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

OCTOBER TERM, 1982

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

REPLY BRIEF FOR THE PETITIONERS.

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TABLE OF AUTHORITIES

Cases

Citizens Savings & Loan Ass'n v. Topeka, 87 U.S. (20 Wall.) 655 (1875)

Encyclopedia Britannica Educational Corporation, Learning Corporation of America, Time-Life Films, Inc. v. Board of Cooperative Educational Services, et al., 447 F.Supp. 243 (W.D.N.Y. 1978), 542 F.Supp. 1156 (W.D.N.Y. 1982)

Hatch v. Ooms, 69 F.Supp. 788 (D.D.C. 1947); rev'd sub nom. Dorsey v. Kingsland, 173 F.2d 405 (D.D.C. 1948), rev'd 338 U.S. 318 (1949), reh'g. den. 338 U.S. 939 (1950)

United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948)

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

Constitutional Provisions

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Copyright Revision Act of 1976, P.L. 94-533, 90 Stat. 2541 - 17 U.S.C.

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§ 108(f)(3)

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Sound Recordings Act of 1971, P.L. 92-140, 85 Stat. 391

Rules

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House Judiciary Committee Report No. 94-1476, 94th Cong., 2d Sess. (1976) - "1976 House Report"

Senate Judiciary Committee Report No. 94-473, 94th Cong., 1st Sess. (1975) - "1975 Senate Report"

House Judiciary Committee Report No. 92-487, 92nd Cong., 1st Sess. (1971) - "1971 House Report"

Head and Sterling, Broadcasting in America, 4th ed. 1982

Greenfield, Television: The First Fifty Years, 1977

QUESTIONS PRESENTED.

1. Is reception at home by videotape recorder (followed only by private viewing at home) of free off-the-air television programming an infringement of statutory copyright on such programming?

2. If the answer to Question No. 1 is "Yes", does the manufacture, sale and/or advertisement of a home videotape recorder per se constitute contributory infringement whenever that videotape recorder is used for such reception at home?

3. Is "fair use" of a copyrighted work (17 U.S.C. § 107) limited to a "productive use", and precluded from being an "intrinsic use"?

4. Can a federal court impose a compulsory license on a copyright owner, and

impose continuing royalties on an infringer, as a remedy for statutory copyright infringement?

5. By totally ignoring the findings of fact of the district court, and by holding retailers liable for contributory infringement when they never were alleged to have such liability, did the Court of Appeals so far depart from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision?

The parties to the proceedings below are UNIVERSAL CITY STUDIOS, INC., a corporation ("Universal"), and WALT DISNEY PRODUCTIONS, a corporation ("Disney"), Respondents herein, Plaintiffs-Appellants below, v. SONY CORPORATION OF AMERICA, a corporation ("Sonam") -- distributor in America of a home videotape recorder called Betamax, SONY CORPORATION, a corporation ("Sony") -- manufacturer of Betamax; CARTER HAWLEY HALE STORES, INC., a corporation, ASSOCIATED DRY GOODS CORPORATION, a corporation, FEDERATED DEPARTMENT STORES, INC., a corporation, HENRY'S CAMERA CORPORATION, a corporation -- retailers of Betamax; DOYLE DANE BERNBACH, INC., a corporation ("DDBI") -- Sonam's former national advertising agency for Betamax; and WILLIAM GRIFFITHS, an individual; Petitioners herein (except Griffiths, who has no interest in the outcome of this petition or this case), Defendants-Appellees below.

A listing naming all parent companies, subsidiaries (except wholly-owned subsidiaries) and affiliates of each corporate petitioner has been included in the Petition; it currently is still accurate (Sup. Ct. Rule 28.1).

REPLY TO "COUNTERSTATEMENT OF QUESTIONS PRESENTED" AND TO "COUNTERSTATEMENT OF THE CASE".

This Reply Brief for the Petitioners is necessitated by the "Counterstatement of Questions Presented" in Brief for Respondents, which changes (in an argumentative fashion) the substance of the questions upon which certiorari has been granted -- contrary to Sup. Ct. Rule 34.2; n1 and by respondents' ensuing "Counterstatement of the Case", which consists primarily of material factual misstatements unsupported by, and contrary to, the findings of fact and the evidence. Correction of respondents' overreaching requires a reply incorporating some related background information which the Court otherwise could have, and should have, been spared.

n1 This reply brief will not address respondents' counterstated questions 3 and 4, which change the petition's questions 4 and 5 -- the lack of authority for a federal court to impose compulsory licenses and compulsory royalties as relief for copyright infringement is so clear, and the departure by the Court of Appeals from the accepted and usual course of judicial proceedings was so blatant in its total disregard of the district court's findings of fact, that respondents' "changes" are an implicit admission that respondents have no position under the petition's questions 4 and 5.

I.

THE ISSUE OF CONTRIBUTORY INFRINGEMENT. n2

n2 Respondents concede that no contention of direct infringement, vicarious liability or unfair competition on the part of petitioners is before this Court (Resp. Br. 9 n. 22, 41 n. 90).

Petitioners (Pet. Br. 39) and respondents (Resp. Br. 39) agree that this is the most important issue of the case -- because it will determine whether home videotape recorders continue to be made available to the American public. As presented by the petition for certiorari, question No. 2 is whether the manufacture, sale and/or advertisement of a home videotape recorder ("VTR") per se (e.g., without inducement to record any particular work) constitutes contributory infringement in those instances (if any there be) where the VTR is used for such home reception of free off-the-air TV programming as may constitute direct copyright infringement. As substantively and argumentatively warped by respondents, the counterstand question No. 2 incorporates a misleading paraphrase of the Court of Appeals' opinion (Pet. App. 19, 27) that the VTR suppliers "intend[ed], expect[ed] and encourag[ed] that [the VTRs] be used primarily to copy entire copyrighted motion pictures" -- with an ensuing false counterstatement of the case to the effect that the bulk of those motion pictures were the works of respondents.

Role of the Home VTR in Free Off-The-Air TV in the United States.

Radio broadcasts were made available to the American public beginning in 1920 by the electronics industry for the purpose of creating a market for home radio receivers. Within a few years, the expense of broadcasting was taken over from the receiver manufacturers by opportunistic advertisers -- the concept of varied broadcast programming to get the public's attention (ecucational, informational, religious, sports, news, entertainment, etc.), plus as many advertising messages from sponsors as could be interspersed without losing that attention, thus is almost as old as broadcasting itself. The electronic industry's efforts to technically enhance public radio broadcasting and reception have been ongoing to this day (e.g., transistorization, portability, FM, stereophonic FM, hi-fi component reception, off-the-air audio tape recorder reception, digital transmission, etc.).

Television broadcasting for public reception was introduced in the United States in 1941 by the electronics industry, and expanded rapidly beginning in 1948 after World War II. Like radio, commercial TV broadcasting was sponsored by advertising virtually from the outset (conversely, most foreign countries sponsor broadcasting by a tax on receivers). A belief by many that some free off-the-air TV programming should have a quality different from what advertisers would provide led to the origin in 1953 of national educational television stations sponsored by government and by the public, today called the Public Broadcasting Service ("PBS"). Ongoing technical progress provided by the electronics industry for enhancing free TV broadcasting and reception has included transistorization, color, off-the-air VTR reception, stereophonic sound, component reception, digital transmission, etc. Of all the media in America, television probably contributes most to the existence of a well informed populace and electorate -- the goal of the First Amendment (see amici brief of Virginia Citizens' Consumer Council, Inc., et al., pp. 4-17).

America today has free off-the-air TV not because of respondents and their amici studios, but in spite of them. For many years the movie studios resisted free off-the-air TV as a threat to theatre. Not until the middle 1950's did any studio originate programming for free TV or make other than pre-1948 movies available to free TV. Not until the middle 1960's, and then only in their own self interest, did the studios

commence to supply better and more recent theatrical movies to free TV, or to make movies for television. n3

n3 "The motion picture industry, scared to death of television, kept all but its oldest and sleaziest feature films locked away in the vaults." Head and Sterling, Broadcasting in America, 4th ed. 1982, pp. 197, 201, 203-4; Greenfield, Television: The First Fifty Years, 1977.

Respondents unconscionably dispute (Resp. Br. 5 n. 10) the fact that VTRs have been on sale and sold for free off-the-air TV home recording continuously since the middle 1960's. The home VTR (black and white "CV" series) was first made available in the United States in 1965 (Pet. App. 40). It was heralded to the public in general (e.g., see Appendix A hereto, The New York Times, June 9, 1965, DX V; see also DX L-AL, AV-EN, JC, JD; R. 636-7) and was demonstrated to respondents and to the entertainment industry in particular (DX A-J, JH, JI). n4 The first color home VTR ("AV" series) was made available in the United States in 1969-70, also with national media fanfare (e.g., see Appendix B hereto, Life magazine, October 16, 1970), and still is being sold (R. 636, 638, 753-4). The first cassette home VTR ("U-Matic" series) was made available in the United States in 1972 (R. 639). The Betamax model home VTR was introduced in 1975.

n4 Each defendants' and plaintiffs' trial exhibit referred to herein ("DX" and "PX") is listed in order in Appendix E hereto, together with the pages in the record at which such exhibit was identified and was admitted into evidence. Sup. Ct. Rule 34.5.

As respondents well know, petitioners' caveat to buyers "This videotape recorder is not to be used to record copyrighted material" (Resp. Br. 6 n. 16) goes back to the early days of the home VTR. Since the whole idea of VTR is time-shift viewing, and since it is obvious that some sort of interim "record" or "copy" of the broadcast therefore must exist to provide the playback viewing, the copyright issue raised by the home VTR was self-evident at the outset. However, as the years went by, concerns over the copyright issue as regards home VTR reception were made to appear groundless.

First, following the advent and publicizing of the home VTR in 1965, and until late 1976, neither respondents, their amici nor anyone else raised any copyright infringement objection. To the contrary, for example, Universal's executive Adams wrote Sony's president in 1969 that the home VTR was "an exciting breakthrough for both the motion picture industry and television industry. May I wish you success" (DX EX); n5 and as late as December 1975 Universal's executive Schreiber wrote a Sony distributor "certainly there is a market for 'Betamax'. I hope that it contributes importantly to your earnings" (DX KA).

n5 Respondents had the effrontery to tell the district court in a pre-trial brief that the only Sony home VTR prior to the U-Matic series "was sold in such limited quantities that plaintiffs never knew of its existence" (C.R. 10/224, pp. 71, 76). However, petitioners' persistent discovery eventually forced respondents' production of internal documents going back to 1965 -- documents which not only established

respondents' knowledge of the CV and AV series and of the fact that "Any TV programs (including filmed shows) may be recorded" and which made no suggestion of copyright infringement, but which also correctly prophesied that VTRs "will create demand for pre-taped non-broadcast programs" (DX E, H, I).

Second, in 1971, Congress was passing the Sound Recordings Act ("1971 Amendment") with a legislative history embodying statements such as by the president of the Record Industry Association of America, Inc. that as to home off-the-air audio recording "no such enforcement is possible, and certainly none is intended"; by the Chairman of the House Judiciary Committee that home recording "off a program which comes through the air on the radio or television... is considered both presently and under the proposed law to be fair use"; and by the 1971 House Report that "it is not the intention of the Committee to restrain the home recording, from broadcasts... where the home recording is for private use" (Pet. Br. 32-39). Notwithstanding Johnny-come-lately specious arguments that home audio recording constitutes infringement under this 1971 Amendment and under the Copyright Revision Act of 1976, even respondents and their counsel (like petitioners) believe it does not (see Appendix C hereto).

Respondents knowingly misstate that "petitioners... have always believed that home video recording violates the Copyright Act" (Resp. Br. 6, 6 n. 14, 44 n. 95). By the time Betamax was introduced in 1975, Sonam's president "did not believe that people recording in their home would violate the copyright law" (R. 2714); and the caveat to each Betamax purchaser had been modified to: "CAUTION Television programs... may be copyrighted. Unauthorized recording of such material may be contrary to the provisions of the copyright laws." As the district court noted, after reference to events between 1965-75, "opinions changed" (Pet. App. 94). In fact, when Universal filed this action in November 1976, it tried to induce the other major movie studios to join with it -- but got turn-downs from all but Disney (see Appendix D hereto). Conversely, those same studios and other copyright owners have not hesitated to sue VTR users who exceeded home usage. n6 The only logical inference is that these studios and copyright owners either consent to home VTR reception or, like petitioners, do not consider it to be infringement.

n6 E.g., American Broadcasting Companies, Inc. v. Le Disco, Inc. (D. Mass. No. 80-2724 Ma) -- General Hospital free off-the-air TV recordings used for customer entertainment in a discotheque; Universal City Studios, Inc., Metro-Goldwyn-Mayer, Inc., Paramount Pictures Corporation, Walt Disney Productions, Warner Bros., Inc., Warner Bros. Distributing Corporation v. Chopot, et. al. (E.D. Wash.-Nos. C 78-243 & 360) -- free off-the-air TV recordings used commercially in Fiji; Encyclopedia Britannica Educational Corporation, Learning Corporation of America, Time-Life Films, Inc. v. Board of Cooperative Educational Services, et al., 447 F.Supp. 243 (W.D.N.Y. 1978), 542 F. Supp. 1156 (W.D.N.Y. 1982) -- distribution to schools of free off-the-air TV educational recordings in competition with copyright owners.

Respondents knowingly misrepresent petitioners' supposed knowledge and defeat of, and objection to introduction into evidence of, a technological system which would prevent off-the-air recording of respondents' programming while permitting recording of all other programs (Resp. Br. 2 n. 4, 45 n. 97). VTRs and television sets both are free off-the-air TV receivers, each employing a tuner. What one can receive,

so can the other -- and vica versa. As is obvious, broadcast signals carry no information which enables the TV set or the VTR to distinguish whether the program is copyrighted or whether its owner objects to reception by recording. Respondents' evidence, rejected at trial "because of its impracticality" (R. 3169-71 -- with no appeal as to the rejection), was of a puerile and inane hypothetical system presupposing that broadcast signals of respondents' programs somehow could be made electromagnetically different from signals of all other broadcasts (R. 3161-2), a supposition wholly beyond petitioners' control. Respondents' misstatement that Sony "discovered a method of overcoming this system" is another instance suggesting either respondents' reckless disregard of the evidence or its brief-writer's ignorance thereof. In truth, because of a confidentiality order obtained by respondents, petitioners never even learned of the system (R. B28-34, 3167).

In trying to deceptively side-step the findings and evidence as to the absence of any kind of harm, actual or potential, from home VTR reception, respondents say they "were unable to measure the amount of harm which they had suffered from unknown VTR copies. Respondents, however, adamantly maintained that such harm had in fact occurred...." (Resp. Br. 7 n. 18). Not only did the trial court find such assertions not credible, it rendered them irrelevant ab initio by striking all of respondents' allegations of "unknown damages", of "unknown infringements" and of "unknown infringers" (R. A222-5, A237-9; J.A. 64; C.R. 16/151, 18/173).
Free Off-The-Air TV Programming Today.

Since respondents elected to present the district court with only a thumbs-up or thumbs-down case by suing VTR suppliers instead of VTR users, viz., the court either had to stop all home VTR reception or none, it was of obvious relevance to ascertain what portion of total free off-the-air TV programming was provided by respondents. For Disney, this was easy -- its contribution was, and still is, a de minimis one hour a week (Pet. App. 38-9; Creators and Distributors amici Br. Appendix B). In discovery, Universal professed not to know its contribution; n7 but at trial, MCA's chairman volunteered his last minute personal survey that Universal had 75 hours of TV programming that week in the Los Angeles market -- which he testified was about 5% of the total programming of the eleven local commercial stations, and was less than 5% of all TV programming if local public/educational station programming were included (R. 474-5, 532-4, 459-50).

n7 "... plaintiffs answer that they have no knowledge or belief as to what percentage of total television broadcast time was comprised of the motion pictures of plaintiffs in any geographical area for any time period." (Ans. Int. No. C-15, p. 23, served 3/6/78).

Since respondents thus demonstrably provide less than 5% of all TV programming in a representative market selected by Universal's chief executive, and since no one else ever has brought an action to protest home VTR recording notwithstanding Universal's urging, respondents improperly attack (Resp. Br. 6) petitioners' justifiable and accurate assertion that 95 + % of all free off-the-air TV programming has been available for unchallenged home VTR reception. The significance of the number and identity of the 73 amici who now have lent their names to the Creators and Distributors amici brief is less than clear. Many obviously are not owners of copyright on the titles associated with their names. As stated, some expressly have refused to bring suit against home VTR reception -- all have failed to do so. Further,

the presence of several PBS stations as amici for respondents contrasts with the fact that PBS itself is an amicus for petitioners in the amicus brief of the Ad Hoc Copyright Committee. What is of ultimate primary significance is the fact that respondents are the only entities ever to sue re home VTR reception during the 17 years since its introduction. Even taking, arguendo and as their best shot, respondents' amici's unverified claim as to the volume of their programming, it still is obvious that the bulk of free off-the-air TV programming remains available for unchallenged home VTR reception.

The substantial non-infringing, non-challenged uses of Betamax include, inter alia:

(a) home VTR reception of copyrighted programming whose owners consent thereto (Pet. Br. 7-9);

(b) home VTR reception of programming as to which the right of any bringing any action for infringement has been forfeited by destruction of the only copy without registration (Pet. Br. 9);

(c) home VTR reception of programming which cannot be copyrighted (e.g., 17 U.S.C. § 105);

(d) home VTR reception of programming in which copyright has expired (e.g., Film Superlist: 20,000 Motion Pictures in the Public Domain, 7 Arts Press, Inc.);

(e) making (with limited retention) by a school of off-the-air recordings of instructional television programs for the purpose of delayed viewing by students (1975 Sen. Rep. 66; 1976 House Rep. 71-2);

(f) recording of any free off-the-air TV broadcast by non-profit educational institutions, played back to students in classrooms within 10 days, and retained for 45 days (Guidelines for Off-Air Recording of Broadcast Programming for Educational Purposes, 127 Cong. Rec. 145 E4751, October 14, 1981 -- expressly consented to by respondent Universal);

(g) recording of news programs by libraries (17 U.S.C. § 108(f)(3));

(h) off-the-air recording by a cable system for one non-simultaneous transmission to subscribers (17 U.S.C. § 111(e)).

Respondents' ill-founded and misleading assertion that the trial court refused to find the home VTR capable of substantial non-infringing use (Resp. Br. 8, 13, 50-51, 54, 57 n. 122) files in the face of the following findings:

"The videotape recorder, like a tape recorder, is a staple item of commerce. Its uses are varied" (Pet. App. 92);

"[VTR is] a new technology capable of noninfringing uses" (Pet. App. 104);

"[VTRs are] used for purposes where no infringement could be alleged (e.g., recording material which is not copyrighted or where permission to record is given)" (Pet. App. 106-7);

"[VTRs can] legally be used to record noncopyrighted material or material whose

owners consented to the copying" (Pet. App. 114).
"... Copying Solely for Purposes of Entertainment and Convenience of Entire Copyrighted Motion Pictures."

This substantive change in counterstated question No. 1, like the analogous change in counterstated question No. 2, ignores that essentially everything broadcast on free off-the-air TV is a "motion picture" within the definition of 17 U.S.C. § 101, a great deal of which has a potential for copyright protection from the time of its creation (17 U.S.C. § 302(a)). n8 Hence, to emphasize that the main purpose of Betamax is to record entire copyrighted motion pictures off-the-air is a pointless and irrelevant waste of breath and print (e.g., Resp. Br. 4-5, 42 n. 92).

n8 Petitioners expect this Court to hold, but do not concede, that the Constitution enables Congress (a) to protect motion pictures as "writings", and (b) to define videotapes as "copies".

However, respondents' follow-up assertions (erroneously attributed to survey findings) that "over 80% of the material copied is entertainment programming, the bulk of which is owned by respondents and supporting amici " (Resp. Br. 4-5, 6, 43, 52), and that "the majority [of Betamax owners] collect large libraries of VTR recordings, including recordings of motion pictures owned by respondents, which are saved indefinitely for unlimited repeat viewings" (Resp. Br. 5, 5 n. 11), are downright unsupported and false.

First, no survey limited "entertainment programming" to just the kinds of motion pictures owned by respondents; and no survey inquired about the owner's identity as to any programming recorded, entertainment or otherwise. There is no evidence entitling respondents to claim ownership to any part of any programming covered by any survey, let alone the "bulk" of it.

Second, the cornerstone of this case is that, after years of discovery and preparation which included without limitation the unconditional right to prepare and conduct a survey of 17,000 Betamax owners, respondents elected to make or break their case on 32 instances of time-shift recording by four individuals (J.A. 110-170) and expressly disclaimed alleging copyright infringement as to any other work (R. B175). Librarying was introduced into this case only by the surveys but, even so, neither respondents' nor petitioners' survey made any inquiry as to the recording or librarying of respondents' works or of the works of any of their amici; no survey in this case relates to or supports any allegation of infringement of any work in issue.

Third, respondents knowingly mislead the Court by challenging petitioners' statement that "there was no evidence of any librarying of any work of respondents" (Resp. Br. 5 n. 11). As stated, no survey inquired as to whether any of respondents' movies were in anyone's library. Furthermore, no survey inquired as to saving recordings "indefinitely" or for "unlimited repeat viewings". In contrast to respondents' misstatement that the district court found "pervasive librarying activities" (Resp. Br. 5 n. 11), the district court actually found "it has not been proven that many persons will 'library' to any significant extent " (Pet. App. 112); respondents' survey (PX 730, Tables Q. 10A, Q. 10B) showed that 43.4% of Betamax owners had no "movies" at all in their "library", that 5% had only one, 6.1% had two, 3.9% had three and 5.2% had four -- and that 75.6% of the owners

intended to keep only two or less cassettes containing television "movies, drama or comedy series". And these are the same owners who, as respondents point out, owned an average of 30 cassettes apiece (Resp. Br. 5, 5 n. 11; PX 730, Table Q. 6A). Respondents' survey (PX 730, Table Q. 9) actually showed that 38.8% of these same Betamax owners use it "almost always" for time-shift and 75.4% use it half or more of the time for time-shift.

In contrast to respondents' statement that "40% to 85% of all VTR recordings are viewed without commercials" (Resp. Br. 6 n. 14), even respondents' survey (PX 730, Table Q. 11) showed that 58.3% of Betamax owners deleted commercials "never", "rarely" or only "sometimes" -- and whenever the remaining 42% did delete commercials, they had to watch them in order to do so.

Contrary to respondents' assertion that "a VTR owner is not likely to purchase a pre-recorded cassette [or disc] of the original from respondents" if he has an off-the-air recording of the same program (Resp. Br. 28 n. 57), the only two witnesses who testified on the subject said they would do exactly that (R. 876, 1652).
"... Intending, Expecting and Encouraging That [Betamax] Be Used Primarily to Copy Entire Copyrighted Motion Pictures."

Respondents thus change question No. 2, and follow-up by misstating that petitioners "advertised, intended, expected and encouraged" the home VTR reception of "especially copyrighted motion pictures owned by respondents and amici " (Resp. Br. 4-5) through Betamax ads which exhorted recording of "favorite shows", "movies", "classic movies" and "novels for television", and to "build a library" (Resp. Br. 10 n. 24, 13, 42, 44, 44 n. 96, 49) -- thereby inexcusably failing to add that these advertisements are irrelevant in light of the findings "that there was no evidence at trial that any advertisements or other statements by [petitioners] in any way induced or caused to be made any of the copies at issue" (Pet. App. 93-4) and that "there was no evidence that any of the copies made by Griffiths or the other individual witnesses in this suit were influenced or encouraged by these advertisements" (Pet. App. 96-7).

Moreover, the foregoing ads all date back to the earliest days of Betamax advertising. After respondents belatedly reversed their field in late 1976 and sued, rather than praised, Sony because of home VTR, subsequent Betamax ads were carefully worded to state only the technical capabilities of Betamax and to mention unchallenged kinds of programming for home recording -- and each buyer continued to get an individual caveat about unauthorized recording (supra). n9

n9 Respondents knowingly undermine petitioners' caveat to VTR buyers about "unauthorized" recording when respondents represent publicly that they never will sue any home VTR user -- see Pet. Br. App. A. Such representations carry a clear implication of "authorization".

Summary of Contributory Infringement in This Cause.

This cause is not a copyright law classroom exercise nor a law review article -- where facts can be assumed or ignored at will so as to provide a vehicle for a pre-formed conclusion or to achieve a desired result. Neither is it a legislative hearing, where partisans can grind their own axes without fear of cross-examination (e.g., Resp. Br. 3 n. 6, 4 n. 7, 26 n. 54, 29 n. 59, 35 n. 74).

The precise and only issue to be decided by this Court is whether petitioners are liable for contributory infringement based on the 32 free off-the-air TV home VTR time-shift recordings in issue of Griffiths, Lowe, Soule and Wielage (with the absence of actual harm being admitted, with no proof of potential harm with respect thereto being offered, and with the absence of potential harm being affirmatively proved). There is no allegation or evidence on which to adjudicate anything else. The underlying important question of federal law to be resolved implicitly by this decision is whether the American public can be deprived of the technical advance of home VTR reception of free off-the-air TV by two copyright owners who voluntarily commingle their programming with all other TV programming.

The evidence is overwhelming that Betamax was conceived, developed and supplied to the American public by Sony in good faith, and with respondents' encouragement, as a beneficial technical advance in free off-the-air TV reception, that respondents' objection to home Betamax reception of their programming came late in the game; that not only substantial, but actually the bulk of, TV programming is available for unchallenged Betamax reception; that some kinds of VTR reception using Betamax are expressly permitted by statute; that petitioners did not induce, cause or contribute to the home reception in issue other than by the mere act of having made Betamax available to the general public.

It requires no belaboring of common sense or judicial precedent to recognize, after knowledge of the true facts, that respondents have presented no case of contributory infringement by any petitioner. n10

n10 Respondents' aspirations to induce Congress to impose a royalty on a staple item of commerce such as the home VTR for the purpose of paying the proceeds over to copyright owners (Resp. Br. 10-11, 11 n. 26) will find no such authority conferred on Congress by the Constitution. Citizens Savings & Loan Ass'n. v. Topeka, 87 U.S. (20 Wall.) 655, 664 (1875).

II.

THE ISSUE OF DIRECT INFRINGEMENT.

Question No. 1 in the petition, of direct infringement by home VTR owners (viz., Griffiths, Lowe, Soule or Wielage), presents several considerations.

First, respondents voluntarily licensed their 32 works in issue for broadcast for profit, with the unequivocal intention and expectation that each of Griffiths, Lowe, Soule and Wielage would receive and view each work he recorded. Using Betamax, each individual did no more than just that; each viewing was soon after the broadcast and each recording would have been erased soon after the viewing except for respondents' counsel. No detriment to the value of any of the 32 works was caused. Respondents picked these instances on which to base their case; these 32 instances present the sole case to be decided, yet Brief for Respondents literally ignores them totally.

A finding that these instances involve no direct infringement supports and requires a finding that there was no contributory infringement with respect thereto.

On the other hand, if this Court concludes that there can be no contributory infringement in this cause irrespective of direct infringement, then the cause has been completely resolved without any necessity for a holding as to whether there was direct infringement. Lowe, Soule and Wielage are not parties to the cause; Griffiths is a straw man (a client of respondents' counsel, granted local immunity by respondents, never represented by counsel, never having appeared as a party to the cause -- Pet. App. 43-4; R. A88, A158-9). n11

n11 Amicus New York City Bar Committee's brief (p. 2 n. 1) concurs with petitioners on this point, which respondents have tried so hard to obfuscate.

The Bar Committee's brief (p. 11 n. 6) further points out the illegality of using two VCRs in tandem to duplicate a rented copyrighted pre-recorded cassette -- which can be done but which requires no use of either VCR's built-in tuner. Yet, respondents expressly make no objection to the supply of VCRs without built-in tuners (Resp. Br. 5 n. 9). This further failure of amicus Bar Committee to interface supportively with respondents illustrates that infringement actions should be directed to particular improper usages of the VTR or of its recordings, not to the VTR itself or to its suppliers. In contrast, respondents are exacerbating the situation by assuring VTR users that they never will be sued on matter what they record.

Moreover, respondents have represented to the public and to this Court that no home VTR user ever will be sued by them. Hence, what would be accomplished by a ponouncement of this Court that any home VTR reception in issue was direct infringement? Further, respondents evade answering the point that such a representation and authorization has been held by this Court to be a future license under federal law, absolving both direct and contributory infringement (Pet. Br. 40-1, 44; Resp. Br. 40 n. 84).

REPLY TO ARGUMENT.

Stripped of their foundation of factual misrepresentations, the arguments in Brief for Respondents become pointless and fallacious -- and encompass nothing not already refuted by Brief for the Petitioners. The arguments distill down to nothing more than that 32 "copies" were made and that there is no express exemption from infringement for home VTR reception in 17 U.S.C. §§ 108-118. The arguments constitute a perfect example of the copyright statutes being "read with blinders" (Williams & Wilkins Co. v. United States, 487 F.2d 1345, 1350 (Ct. Cl. 1973), aff'd by equally divided court, 420 U.S. 376 (1975)). Respondents try to support the Court of Appeals' holding that intrinsic use never can be fair use (question No. 3 in the petition). But as the Court of Appeals pointed out (Pet. App. 17), williams & Wilkins Co. held that "intrinsic use" could be "fair use" -- and that case was a prominent part of the "present judicial doctrine of fair use" which section 107 "restated" and did not "change, narrow, or enlarge" (1975 Sen. Rep. 62; 1976 House Rep. 66). Respondents nit-pick as to whether legislative history shows an "implied exemption" for home recording or whether it shows home recording to be fair use (e.g., Resp. Br. 8 n. 20, 31 n. 66). But petitioners' position is simply that legislative history shows Congress did not regard or intend home recording to be copyright infringement -- without pettifoggery as to how this position is expressed.

The arguments in respondents' alter ego amici briefs of the MPAA, of the so-called Creators and Distributors, of the Guilds and of IATSE add nothing. Collectively, these simply reflect the self-interest of people who are in the unique and enviable position of being able to do a job once and normally to be paid and repaid for it many times over. Their motion pictures historically and primarily are licensed for exhibition via "secure media" such as theatres, cable TV, pay-TV, satellite, etc. (distribution media of each kind being owned or being acquired by respondents and their amici -- except maybe theatres: see United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948)), where reception can be controlled by them; and are sold on prerecorded discs or cassettes reserving to themselves as much control over usage thereof as the law permits. But when these works are exploited in a medium originated and maintained for the free use of the general public, something has to give. Respondents have no right to start exploiting their works in the established free TV medium, and then to arrest technical progress in that medium using their copyrights. Unless the tail is to wag the dog, the interest of the copyright owners must accommodate to the longer-standing and paramount interests of the public -- call it implied consent based on their broadcast (J.A. 77), First Amendment supremacy (J.A. 77), fair use (J.A. 76) or whatever.

The amici briefs of the RIAA, of the Music Publishers and of CBS simply constitute attempts by sound recording owners to use this case as a lever to help them renege on the bargain they made with Congress in 1971 -- viz., a waiver of any claim against home recording in order to get protection against the commercial pirate.

The amici briefs of the Authors League and of the American Publishers, and of the two copyright lawyer groups, merely reiterate the copyright owners' rote position in the never-ending battle to expand their rights vis-a-vis educators, the public, etc.

None of the amici briefs meets the criterion of Sup. Ct. Rule 36.3 by setting forth any relevant fact or relevant question of law not already adequately presented by the parties. n12 Each does show clearly the amici's preoccupation with their own special interests, typified as to all by the international president of amici IATSE:

n12 The presentation by respondents (Resp. Br. 35) and by several amici of various written expressions of supposedly objective opinion by Professor Melville B. Nimmer, whom they modestly describe as "the country's leading copyright expert", omit to inform the Court that Professor Nimmer is not an impartial author on the subject of home recording but in fact has been retained for compensation by amici RIAA and National Music Publishers Association, Inc. to advocate publicly against it. See: Hatch v. Ooms, 69 F.Supp. 788 (D.D.C. 1947); rev'd sub nom. Dorsey v. Kingsland, 173 F.2d 405 (D.D.C. 1948), rev'd 338 U.S. 318 (1949), reh'g. den. 338 U.S. 939 (1950).

"Q. Do you have any opinion one way or another whether the Betamax is a beneficial instrument for the American public in general?

"A. For the American public in general, it is possible and probable that it is. To the people that I represent, the answer is no."

Deposition of Walter F. Diehl, May 17, 1978, p. 74.

CONCLUSION.

The American public is entitled to view, in the privacy of the home, any free off-the-air TV program broadcast to it. Those who are unable to be in front of their TV sets at the time of broadcast now have been enabled by science to view, and should be entitled by law to view, the broadcast via time-shift using home VTRs. A few dissident copyright owners should not be permitted to deprive the American public of this progress of science. If and when there may be improper usages of the VTR or of its recordings, be it copyright infringement or otherwise, then the appropriate legal action should be against such usages -- but not against the VTR or its suppliers.

Respectfully submitted,

DEAN C. DUNLAVEY, (Counsel of Record), DONALD E. SLOAN, Attorneys for Petitioners Sony Corporation of America, et al.

Of Counsel: MARSHALL RUTTER.

December 3, 1982.

APPENDICES

APPENDIX A.

The New York Times

(Wednesday, June 9, 1965).

$995 Home TV Tape Recorder To Be Introduced Here by Sony

BY GENE SMITH

The Sony Corporation of America took the lead yesterday in home video tape recording.

The American branch of the Japanese electronics company introduced a $995 portable unit, called a Videocorder, said to be as easy to operate as an ordinary tape recorder.

Akio Morita, president of the American subsidiary, said in an interview here that the new units, combining both a video tape recorder and a television receiver, would be available here within eight weeks. He said he foresaw "a very great potential" for the device and expected sales to reach "a couple thousand a month in the very near future."

Mr. Morita, who is also executive vice president and cofounder of the Sony Corporation of Tokyo, said he personally uses the set, with its optional camera, to take motion pictures of his golf game.

"This equipment," he said, "should find a good market here for politicans. They can film and study their talks, record them for $21.95 a half-hour and distribute them to local television stations for future use."

Representatives of Arthur D. Little, Inc., who were present at yesterday's showing, said their company had been "closely associated with Sony" in the developmental period. One added that Little worked with Sony on "the appraisal of markets and a general understanding of American buying habits."

The videocorder is a combination TV receiver and a companion audio-video recorder. It is housed in a single cabinet made in the United States. The receiver can be used separately as a TV set.

The recording unit can be operated during a telecast and will not distort the viewing picture. It can then be replayed as any audio tape and will give both a black-and-white picture and the sound through the receiver. Certain models have timing devices that can be pre-set to turn on automatically to record programs while the owner is away.

Sony has also developed a companion camera kit that will use the video tape, take black-and-white motion pictures and sound, show them simultaneously and record as well for future use. It sells for $350.

APPENDIX B.

Life Magazine.

(October 16, 1970).

[See Material in Original]

EXCERPT

(Entire magazine lodged with the Clerk)

The player unit shown at left with a cassette being lowered into it is Sony Corp.'s entry in the race. Like other systems that use videotape as recording medium, Sony's will permit viewers to tape broadcast TV programs. A home model will reach the U.S. early in 1972 after first being sold in Japan.

What to expect

BRAND NAME	TARGET DATE FOR HOME MODELS	ESTIMATED PLAYER COST
AVCO Cartrivision	mid-'71	$800-$900 with color TV console
NORELCO Video Cassette Recorder	late '71	$500-$600
SONY Videocassette	early '72	$400
AMPEX Instavision	mid-'72	$500
CBS		

Electronic Video Recording	mid-'72	$400
RCA Selecta Vision	late '72	$400

and when

RECORDING CAPABILITY		ESTIMATED
Camera	TV broadcasts	CASSETTE COST *
yes	yes	$14
yes	yes	$20
probably	yes	$20
yes	yes	$20
no	no	$30
no	no	$10

* Prerecorded color, per half hour

APPENDIX C.

"Q. Are you aware that radios are made in combination with cassette recorders are capable of recording radio broadcasts as they are taking place?

"A. Yes.

"Q. Do you have any knowledge or information whether broadcasts of records in which MCA has copyright interest have been recorded in that fashion.

"A. My belief is that they have.

"Q. What has MCA done in the past about pursuing or investigating its copyright interests in that kind of recording?

"A. I don't know that MCA has done anything... I am not advised at the moment that is a litigable form of piracy... it's my understanding... that we don't have a cause of action in the sound recording area."

Deposition of Sidney J. Sheinberg, MCA president, June 10, 1977, pp. 123-6.

APPENDIX D.

"Q. Were you the first one at MCA that said let's bring a lawsuit?

"A. Yes, sir.

"A. ... I advised him [Card Walker of Disney] that MCA planned on filing a lawsuit and asked whether or not they would like to join as parties plaintiff...."

"A. ... the statement that we were proceeding in this area was made before a meeting of the MPAA. Frank Wells took it upon himself to send a letter to other members of the MPAA indicating his belief that such other companies should also join the lawsuit."

Deposition of Sidney J. Sheinberg, MCA president, June 10, 13, 1977, pp. 123, 214, 217.

APPENDIX E.

Exhibit	Offered Into Evidence	Admitted
A	R. 3077, 3078	R. 3213
B	R. 3077, 3079	R. 3213
C	R. 3077, 3079	R. 3213
D	R. 3077, 3111	
E	R. 3077, 3083	R. 3213
F	R. 3077, 3111	R. 3213
G	R. 3077, 3079	R. 3213
H	R. 3077, 3081	R. 3213
I	R. 3077, 3081	R. 3213
J	R. 3077, 3111	
V	R. 3077	R. 3213
L-AL	R. 3077, 3107	R. 3213
AV-EN	R. 3077, 3107	R. 3213
EX	R. 3077, 3092	R. 3213
JC	R. 3077, 3108	R. 3213
JD	R. 3077, 3108	R. 3213
JH	R. 3077, 3108	R. 3213
JI	R. 3077, 3079	R. 3213
KA	R. 3077, 3103	R. 3213
730	R. 1082	R. 1120