

Comment: Reflections on the Betamax Decisions

22 IDEA 265 (1982)

Thomas G. Field, Jr.

Professor of Law, Franklin Pierce Law Center

As most readers will know,¹ the 9th Circuit recently held Sony responsible for the acts of individuals using Betamax recorders to tape copyrighted broadcasts in their houses. While the case was remanded, there is reason to believe that relief consistent with the appellate decision is likely to interfere with the ability of subsequent Betamax purchasers to tape material off the air. Moreover, that will be true regardless of whether that material is or is not copyrighted and regardless of the circumstances in which taping of copyrighted materials may fit within fair-use limitations.

This is unnecessary to address what appear to be the concerns of the courts in reaching opposite conclusions, and it is unwarranted. It is unwarranted if there is a major impact on parties who were not even nominally represented in the litigation.² It is unnecessary because an unconsidered theory of liability³ would permit an alternative, e.g., to redesigning the Betamax so as to prevent its being used to tape broadcasts. However, before pursuing those matters, it will be useful to review the two decisions.

In *Universal City Studios v. Sony Corp. of America*, 480 F.Supp. 429 (C.Dist. Ca. 1979), Sony was exonerated from liability on each of a number of theories. Included were: (a) direct infringement, *id.* at 457; (2) contributory infringement, *id.* at 459; (3) vicarious liability, *id.* at 461; and (4) various “state causes of action,” *id.* at 462. Having made a fairly careful examination of each, the court considered the second most plausible but nevertheless inapplicable. Given that individuals in their homes are *de facto* exempt from copyright liability and that this is buttressed, e.g., by the right of privacy, the court analogized to the use of audiotape machines and found *de jure* exemption. Moreover, hedging a bit, the court pointed out that, regardless of the outcome on that issue: (1) there are any number of clearly legitimate uses of video recorders, *id.* at 458-59; and (2) even with regard to off-the-air recording, a certain amount of material is available for copying notwithstanding the precise limits of the fair-use doctrine, *id.* at 468.

Having come to that conclusion, the district court again analogized – this time to contributory infringement as codified in 35 U.S.C. §271(c) and applied by the courts in patent cases. That section makes a seller of an article liable if the article is “especially made... for use in an infringement..., and not a staple article... suitable for substantial noninfringing use....” Because of the capacity of the Betamax for noninfringing use, the court therefore ruled it to be a “staple” and Sony not to be liable for selling it; 480 F.Supp. at 461. Thus, notwithstanding exhortations in Sony’s ads to “record favorite shows” or “build a library” and a failure to caution users about copyright infringement (except in a vague warning on p. 17 of an instruction booklet), *id.* at 436, Sony was free to continue as before.

The court of appeals was clearly upset by this result, 659 F.2d 963 (9th Cir. 1981), and went to the other extreme. It ruled, *inter alia*, (1) that Congress did not intend a blanket home-use exemption for videotaping, and (2) that the district court in analyzing fair use had put far too much emphasis on the, as yet, uncertain nature and extent of harm to copyright proprietors; *id.* at 965-74. It is hard to quarrel with the court’s analysis respecting either of those propositions, but unfortunately it went further, raising the specter of a *de facto* if not *de jure* blanket nonexemption for home use.

¹ Indeed, because of the remarkable amount of media coverage, there may be few people who are not aware of the decision’s potential impact on videotaping.

² There was a named individual defendant (William Griffiths), but, as discussed below, he was recruited by plaintiff’s law firm and was unrepresented. 480 F.Supp. at 437.

³ Induced infringement; *see* 35 U.S.C. §271(b). This too is discussed below.

In direct contrast with the district court, it found the Betamax to be a nonstaple, observing that: "Virtually all television programming is copyrighted material. Therefore, videotape recorders are not 'suitable for substantial noninfringing use'." *Id.* at 975. Notwithstanding an appreciation of the difficulty of the task, it was but a short step to remand for what seems to be the primary purpose of fashioning relief; *id.* at 976. Also, in addressing that matter, it saw fit to add: "Once a determination has been made that infringement is involved, the continued profitability of appellees' business is of secondary concern." *Id.*

This is the sort of language courts use in dealing with scoundrels. However, in slamming the door on what it found to be an unacceptable way to earn a profit, the court carelessly caught the fingers of the public. As discussed in passing by the district court, and apparently not fully appreciated by the court of appeals, not a single home user was a *represented* party in the litigation. *See* 480 F.Supp. at 437. Implicit in the appellate discussion of staple/nonstaple, quoted above, is a finding that *no* home copying would be protected by fair use. Pursued to its logical conclusions with regard to relief, this may foreclose individuals whose interests are directly at stake from subsequently urging, e.g., that while "librarying" may be beyond fair use, short-term convenience copying is not. Should persons who are unable to watch one program in a series be forbidden to tape it for the later watching (and immediate erasure)? More importantly, should that issue be resolved when such persons lack more than nominal representation? Regardless of the ultimate answer to the first question, "no" seems to be the only sound answer to the second.⁴

Does this mean that Sony should be free to encourage unrestricted home copying? That result also seems to be unwarranted, but it could be addressed by analogizing to the subsection of 35 U.S.C. §271 which addresses *induced* infringement [§271(b)]. Given the concerns of the court of appeals on the one hand and the lack of representation of Betamax users on the other, even that subsection is difficult to apply, however. At a minimum, the theory of induced infringement would permit an order restricting the scope of Sony's ads: a remedy far less extreme than one calling for design changes in the product – and one which would be less of an encroachment on the options of purchasers or sellers.⁵ Optimally, an order under the theory of induced infringement ought also to call for prominent, affirmative cautions about the scope of fair use for home use of videotape recorders. Unfortunately, however, in the absence of a case in which it would be more appropriate to rule on the issue – or a statute which gives far better guidance than that contained in 17 U.S.C. §107 – such a caution would be impossible to write. Meanwhile, there seems no alternative but to prevent the manufacturers of videotape recorders from encouraging activities that may ultimately prove to be beyond the proper bounds of fair use.

As inadequate as that may be, nothing else seems possible given the present parties to the Betamax litigation and the state of the law. No doubt, it would be difficult to address two new issues at this stage of the proceedings. Yet, all things considered, this might be an easier problem to solve than the ones likely to be created by continuing to neglect those issues.

⁴ It is widely feared that videotape machines will no longer be capable of off-the air recording, fair or not. If one is, in fact, incapable of doing an act, it is difficult to establish a case or controversy in which its legitimacy can be properly addressed.

⁵ While somewhat wide of the mark, it is interesting to analogize to the legitimacy of filled milk statutes. In several decisions, federal and state statutes have been declared unconstitutional because they forbid the sale of a product in circumstances where it is more appropriate to regulate its advertising and labeling and where such statutes do not ban similar products. *See, e.g.,* Milnot v. Douglas, 452 F.Supp. 505 (S.D. W.V. 1978).