Stravinsky, Keep on Rocking )

John Scagliotti (Before Stonewall, Stuff of Dreams )

Fred Wiseman (High School, Primate, Hospital, Welfare, Law and Order, Juvenile Court, Model, seraphita's Diary, Basic Training, Essene, Meat )

David Wolper (Roots, Sandburg's Lincoln, The American Heritage Series, National Geographic Society Specials, The Smithsonian Institution Specials, The Rise and Fall of the Third Reich, The March of Time, The Making of the President 1960 and 1964, The Undersea World of Jacques Cousteau, Victory at Entebbe )

III -- The following amici are involved in the creation, production and/or distribution of theatrical motion pictures and/or programming made for primary exhibition on television:

Andrews & Associates (syndicator of programs, including Alligator, Psychic, Have Gun, Will Travel, The Millionaire)

Robert Benton (director of Kramer vs. Kramer, The Late Show, Still of the Night )

Stephen J. Cannell Productions (The Greatest American Hero, The Quest, The A Team )

Carson Productions (The Tonight Show, Teachers Only, A Second Commercial Special )

Joseph Cates Company (Hallmark Hall of Fame, Bell System Family Theatre, George Gershwin Special, Anne Bancroft Special, Johnny Cash Special, The Magic of David Copperfield )

Columbia Pictures Industries, Inc. (Annie, Tess, The Competition, Das Boot,

Tempest, Born Free, The Bridge Over the River Kwai, Kramer vs. Kramer, Lawrence of Arabia, A Man For All Seasons, Hart to Hart, Ripley's Believe It Or Not, T.J. Hooker, Bring 'Em Back Alive, Filthy Rich, Barney Miller )

Embassy Television (The Jeffersons, One Day At A Time, Square Pegs, Facts of Life, Silver Spoons )

Embassy Pictures (The Graduate, The Lion in Winter, Time Bandits, Vice Squad, Paradise, The Long Good Friday )

EMI Television Programs, Inc. (A Piano for Mrs. Cimino, The Manions of America )

Carl Foreman (producer and writer, The Guns of Navarone, High Noon, Young Winston; producer, Born Free, Living Free; writer, The Bridge Over the River Kwai )

Lillian Gallo (Surprise, Surprise, Fun and Games, Hustling, Haunts of the Very Rich, The Stranger Who Looks Like Me )

David Gerber Productions, Inc. (Police Story, Police Woman, Today's FBI, Beulah Land, Seven Brides for Seven Brothers, The Lindbergh Kidnapping Case )

Ulu Grosbard (director of True Confessions, Straight Time, Who Is Harry Kellerman, The Subject Was Roses )

Hill-Mandelker Films (Tucker's Witch )

The Ladd Company (Chariots of Fire, Blade Runner, Night Shift, Love Child )

Alan Landsburg Productions (Gimme a Break, That's Incredible, The Chisholms, In Search of Ancient Mysteries )

Lorimar Productions, Inc. (Dallas, The Waltons, Falcon Crest, Knots Landing, A Man Called Intrepid )

Lucasfilm, Ltd. (Star Wars, The Empire Strikes Back )

MTM Productions (Hill Street Blues, Lou Grant Show, Mary Tyler Moore Show, Rhoda, White Shadow, WKRP in Cincinnati, Newhart, Remington Steele, St. Elsewhere )

Metro-Goldwyn-Mayer Film Co. (The Wizard of Oz, Gone With the Wind, Doctor Zhivago, How the West Was Won, 2001: A Space Odyssey, Seven Brides for Seven Brothers, CHiPs, Fame, Gavilan )

New Yorker Films (distributes films theatrically: Chan Is Missing, My Dinner With Andre, Aguirre, The Wrath of God, The American Friend, The Chant of Jimmie Blacksmith, Don Giovanni, The Marriage of Maria Braun, The Tree of Wooden Clogs; and on PBS: Gates of Heaven, Vernon, Florida )

Paramount Pictures Corporation (Raiders of the Lost Ark, Ordinary People, Ragtime, Reds, Atlantic City, Gallipoli, Elephant Man, An Officer and a Gentleman, Becket, Bang the Drum Slowly, Catch-22, The Godfather, Taxi, Happy Days, Star Trek, The Odd Couple, Laverne and Shirley, Mork and Mindy, Joanie Loves Chachi,

Star of the Family, Cheers, Family Ties, Powers of Matthew Star, Shogun, A Woman Called Golda )

Martin Ritt (producer and director, Norma Rae, Hud; director, Sounder, No Down Payment )

Rollins-Joffe-Mora-Brezner (Woody Allen films and Arthur )

Romper Room Enterprises, Inc. T/A Klaster Television Productions (Romper Room )

Charles Schneer (Clash of the Titans, Sinbad and the Eye of the Tiger, Golden Voyage of Sinbad, Mysterious Island, First Men In the Moon)

Bert Schneider (Easy Rider, Five Easy Pieces, The Last Picture Show, Days of Heaven, Hearts and Minds, The Monkees )

SFM Entertainment, a division of SFM Media Corp. (Shock Trauma, The Adventures of Nicholas Nickelby, The Children's Story, Moshe Dayan )

Aron Spelling Productions, Inc. (The Love Boat, Dynasty, Matt Houston, Strike Force )

Survival Anglia Ltd (World of Survival, Tales of the Unexpected )

D.L. Taffner/Ltd. (Three's Company, Too Close For Comfort, Benny Hill, World at War, Destination America )

Tandem Productions (All in the Family, Diff'rent Strokes, Archie Bunker's Place, Maude )

Telepictures Enterprises, Inc. (syndicates Here's Lucy, My Favorite Martian, The New Dick Van Dyke Show, People's Court, Real People, Monty Python at the Hollywood Bowl, The Hideaways, The Children's Story )

Tomorrow Entertainment, Inc. (Lifeline, Body Human Series, Roll of Thunder, Hear My Cry, Gnomes, Faeries )

Twentieth Century-Fox Film Corporation (Star Wars, The Empire Strikes Back, Julia, 9 to 5, The Turning Point, All That Jazz, Breaking Away, Diary of Anne Frank, The French Connection, Patton, Norma Rae, The Sound of Music, Sounder, The Paper Chase, M\*A\*S\*H, The Fall Guy, Trapper John, M.D.)

United Artists Corporation (Raging Bull, Being There, The Black Stallion, Exodus, One Flew Over the Cuckoo's Nest, The Greatest Story Ever Told, Romeo and Juliet, 12 Angry Men, Rocky I, II, III, Woody Allen films, Pink Panther series, James Bond series, Seven Brides for Seven Brothers, CHiPs, Fame, Gavilan )

Viacom International, Inc. (producer of network programs, such as The Devlin Connection, Nurse, Missiles of October, East of Eden; syndicator of television programs, including All In the Family, Hogan's Heroes, Cannon, I Love Lucy, Twilight Zone, Hawaii Five-O, Bob Newhart, Honeymooners, Perry Mason, Dick Van Dyke Show, Gunsmoke, The Autobiography of Miss Jane Pittman )

Victory Television (syndicator of programs, including WKRP in Cincinnati, Rhoda, The Streets of San Francisco )

Brent Walker, Ltd. (Complete Gilbert and Sullivan operas )

Warner Bros. Inc. (Life on Earth (PBS), Shoulder to Shoulder (PBS), Superman, The World According to Garp, My Fair Lady, Camelot, The Candidate, The Exorcist, Roots, Scruples, The Thorn Birds, Dukes of Hazzard, Alice, Private Benjamin, Love, Sidney )

Daniel Wilson Productions, Inc. (The Late Great Me, Sophisticated Chance, The Great Wallendas )

Witt-Thomas-Harris Productions (Benson, Soap, It Takes Two ); Witt-Thomas (Making a Living )

IV-The following amici are engaged in non-theatrical distribution of motion pictures and television programs:

Direct Cinema, Ltd. (The Making of Raiders of the Lost Ark, The Making of Rocky III, The Brooklyn Bridge )

Films, Inc. (the largest non-theatrical distributor in the U.S. with rights to more than 8000 titles, including BBC films and features such as Star Wars, Reds, Arthur, Raiders of the Lost Ark, 9 to 5, Ragtime )

Janus Films, Inc. (The Seventh Seal, Wild Strawberries, Jules and Jim, Topper, Number Seventeen, Murder, The Most Dangerous Game, Pygmalion, The Third Man, The Lady Vanishes, The 39 Steps, Oliver Twist, Hamlet, A Night to Remember, Secret Agent )

Learning Corporation of America (Educational and other films, including The Autobiography of Miss Jane Pittman, Blithe Spirit, Brian's Song, Brief Encounter, The Browning Version, A Doll's House, Foreign Correspondent, Great Expectations Henry V, The Hound of the Baskervilles, Holocaust, In Which We Serve, The Ladykillers, Last Holiday, The Lavender Hill Mob, Major Barbara, The Man in the White Suit, Odd Man Out, Rain, The Red Shoes, Stagecoach, To Be or Not To Be, Tunes of Glory )  
V-Other amici:

International Creative Management, Inc. (one of the world's largest talent and literary agencies representing more than 2400 creators and performers)

Burton Lane (composer and lyricist, On A Clear Day You Can See Forever, Finian's Rainbow, Royal Wedding)

Harold Rome (composer and Lyricist, Fanny, Pins and Needles, Destry Rides Again, Wish You Were Here )

APPENDIX B  
1982-83 SEASON -- Prime-Time Programs on CBS, ABC and NBC Produced or Distributed by Amici and Respondents

(Total: 132 Half-Hrs.)  
Producer/Distributor # Half Hrs. % Total

Movies	24	18.0
TV Series		
Universal	12	9.0
Columbia	11	8.3
Paramount	10	7.6
MGM	8	6.0
Embassy	8	6.0
MTM	7	5.3
Fox	6	4.5
Spelling	6	4.5
Lorimar	6	4.5
Warner Bros.	5	3.8
Cannell	4	3.0
Landsburg	3	2.3
Hill/Mandelker	2	1.5
Witt/Thomas/Harris	2	1.5
Disney	2	1.5
Viacom	2	1.5
Taffner	2	1.5
Totals:	120	90.6%

#### APPENDIX C

Top 20 Syndicated Programs (based on number of markets)

	Distributor	Amici or Respondent
1) M*A*S*H	Century-Fox	Yes
2) Happy Days	Paramount	Yes
3) Little House on the Prairie	Worldvision	No
4) Barney Miller	Columbia Pictures Television	Yes
5) Three's Company	D. L. Taffner	Yes
6) Saturday Night Live	Filmways	No
7) Hardy Boys/Nancy Drew	MCA	Yes
8) Sanford & Son	Embassy	Yes
9) All in the Family	Viacom	Yes
10) Laverne & Shirley	Paramount	Yes
11) Mary Tyler Moore	Viacom	Yes
12) Rockford Files	MCA	Yes
13) Andy Griffith	Viacom	Yes
14) The Waltons	Warner Bros.	Yes
15) CHiPs	MGM/UA	Yes
16) Eight Is Enough	Lorimar	Yes
17) The Jeffersons	Embassy	Yes
18) The Brady Bunch	Paramount	Yes
19) Star Trek	Paramount	Yes
20) Hogan's Heroes	Viacom	Yes

